

IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Appellate Side

Present :- Hon'ble Justice Amrita Sinha

WPA No.23776 of 2024

Shyamoli Saha & Anr.

-vs-

The State of West Bengal & Ors.

For the writ petitioner	:-	Mr. Achin Jana, Adv. Mr. Bhaskar Dalui, Adv. Ms. Gargi Dhang, Adv. Ms. Chetna Rustagi, Adv.
For the State	:-	Mr. Biswabrata Basu Mallick, AGP Mr. Debraj Sahu, Adv.
For the respondent no. 4	:-	Mr. Dhananjay Banerjee, Adv. Mr. Suman Chakraborty, Adv. Mr. Prosenjit Ghosh, Adv.
Heard on	:-	19.11.2024
Judgment on	:-	22.11.2024

Amrita Sinha, J.:-

1. The fervent yearning of a married infertile couple to have a family has compelled them to approach this Court praying for a direction upon the respondent no. 4 for providing Assisted Reproductive Technology Service (hereinafter referred to as 'ARTS' for the sake of brevity) for giving birth to a child. The petitioners are a married childless couple. Despite leading happy conjugal life for the last thirty years, the petitioners have failed to beget a child. They intend to avail the facility

under ARTS for giving birth to a baby. The stumbling block is the over age of the husband-petitioner no.2.

2. The issue to be decided is whether the petitioners would be eligible to avail the said facility in accordance with the Assisted Reproductive Technology (Regulation) Act, 2021 (hereinafter referred to as 'the Act' for the sake of brevity).
3. According to the Act the service is available to a woman above the age of 21 years and below the age of 50 years and to a man above the age of 21 years and below the age of 55 years. Though the wife- petitioner no. 1 is within the prescribed age limit, but the husband fails to meet up the age criteria. He is currently 58 years of age. The clinic from where the petitioners intend to avail the service, has denied to provide the same in the absence of any order from the court of law.
4. The clinic was directed to file a report disclosing whether the petitioner no. 1 wife would be able to avail the service by borrowing the ova and sperm from a bank and whether the petitioner no. 1 is physically fit to hold the embryo for giving birth to the child. The State respondents were directed to file a report as to whether Section 21 (g) of the Act would be applicable when both the ova and the sperm are borrowed from a third party through the bank.
5. In compliance of the direction passed by the Court, the clinic has filed a report disclosing that the TVS scan report of the petitioner no. 1, after hormonal therapy, shows normal size of the uterus with normal

endometrial thickness. The range is normal for a woman planning conception. The uterus of the petitioner no. 1 can hold the embryo as per the TVS report. The TVS scan report of the petitioner no. 1 has been attached with the report filed by the clinic.

6. Learned advocate representing the State respondents has relied upon the instruction forwarded by the Special Secretary (MERT) and Chair person, SAA under ART and Surrogacy Act, department of Health and Family Welfare mentioning that Section 21 (g) stands as a bar for providing service under the Act to a man above the age of 55 years. As the petitioner no. 2 has crossed the prescribed age limit, he will not be able to avail the facility of ARTS.

7. Reliance has also been placed on the reasons for prescribing the age limit under Section 21 (g) of the Act for application of ARTS as forwarded by the Ministry of Health and Family Welfare (department of Health Research, Government of India). Some of the reasons mentioned for prescribing the age limit are :-

- Bringing up a child at least up to 18 years, to take care of the responsibility to provide care and financial support while the child is growing up needs parents with reasonable good health status and financial stability.
- Life expectancy in India is around 70 years.

- The child born to infertile couples through ART requires love, care and best option and should get all family care and family life similar to any average child born to biological parents within the realms of normal biology.
- The average age of menopause in females in India is 46.2 years.
- Men's sperm quality gets compromised above 55 years of age and the number of mutation in the phasing genome increases leading to increase in the instance of congenital malformations in offspring. Older paternal age may be harmful to the offspring's health in terms of genome mutation and epigenetics.

8. In support of their prayer the petitioners rely on the order passed by a coordinate Bench of this Court on 8th April, 2024 in **WPA 12154 of 2023 (Sanchita Ghosh & Anr. Vs. Union Of India & Ors.)** and the judgment dated 26th April, 2024 in **WPA 9232 of 2024 (Sudarshan Mandal & Anr. Vs. State of West Bengal & Ors.)**.
9. I have heard and considered the submissions made on behalf of all the parties.
10. The subject Act has been enacted for addressing the issues of reproductive health where Assisted Reproductive Technology is required for becoming a parent where the parent fails to give birth to a child in the normal biological process. The Act provides for regulation

and supervision of the clinics and the banks and also to prevent misuse, for safe and ethical practice of ARTS.

