IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE C.S.DIAS

TUESDAY, THE 8TH DAY OF APRIL 2025 / 18TH CHAITHRA, 1947

WP(C) NO. 1395 OF 2025

PETITIONERS:

1 **JESSY JOY**
AGED 49 YEARS
WIFE OF JOY, KAINADATHUPARAMBIL HOUSE', ALOOR, NEAR RAILWAY GATE, THRISSUR, PIN – 680683.

2 **JOY K.K.**
AGED 58 YEARS
SON OF KUNJUVAREETH, KAINADATHUPARAMBIL HOUSE', ALOOR, NEAR RAILWAY GATE, THRISSUR, PIN - 680683

BY ADVS.
AKASH S.
GIRISH KUMAR M S
RICHU THERESA ROBERT

RESPONDENTS:

1 **THE UNION OF INDIA**
REPRESENTED BY ITS SECRETARY, MINISTRY OF HEALTH AND FAMILY WELFARE, SASTHRI BHAVAN, NEW DELHI, PIN – 110001.

2 **THE STATE OF KERALA**
REPRESENTED BY ITS SECRETARY, MINISTRY OF HEALTH AND FAMILY WELFARE, SECRETARIAT, THIRUVANANTHAPURAM, PIN – 695001.

3 **THE DISTRICT REPRODUCTIVE & CHILD HEALTH ("RCH") OFFICER,**
DISTRICT MEDICAL OFFICE, ERNAKULAM, PARK AVENUE, MARINE DRIVE, ERNAKULAM, PIN – 682011.

4 **SABINE HOSPITAL AND RESEARCH CENTRE PVT. LTD,**
REPRESENTED BY ITS MANAGING DIRECTOR,
PEZHAKKAPPALLY PO, MUVATTUPUZHA, PIN - 686673

BY ADV K.K.SETHUKUMAR
DSGI SRI.DINESH
GOVT.PLEADER SMT.VIDYA KURIAKOSE

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 08.04.2025, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

JUDGMENT

Dated this the 8th day of April, 2025

The 1st petitioner is the wife of the 2nd petitioner. The petitioners are aged 49 and 58 years, respectively. They are issueless. The 1st petitioner has undergone in-vitro fertilisation (IVF) procedures at the 4th respondent hospital. Although the doctors have advised the 1st petitioner to undergo another IVF procedure, the hospital has declined the procedure for the reason that the 2nd petitioner has surpassed the age of 55 years as stipulated under Section 21 (g) (ii) of the Assisted Reproductive Technology (Regulation) Act, 2021 ('Act', for brevity) and the petitioners fall within the purview of the term “commissioning couple” defined under the Act. Since the 1st petitioner is 49 years of age and she is a “woman” as defined under Section 2 (1)(u) of the Act, and further, the 2nd petitioner has given his consent for the procedure; the 1st petitioner is entitled to undergo the procedure. The

refusal of the hospital to provide treatment to the petitioners is an infringement of their right to life. The age restrictions laid down under the Act apply only if the man and woman participate in the Assisted Reproductive Technology (‘ART’) procedure. In the present case, only the 1st petitioner needs to undergo the procedure. Hence, the respondents may be directed to permit the 1st petitioner to avail of the ART procedure using donor male gamete.

2. In W.P(C) No.31161/2024, a case of identical nature, the 1st respondent has filed a counter affidavit contending that, as the 2nd petitioner has exceeded the age criteria prescribed under Section 21(g)(ii)of the Act, the petitioners are ineligible to avail the ART services. Merely because the 1st petitioner has not surpassed the age prescribed under Section 21(g)(i) of the Act, she is not entitled to proceed with the procedure. In view of Section 2(1)(e) of the Act, which explicitly defines a commissioning couple, the petitioners have to fulfil the conditions under Sections

2(1)(e) and 21(g) of the Act. The Act has been enacted considering the status of a single woman (unmarried, divorcee and widow) and a married woman. The criteria for selecting the beneficiaries under the Act was discussed by the Parliamentary Committee as per Ext.R1(a) report. The age restrictions in the Act have been laid down after considering the best interest of the child to be born through the ART procedure. The petitioners have filed the writ petition as a couple; therefore, they fall within the definition of a commissioning couple. Section 21(g) requires a man and a woman to complete the procedure. Any married woman or married man constituting a commissioning couple and wanting to undergo an ART procedure has to simultaneously qualify the twin conditions under Sections 21(g)(i) and 21 (g) (ii) of the Act. There is no indication in the Act that only one among the men or women constitutes a commissioning couple. The age restrictions have been imposed on both parties, keeping in view the social responsibilities of the father.

