

8th April,
2024
(AK)
12

W.P.A 12154 of 2023

Sanchita Ghosh and another
Vs.
Union of India and others

Ms. Deblina Lahiri
Mr. Mrinmoy Chatterjee
...for the petitioners.

Mr. Asok Kr. Chakraborty, Ld. ASG
Ms. Sayani Roy Choudhury
...for the UOI.

Mr. Subhajit Panja
...for the respondent no.4.

1. An interesting question has been raised in the present challenge to the *vires* of Section 21(g) of the Assisted Reproductive Technology (Regulation) Act, 2021 (for short, the 2021 Act).
2. Learned counsel for the petitioner argues that whereas the term “woman” has been defined separately in Section 2(u) of the Act to mean any woman above the age of twenty-one who approaches an assisted reproductive technology clinic or such bank for obtaining the authorized services of the clinic or bank, “commissioning couple” has been defined separately in Section 2(e) to be an infertile *married* couple who approach for similar services.

3. It is argued that in the case of the petitioner no.1, the petitioner no.1 is married to a man (petitioner no.2) who has exceeded the age limit as stipulated in Section 21(g)(ii) whereas the petitioner herself, being the other spouse, still comes within the age bar as stipulated in Section 21(g)(i) of the 2021 Act.
4. The predicament of the petitioners is that in view of the bar stipulated in Clause (g)(ii) of Section 21, since the petitioner no.2 is debarred from approaching the appropriate clinics for assisted reproductive technology services, the petitioner no.1 is also being prevented to do so, since the petitioner no.1 and the petitioner no.2 are married to each other and constitute a 'commissioning couple' within the contemplation of the Act.
5. It is submitted that such debarment of married women as opposed to women who are not in a matrimonial relation, as stipulated in Section 21(g), is palpably violative of Article 14 of the Constitution of India. Hence, the said provision is *ultra vires* the Constitution of India and should be struck down.
6. Heard learned ASG, who defends the *vires* of the statute and contends that the Legislature, in its wisdom, has enacted the statute, putting in sufficient riders to cater to all sections of society and to deal with infertility.

7. Upon hearing learned counsel, it is apparent that the question involved is short and as such, unnecessary direction for affidavits will only prolong the agony of the petitioners.
8. Let us look into the Preamble of the statute in order to shed some light on the issue at hand. The Preamble reads as follows:

“An Act for the regulation and supervision of the assisted reproductive technology clinics and the assisted reproductive technology banks, prevention of misuse, safe and ethical practice of assisted reproductive technology services for addressing the issues of reproductive health where assisted reproductive technology is required for becoming a parent or for freezing gametes, embryos, embryonic tissues for further use due to infertility, disease or social or medical concerns and for regulation and supervision of research and development and for matters connected therewith or incidental thereto.”
9. It is, thus, evident that the Act is for regulation and supervision of assisted reproductive technology primarily, putting in certain safeguards to prevent misuse and to ensure safe and ethical practice of the technology.
10. The purpose of such Act is also for addressing the issues of reproductive health where assisted reproductive technology is required for becoming a parent.

11. As such, the thrust of the statute is two-fold – first, it is to provide a healthy channel for couples who are willing to have a baby but are unable to do so due to certain inability, clinical or otherwise, to avail of assisted reproductive technology and second, to regulate and govern such process in order to curtail rampant abuse and exploitation of such eager couples by unruly and unlawful elements.
12. The purpose is noble and as such has to be read in a liberal context insofar as the beneficiaries of the statute, that is, childless couples are concerned.
13. The first thing which strikes the eye even on a primary reading of the statute is that there is no specific bar or age limit in respect of ‘commissioning couples’ for availing assistive reproductive technologies.
14. The bar is stipulated in Section 21(g) separately and specifically in respect of women and men, described independently by their genders.
15. However, whereas a woman has been separately defined in Section 2(1)(u), there is no such definition of a man under the statute.
16. Since Section 2(1)(e) defines a ‘commissioning couple’ independent of a ‘woman’, it has to be construed that the said terms have been used and intended to be used separately.

