IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 28.01.2025

PRONOUNCED ON : 07.02.2025

CORAM

THE HONOURABLE MR.JUSTICE S.SOUNTHAR

W.P.No.35158 of 2024
and W.M.P.Nos.38070 of 2024
and W.M.P.No.2306 of 2025

Kavitha Anand ... Petitioner

vs.

1.State of Tamil Nadu
Rep. by its Principal Secretary to Government,
Namakkal Kavingar Maaligai,
4th Floor, Fort St George,
Chennai – 600009 (Near Reserve Bank of India)

2.The Director,
Directorate of Medical and Rural Health Service,
No.359, DMS Complex, 361, Anna Salai,
Chennai – 600 006.

3.The Joint Director of Health Service
District Medical Board,
O/o. Joint Director of Health Service,
No.359, DMS Complex,
361, Anna Salai, Chennai – 600 006.

4.National Surrogacy Board
Department of Health Research 2nd Floor,
IRCS Building 1, Red Cross Road,
New Delhi – 110001

5.Tamil Nadu State Surrogacy Board
Directorate of Medical and Rural Health Service,
No.359, DMS Complex, 361, Anna Salai,
Chennai – 600 006.

6.The Secretary
Health and Family Welfare Department
Government of Tamil Nadu
Namakkal Kavingar Maaligai,
4th Floor, Fort St George,
Chennai – 600009 (Near Reserve Bank of India)

7.The Secretary to Government of India
Ministry of Health and Family Welfare,
Department of Health Research, 2nd Floor,
IRCS Building 1, Red Cross Road,
New Delhi -110001 ... Respondents

PRAYER: Writ Petition is filed under Article 226 of the Constitution of India, to issue a Writ of Certiorarified Mandamus, to call for the records and quash the impugned order of the 7th Respondent dated 12th July 2024 and direct the Respondents to permit the Petitioner to continue with IVF treatment.

For Petitioner : Mr.G.R.Hari

For R1 to R3, R5 and R6 : Mr.E.Sundaram
Government Advocate

For R4 and R7 : Mr.K.S.Jeyaganesan
Central Government Standing Counsel

O R D E R

The Writ Petition is filed challenging the order passed by the 7th respondent rejecting the representation of the petitioner dated 02.07.2024 requesting him to permit the petitioner to use gametes of donors and avail services under the Assisted Reproductive Technology (Regulation) Act, 2021 (hereinafter referred to as 'ART Act' for the sake of brevity) by citing Section 21(g) of ART Act.

2. The learned counsel appearing for the petitioner vehemently contended that the word 'Woman' is defined under Section 2(u) of ART Act as any woman above the age of 21 years, who approaches an ART Clinic or ART Bank for obtaining the authorised services and hence, in the absence of any upper age limit for the word 'Woman' as defined under the Act, the 7th respondent committed a serious error in rejecting the request of the petitioner for availing ART services by citing her age. The learned counsel in support of his contention had taken this Court to definition of the word 'Woman' under Section 2(u) of ART Act and the definition of the expression 'commissioning couple' under Section 2(e) of ART Act and emphatically

submitted that in the absence of upper age limit in the definition section, a restrictive meaning cannot be given to the word 'Woman' or expression 'commissioning couple' by excluding woman aged above 50 years. The learned counsel also submitted that under the sister legislation, the Surrogacy (Regulation) Act, 2021, the expression 'intending woman' has been given restrictive meaning by prescribing upper age limit, however in ART Act, no such upper age limit is prescribed in the definition section. The learned counsel further submitted that as per the definition of the word 'Woman' under the Act, any woman above the age of 21 years is entitled to ask for services of ART Clinic or Bank and the 7th respondent erred in applying Section 21(g) of ART Act. He further submitted that Section 21(g) of the Act only makes it mandatory for the ART Clinic to apply ART services to a woman between the age of 21 years to 50 years and it does not mean woman above the age of 51 years is not entitled to seek services of ART.

3. In order to decide the issue raised by the learned counsel appearing for the petitioner in this writ petition, a reference to following provisions of the ART Act are essential.

"(i) ***Section 2(e) - 'Commissioning Couple'*** *means an infertile married couple who approach an assisted reproductive technology clinic or assisted reproductive technology bank for obtaining the services authorised of the said clinic or bank.*

(ii) ***Section 2(u) – 'Woman'*** *means any woman above the age of twenty-one years who approaches an assisted reproductive technology clinic or assisted reproductive technology bank for obtaining the authorised services of the clinic or bank.*

(iii) ***Section 21(g)*** *the clinics shall apply the assisted reproductive technology services,-*

(i) to a woman above the age of twenty-one years and below the age of fifty years;

(ii) to a man above the age of twenty-one years and below the age of fifty-five years;

(iv) ***Section 27. Sourcing of gametes by assisted reproductive technology banks.*** *- (1) The screening of gamete donors, the collection, screening and storage of semen; and provision of oocyte donor, shall be done only by a bank registered as an independent entity under the provisions of this Act.*

(2) The banks shall-

(a) obtain semen from males between twenty-one years of age and fifty-five years of age, both inclusive;

(b) obtain oocytes from females between twenty-three years of age and thirty-five years of age; and

(c) examine the donors for such diseases, as may be prescribed.

(v) ***Clause 5(d) of Statement of Objects and Reasons of ART Act, reads as follows****:-*

5(d) to provide that the assisted reproductive technology services shall be available to a woman above the legal age of marriage and below the age of fifty years and a man above the legal age of marriage and below the age of fifty-five years."