As per Section 2(1)(e) of the Act, when a woman approaches an ART clinic with her man as a “commissioning couple”, they should be married and infertile as provided under Section 2(1)(j). Moreover, as per Rule 13(1)(f)(iii) of the Assisted Reproductive Technology (Regulation) Rules, 2022, a married woman is required to submit the consent of her husband in Form 8. If a married woman is permitted to approach the clinic as a woman, her husband will not come into the picture, and she will escape the stipulation under Rule 13(1)(f)(iii), which would defeat the condition under the Act and the Rules. The Act does not envisage a married woman approaching a clinic as a woman. In the process of fulfilling the desire of a couple to become parents, the rights and welfare of the unborn child should not be neglected, which is of paramount importance. To ensure the above matters are addressed, the 1st respondent has issued Ext.R1(b) instructions. The constitutional validity of Section 21(g) is under challenge before the Honourable Supreme

Court of India in W.P(c) No.756/2022 and connected cases. It is settled law that there is a presumption in favour of the constitutionality of an enactment. The petitioners have failed to plead or show that their fundamental rights have been infringed. The imposition of an upper age limit in the Act is only a reasonable restriction and cannot be said to violate the rights of individuals/couples. The writ petition is meritless and may be dismissed.

3. Heard; Sri. Akash Sathyanandan S., the learned counsel for the petitioners, Sri.C.Dinesh, the learned counsel for the 1st respondent and Smt.Vidya Kuriakose, the learned Government Pleader.

4. The question that emerges for consideration is whether the 1st petitioner can avail of the ART services in the status as a “woman” despite being married to the 2nd petitioner who has surpassed 55 years of age.

5. The Assisted Reproductive Technology (Regulation) Bill 2020 was introduced in the Lok Sabha

on 14.09.2020 and referred to the Standing Committee. The Lok Sabha passed the bill on 01.12.2021, and the Rajya Sabha passed it on 08.12.2021. The President gave assent to the Bill on 18.12.2021, and the Assisted Reproductive Technology (Regulation) Act 2021 (42 of 2021) came into force on 25.01.2022.

6. To decide the question posed, it is essential to analyse the relevant provisions in the Act, which are reproduced below for reference and understanding of the legislative intention.

(A) Section 2(1)(a) defines “Assisted Reproductive Technology” as under:

> “assisted reproductive technology” with its grammatical variations and cognate expressions, means 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”.

(B) Section 2(1)(e) defines a “commissioning couple”, thus:

> “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”.

(C) Section 2(1)(j) defines “infertility” as follows:

"infertility" means the inability to conceive after one year of unprotected coitus or other proven medical condition preventing a couple from conception".

(D) Section 2(1)(n) defines "patients" as under:

"patients" means an individual or couple who comes to any registered assisted reproductive technology clinic for management of infertility".

(E) Section 2(1)(u) defines woman as follows:

"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".

(F). Section 21 deals with the General duties of assisted reproductive technology clinics and banks, which reads as follows:

"The clinics and banks shall perform the following duties, namely:—

"(a) the clinics and banks shall ensure that commissioning couple, woman and donors of gametes are eligible to avail the assisted reproductive technology procedures subject to such criteria as may be prescribed;

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(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;

(h) the clinics shall issue to the commissioning couple or woman a discharge certificate stating details of the assisted reproductive technology procedure performed on the commissioning couple or woman……. ……..".

(emphasis supplied)

(G) Section 22(1)(a) of the Act reads as follows:

> "22. Written informed consent.
> (1) The clinic shall not perform any treatment or procedure without—
> (a) the written informed consent of all the parties seeking assisted reproductive technology……".