17. Whereas under Section 2(e) a commissioning couple is an infertile married couple who approach for assistive technology, Section 21(g) does not put in any rider to restrict their collective age and/or their individual age limits, if acting as a couple.
18. On the other hand, the restriction put in is to an individual man or a woman who is apparently not married or does not come within the purview of commissioning couple.
19. Thus, two interpretations of the bar stipulated in Section 21(g)(i) vis-à-vis women are possible.
20. The first and restrictive interpretation is that a woman as contemplated in Section 21(g) is a woman who does not fall within the purview of 'commissioning couple' and the second more liberal view is that the Section encompasses women as a class - both in or outside matrimony.
21. Interpreted either way, the bar applicable under Section 21(g)(i), does not discriminate between a woman in a matrimonial bond and a woman who is not.
22. The restriction in Section 21(g)(i) is specifically applicable to a woman, irrespective of whether she is or is not married.
23. Applying such test, in the present case, the petitioner no.1 is a woman who, by chance, is in a

matrimonial bond but remains a woman all the same within the contemplation of the statute.

24. It is evident that the expression “woman” has been used separately defined in the definition clause from a commissioning couple to spread the wings of the liberty granted to persons seeking assistive reproductive technology not only to married couples but also to independent women who are not married or choose not to be married.
25. The same is in advancement of the changing mores of society to assist people who are different from the established and archaic conventional societal norms.
26. As such, the restriction applicable under Section 21(g)(i) applies to women in general, irrespective of whether they are married or not.
27. Applying the same test to a commissioning couple, the separate bars applicable to either of the spouses has to be taken into consideration.
28. In so taking into consideration, we have to take into account that collectively as a ‘commissioning couple’, there is no age limit or upper ceiling of age.
29. Forging the said lack of restriction for commissioning couples with Section 21(g)(i) and (ii), the only possible interpretation is that unless the restriction is applicable to both the spouses who comprise of the commissioning couple, there is no

bar in the commissioning couple to approach the appropriate clinic for assistive reproductive technology services.

30. In the event either the woman or the man comprising the commissioning couple are eligible to have assistive reproductive technology, there is no reason why the bar stipulated for individual women and men should be incorporated into the purview of the commissioning couple as well. The age-related ineligibility of one of the spouses need not affect the other, if they comprise of a 'commissioning couple'.
31. Thus read, the bar available in Section 21(g), clauses (i) and (ii) shall be read as follows:-
 - i) If a commissioning couple approaches a clinic/bank for assisted reproductive technology services, no upper age limit restriction will be applicable to them unless both spouses of the commissioning couple are debarred respectively under sub-clauses (i) and (ii) of sub-Section (g) of Section 21 of the 2021 Act.
 - ii) In the event either of the couples qualify in respect of the age limits as stipulated in Section 21(g), he or she can approach the clinic to have assisted reproductive technology service, irrespective of the fact that he or she is the constituent of a

commissioning couple and her spouse is not eligible age-wise.

- iii) In the second scenario above, the commissioning couple, as a commissioning couple, shall be permitted to avail the facilities of assisted reproductive technology services, since there is no bar on a commissioning couple acting as such, to have such reproductive technology irrespective of any age bar.
 - iv) It is made clear that in the event one of the spouses is eligible under Section 21(g) and the other is not, it will be at the option of the clinic whether or not to use the gamete donated by the ineligible spouse in the process of assisted reproductive technology.
32. Only the above interpretation of Section 21 (g) and its sub-clauses, read harmoniously with the definition clause as stipulated in Section 2 of the 2021 Act, can give complete meaning and a wide expanse to the said Act, in consonance with the contemplation of the Preamble of the Act.
33. Hence, interpreted/read down as above, the provisions of Section 21 (g) of the 2021 Act create no unreasonable discrimination between married and unmarried women in availing assisted

reproductive technology and, thus, passes the test of constitutionality.

34. Accordingly, Section 21 (g) of the Assisted Reproductive Technology (Regulation) Act, 2021 is held to be *intra vires* the Constitution of India.
35. Consequentially, in the present case, in view of the above interpretation of Section 21(g), the petitioners will be entitled to have the benefit of assisted reproductive technology services and can approach an appropriate clinic for having such services, in view of the fact that one of the two spouses, that is, the petitioner no.1, qualifies on the upper age limit as stipulated in Section 21(g), irrespective of the fact that the other spouse does not so qualify.
36. If so approached, the concerned clinics shall, within the contemplation of the Act, assist the petitioners to have the benefit of such assisted reproductive technology service, with or without the gamete of petitioner no. 2 at the discretion of the clinic.
37. WPA 12154 of 2023 is disposed of accordingly in the light of the above observations.
38. There will be no order as to costs.
39. Urgent photostat copies of this order, if applied for, be given to the parties upon compliance of all requisite formalities.

(Sabyasachi Bhattacharyya, J.)