4. A perusal of Section 21(g) of ART Act would make it clear that ART Clinics are duty bound to apply the Assisted Reproductive Technology (ART) services to the woman above the age of 21 years and below the age of 50 years. When the Act imposes a duty on ART Clinics and Banks to apply AR Technology to a woman within a particular age bracket, the natural corollary would be, it creates a legal right on such woman coming within the age bracket prescribed under Section 21(g) of ART Act. Therefore, Section 21(g) of the ART Act creates a legal right for woman above the age of 21 years and below the age of 50 years to demand ART services as a matter of right, subject to conditions prescribed under Act.

5. In other words, the woman outside the age bracket prescribed under the section, though may desire for ART services, however, cannot claim said services, as a legal right and enforce the same in the Court of Law. Therefore, the argument advanced by the learned counsel appearing for the petitioner that Section 21(g) of ART Act, only imposes an obligation on ART Clinics and it does not bar application of AR Technology on woman outside the age bracket is not appealable to this Court.

6. The learned counsel appearing for the petitioner placed much reliance on the definition of the word 'Woman' and definition of the expression 'commissioning couple' under Section 2(u) and 2(e) respectively. It is his specific submission that in the absence of any upper age limit in the definition, the word 'Woman' cannot be given a restricted meaning by resorting to Section 21(g) of the Act.

7. A reading of Section 2(u) of ART Act would indicate that it prescribes only lower age limit and no upper age limit has been prescribed. In the considered view of this Court, legislature in its wisdom purposefully avoided incorporation of upper age limit in the definition of the word

'Woman'. Section 27(2)(b) of the Act prescribes that ART Bank shall obtain oocytes from females between the age of 23 years and 35 years. However, the Act prescribed upper age limit of 50 years for a woman, who seeks ART services under Section 21(g) of the Act. In other words, a woman is entitled to donate oocytes only upto the age of 35, however, she is entitled to be a recipient of gametes upto the age of 50 years. Since two different upper age limit are prescribed for a woman, who is donor and woman, who is recipient, the legislature in order to avoid confusion would have consciously omitted the upper age limit in the definition of the word 'Woman'.

8. Alternatively, this Court would like to point out that nowhere in the Act, woman is given a right to seek services of ART except under Section 21(g). Even under the said Section, woman is conferred with the said right indirectly by imposing a statutory duty on ART Clinics/Banks. When the specific Section 21(g) of ART Act gives a restrictive meaning to the word 'Woman' by prescribing both upper and lower age limits, the same will prevail over the definition in the general definition section.

9. In other words, whenever a word is defined under the Act in particular fashion, the word will be understood as per the definition in the Act. However, if a different meaning is given to the very same word in a specific section of the very same Act, either by restricting the meaning or by enlarging the meaning, the altered meaning given in the specific section will prevail over the general definition contained in definition Section in so far as interpretation of the said specific section is concerned.

10. It is also important to refer to the objects and reasons of the Act while interpreting the true meaning of the enactment, whenever there is ambiguity or difficulty in interpreting the sections. As mentioned earlier, Clause 5(d) of Statement of Objects and Reasons clearly declares that assisted reproductive technology services shall be available to a woman above the legal age of marriage and below the age of 50 years. Therefore, as per the objects and reasons of the enactment, the upper age limit for a woman seeking ART shall be 50 years and the same is reiterated in Section 21(g) of the ART Act. Hence, we can safely presume that Act prohibits application of AR Technology to a woman above the age of 50 years.

11. Coming to the rationality of fixing upper age limit, this Court would observe that age of the woman seeking services of AR Technology is very much relevant in the interest of the child to be begotten. It is not in dispute that every woman is entitled to reproductive autonomy. The reproductive autonomy is held to be one of the essential feature of right to life under Article 21 of the Constitution of India.

12. The scope and ambit of reproductive autonomy has to be defined in the light of the corresponding duty. A woman or commissioning couple, who claim reproductive autonomy has a corresponding duty of bringing up the child. A woman, who asks for ART services for begetting a child is duty bound to take care of the child atleast till he/she attains the majority age of 18 years. A woman intending to use ART to get a child must be biologically and financially capable of supporting the child for another 18 years so as to bring him/her up. In India, the retirement age is 60 years, therefore, it is highly doubtful whether the woman/commissioning couple getting a child after 50 years of age will be in a position to support the child for 18 years.

13. Further, by virtue of ageing process, the risk to the life of mother above the age of 50 years is more than the mother below the age of 50 years. The risk to pregnancy is also very much high after 50 years. Therefore, legislature thought it fit to fix an upper age limit for application of ART. Therefore, the age limits prescribed under the Act cannot be said to be irrational.

14. The learned counsel appearing for the petitioner tried to argue that when a woman at the age of 50 years is entitled to get ART services, a woman with the age of 50 years and one day is denied ART services and the same is highly irrational. I do not think such an argument can be accepted by this Court. Whenever, the legislature wants to fix a limit by drawing a line, these kind of imbalance is bound to happen. In view of the reasons mentioned above, I do not think the age limit prescribed under Section 21(g) of the Act, is irrational. Anyway, the petitioner has not challenged the validity of Section 21(g) of the said Act, fixing age limit and hence, this Court need not go into the question of rationality or validity of age limit prescribed therein, in detail.

15. In view of the discussions made earlier, I do not find any error in the order passed by the 7th respondent in denying the request of the petitioner for ART services by relying on Section 21(g) of the Act.

16. Accordingly, the Writ Petition stands dismissed. No costs. Consequently, the connected writ miscellaneous petitions are closed.

07.02.2025

Index :Yes
Speaking order :Yes
Neutral Citation :Yes
dm

To

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S.SOUNTHAR, J.

dm

Pre-delivery order made in
W.P.No.35158 of 2024

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