(H). Rule 13(1)(f)(iii) of the Assisted Reproductive Technology (Regulation) Rules, 2022, specifies that the consent for Intrauterine Insemination with donor semen is to be obtained in Form No.8.

7. Taber's Cyclopedic Medical Dictionary defines Assisted Reproduction Technology as any of the techniques to assist infertile women to conceive and give birth. These include hormonal stimulation of ovulation and operative techniques such as in vitro fertilisation with embryonic transfer, zygote intra-fallopian transfer for women whose infertility results from tubal factors, and gamete intrafallopian transfer for couples whose infertility stems from semen.

8. In MODIs textbook of Medical Jurisprudence and Toxicology, 27th Edition, it stated that Assisted

Reproductive Techniques have not only enhanced the possibility of pregnancy but have also made women conceive in situations where this would not have been possible decades ago. In in-vitro fertilisation, the eggs are surgically removed from the woman, fertilised with the available sperms in a dish, and the embryo is replaced into the womb of the woman who completes the carriage till delivery. In IVF, the semen samples of the husband are screened two or three times. In this process, the oocyte is picked up trans-vaginally.

9. What is in vitro fertilisation has been succinctly explained by the Mayo Clinic in the following manner:

> "In vitro fertilization, also called IVF, is a complex series of procedures that can lead to a pregnancy. It's a treatment for infertility, a condition in which you can't get pregnant after at least a year of trying for most couples. IVF also can be used to prevent passing on genetic problems to a child. During in vitro fertilization, mature eggs are collected from ovaries and fertilized by sperm in a lab. Then a procedure is done to place one or more of the fertilized eggs, called embryos, in a uterus, which is where babies develop. IVF can be done using a couple's own eggs and sperm. Or it may involve eggs, sperm or embryos from a known or unknown donor. In some cases, a gestational carrier — someone who has an embryo implanted in the uterus — might be used. IVF may be an option if a partner has fallopian tube damage or blockage, ovulation disorders, endometriosis, uterine fibroids, previous surgery to prevent pregnancy, issues with sperm, unexplained infertility or genetic disorder".

10. The contention of the petitioners' is that, given that only the 1st petitioner (the wife) has been advised to undergo the IVF procedure using donor male gamete, and she is under the age of 50, the age restriction imposed under Section 21 (g) of the Act does not apply to her, although the 2nd petitioner has exceeded 55 years of age.

11. Conversely, the respondents contend that both petitioners must satisfy the age criteria set forth in Section 21(g), as they are recognised as a “commissioning couple.”

12. The terms “commissioning couple” and “woman” are defined under Sections 2(1)(e) and 2 (1) (u). However, the term “man” is notably not defined in the Act, even though age restrictions are distinctly laid down for both “woman” and “man” in Section 21 (g). Likewise, there is no specific age restriction for a ‘commissioning couple”. This omission poses a significant question of whether the legislature has excluded a composite age criterion for “commissioning

couples”. The literature on the subject suggests that ART procedures are generally applied to women and men individually, even when both parties may undergo the procedure jointly.

13. To gain further insight into the legislative intent behind Section 21 (g), it would be meaningful to refer to Ext.R1(a) produced in W.P(C) No.31161/2024, Report No.129 of the Parliamentary Standing Committee on Health and Family Welfare Suggestions on Clause 21 (g) of the Bill, which ultimately shaped into Section 21 (g). The relevant portion of the report reads thus:

“SUGGESTIONS:

4.14.14 One stakeholder has informed that the complications of IVF (Ovarian hyperstimulation syndrome, OHSS) are higher in younger woman. The earlier guideline had kept the cut off at 21 years. It has been suggested to keep the lower age limit for woman more than 20 years to ensure safety their safety. The upper age limit for women/man should be decided based on factor viz (i) risk to maternal health due to pregnancy at advanced maternal age (ii) care of child until 18 years and average life expectancy in India.