11. Assisted Reproductive Technology (Regulation) Rules, 2022 provides for reasonable checks and balances. A consent form is to be signed by the couple or the woman disclosing their acceptance of ARTS. The prescribed form specifies that there is no guarantee that the oocytes will be retrieved in all cases, the oocytes will be fertilized and even if there were fertilization, the resulting embryos would be of suitable quality to be transferred. The couple or the woman is made aware of the risks of the procedures involved. There is no assurance that pregnancy will result in the delivery of a normal living child and the uncertainty of the outcome of the procedures is fully explained to the couple or the woman.

12. As per the Act 'commissioning couple' means 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 the bank. 'Gamete Donor' has been defined as a person who provides sperm or oocyte with the objective of enabling an infertile couple or woman to have a child. 'Patients' has been defined as an individual or couple who comes to any registered Assisted Reproductive Technology clinic for management of infertility. 'Woman' has been defined as any woman above the age of 21 years who approaches an Assisted Reproductive Technology clinic or Assisted Reproductive Technology bank for obtaining the authorized

services of the clinic or the bank. Section 21 (g) of the Act bars the clinic from applying Assisted Reproductive Technology who does not meet the prescribed age criteria.

13. In the instant case, the woman falls within the prescribed age limit but the man is over aged. Due to over age of the husband, the clinic is refusing to provide the service to the couple. The term 'patient' in the Act permits an individual to avail the facility of Assisted Reproductive Technology irrespective of gender. The Act does not bar an individual partner of a married couple to avail ARTS independently. The same implies that the parties to a marriage may avail the service either individually or jointly. It is not necessary that the service has to be availed jointly by a married couple. There is no provision in the Act which bars a married woman to approach the clinic individually for availing the benefit of ARTS. The bar will not have any effect if the wife approaches the clinic to seek the service unilaterally. The clinic or the bank does not have any authority to refuse service if a single partner of a married couple intends to avail the service. Had the petitioner no. 1 approached the clinic individually, the clinic could not have refused to provide ARTS to her. Here, since the parties are in a cordial relationship, they approached the clinic jointly as commissioning couple.

14. The medical report of the wife discloses that the lady is physically fit to hold the embryo. The documents annexed to the writ petition reveal that the medical health of the husband is such that he is unable to

produce sperm for the birth of a child. The parties have averred in the writ petition that they would borrow oocyte and sperm from third persons and the pregnancy will be by handling the sperm and the oocyte outside the woman's body and thereafter the gamete will be transferred into the reproductive system of the woman. Apart from being a supportive partner to the lady, the man does not have any role in the birth of the child. The lady acts as the gestational carrier.

15. The Central Government has specified the reasons for prescribing the age limit under Section 21(g) of the Act. As per the data maintained by the government, the average age of menopause of females in India has been found to be 46.2 years. In this case, the wife has crossed the said age. However, the medical report of the lady suggests that she is currently physically fit to hold the embryo which means that the lady is eligible to avail ARTS both age wise as well as health wise.
16. It cannot be said with certainty that each and every case of pregnancy by availing ARTS would be successful. The parties have already spent thirty years of conjugal life and have failed to beget a child. The subject facility must be their last resort to get a child for which they are craving for so long.
17. The legislature in its wisdom has prescribed an age limit to avail such service. The reasons for such prescription seem to be reasonably sound. In the absence of proper restriction and supervision to check defaults there is every possibility that there will be misuse and the

very purpose for providing such service will be frustrated. At the same time, the law cannot be interpreted or applied in such a manner that the same becomes unworkable.

18. In the case at hand, if the woman is not allowed to avail ARTS citing Section 21(g) even though she is eligible for the same, then it will be sheer injustice to her. For the ineligibility of the husband, the wife ought not to suffer. This is so because the husband has no physical participation in any of the procedures involved for the birth of the child through ARTS. The husband has claimed that he is financially strong to bear the expenses of the procedure. Apart from providing moral and financial support to the wife, the husband hardly has a role to play.
19. The Court in the matter of Sanchita Ghosh & Anr. (supra) and Sudarshan Mandal & Anr. (supra) discussed the issue elaborately and held that the couple would be entitled to have the benefit of Assisted Reproductive Technology as one of the parties qualify on the upper age limit stipulated in Section 21(g), irrespective of the fact that the other spouse does not.
20. In view of the above the Court is of the considered opinion that the petitioners will be eligible to avail the facility of ARTS and the respondent no. 4 is directed to provide such facility to the petitioners.
21. The writ petition stands disposed of.
22. No costs.

23. Urgent certified photocopy of this judgment, if applied for, be supplied to the parties or their advocates on record expeditiously on compliance of usual legal formalities.

(Amrita Sinha, J.)