

10.09.2025

Item no. DL/6
Court No. 551

Asraf, A.R.(Ct.)

In the High Court at Calcutta
Constitutional Writ Jurisdiction
Appellate Side

Case No.

WPA 2431 of 2025

In the matter of :

NEMAI ROY & ANR.

.... Petitioners

VS.

THE STATE OF WEST BENGAL & ORS.

....Respondents

For the Petitioner :

Mr. Pinaki Ranjan Chakraborty

....Advocate

For the Respondent / State :

Mr. Joydip Banerjee, Jr. Govt. Advocate

Mrs. Kakali Naskar

....Advocates

For the Respondent nos.2 to 4 :

Mr. Subhrendu Halder

Mr. Abhirup Halder

....Advocates

1. By the present writ petition, the petitioners, a married couple, seek the aid of assisted reproductive technology in order to realize their dream of having a full family, after being unable to have a child due to medical issues.
2. The petitioners had approached the respondent no.4 which is a registered assisted reproductive technology bank and clinic under the Assisted Reproductive Technology (Regulation) Act, 2021 (hereinafter “the said Act of 2021”) for the purpose of availing assisted reproductive technology services but the respondent no. 4 could not provide the said services to the

petitioners in view of the age restrictions contained in the said Act, 2021. To wit, in terms of the said Act of 2021, assisted reproductive technology services can be provided only 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. In the instant case, the man (i.e. petitioner no.1) is overaged, since he is 58 years old. However, the petitioner no.2, i.e. the woman is within the age bracket being 44 years old.

3. The issue as to whether the petitioners are entitled to avail of the services of assisted reproductive technology or not, which is involved in the present writ petition, is no longer *res integra* inasmuch as two Coordinate Benches of this Court have already decided this issue.
4. The petitioner has brought to the notice of the Court at least three judgments that have decided the said issue in cases similar to the one at hand i.e. in cases where the husband was overaged and the wife was within the age bracket. The same are as follows:-
 - a) In the case of ***Sanchita Ghosh & Anr. -vs- Union of India & Ors. (WPA 12154 of 2023)*** this Court had held as follows :-

“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.”

b) In yet another judgment of a Coordinate Bench of this Court in the case of **Sudarsan Mandal & Anr. -vs- The State of West Bengal & Ors. (WPA 9232 of 2024)** the following was held :-

“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.”*

c) The aforesaid two cases were considered by another Coordinate Bench of this Court in the case of ***Shyamoli Saha & Anr. -vs- The State of West Bengal & Ors. (WPA 23776 of 2024)*** and the following observations were made :-

“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.”*

5. Since the facts of the present case are almost similar to the facts of the aforementioned three cases, decisions whereof have been extracted hereinabove, there is no reason for this Court to take a different view and not to follow suit.
6. Accordingly, this writ petition is disposed of by granting liberty to the petitioners to approach the respondent no.4, which is an assisted reproductive technology clinic, for obtaining the assisted reproductive technology services which the clinic is qualified and authorized to provide. If so approached, the respondent no.4 shall, while acting within the confines of the said Act of 2021, take steps to ensure that the petitioners can avail

of the assisted reproductive technology services with or without the gamete of the petitioner no.1, at the discretion of the clinic, as decided in the case of *Sanchita Ghosh* (supra).

7. **WPA 2431 of 2025 stands disposed of.**
8. All parties shall act on the basis of server copy of this order duly downloaded from the official website of this Hon'ble High Court.
9. Urgent Photostat certified copy of this order, if applied for, be supplied to the parties expeditiously after complying with all requisite formalities.

(Om Narayan Rai, J.)