4.14.15 The upper limit for woman should not be beyond 45 years and for man, it should be not be beyond 50 years. The combined age of the couple (woman and man) should not be beyond 90 years (this requirement is same as for adoption in India)

DEPARTMENT’S RESPONSE:

4.14.16 The criterion of age limit for a man and woman to avail ART services has been drafted in consonance with the provisions of the Surrogacy Bill 2019.

OBSERVATIONS/RECOMMENDATIONS:

4.14.17 The Committee observes that the DHR has agreed to the stakeholders' suggestions to remove the phrase "legal age or marriage" from the definition of woman for approaching an ART centre as lower age of marriage is acceptable in some religions. The Committee observes that the ICMR Guidelines stipulates minimum of 20 years of age for woman availing ART services. The Committee has already recommended removal of the term "legal age of marriage" and prescribed that the specific age i.e. 21 years in definition of "woman" as mentioned in the Bill under clause 2(x), therefore, the Committee reiterates the minimum of 21 years for woman and man for availing ART services. The upper age limit for woman and man may be 50 and 55 years, respectively, as recommended by the Select Committee on Surrogacy (Regulation) Bill 2020.

4.14.18 Subject to the above recommendation, the clause is adopted".

(emphasis supplied)

14. A careful reading of the above suggestions reveals that the Parliamentary Standing Committee had suggested the upper age limit for women and men not to exceed 45 and 50 and the couple's combined age (woman and man) not to surpass 90 years to draw a parallel with the age restrictions in the Adoption Regulation. Nevertheless, the Parliament has consciously omitted incorporating any age criteria for a "commissioning couple", possibly recognising the

distinct nature of ART services and the procedures for adopting a child.

15. In this context, it is relevant to refer to Clauses 5 (4) and 5(5) of the Adoption Regulations 2022, which lays down the age criteria to adopt a child and it reads as follows:

"5. Eligibility criteria for prospective adoptive parents.—

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(4) The age of prospective adoptive parents, as on the date of registration, shall be counted for deciding the eligibility of prospective adoptive parents for children of different age groups as under:-

Age of the Child	Maximum composite age of prospective adoptive parents (couple)	Maximum age of single prospective adoptive parent
Upto 2 years	85 years	40 years
Above 2 and upto 4 years	90 years	45 years
Above 4 and upto 8 years	100 years	50 years
Above 8 and upto 18 years	110 years	55 years

Provided that the minimum age difference between the child

and either of the prospective adoptive parents shall not be less than twenty five years.

(5) In case of a couple, the composite age of the prospective adoptive parents shall be counted.

16. Conspicuously, the Act does not contain the concept of combined age for commissioning couples analogous to the composite age criteria applicable to prospective adoptive parents. Instead, the Act adopts an individual-centric approach, whereby the age eligibility criteria are separately laid down for women and men rather than collectively for a couple. This interpretation is further supported by Section 2 (1) (n) of the Act, which defines "patients" as both individuals and couples seeking infertility treatment at a clinic. Additionally, Section 21 casts duties on the ART clinics and banks to ensure adherence to the statutory requirements. Notably, under Section 21(g) the mandate is for the **clinics to apply ART services to a** woman only if she is above 21 and below 50 years of age and to a man if he is above 21 and below 55 years of age. The provision reinforces that the age restriction

is gender-specific rather than couple-specific, reinforcing that eligibility depends on the individual's age rather than the couple's combined age.

17. In the context of the case at hand, the 2nd petitioner has attained 58 years of age, rendering him ineligible to avail of the ART procedure. However, the couple still intends to pursue parenthood through the 1st petitioner, who desires to avail of the ART procedure of intrauterine insemination using donor male gamete, as she falls within the legally permissible age range.

18. A holistic understanding of the Act and the associated ART procedures and services reveal that the only legal requirement that the 2nd petitioner has to comply with to enable the 1st petitioner to apply the ART procedure is to give his consent in Form 8, undertaking that he would acknowledge the child born through the procedure as his legal heir.

19. In essence, the 1st petitioner's eligibility to apply for the ART procedure operates independently despite the 2nd petitioner's ineligibility, provided the 2nd

petitioner gives his consent for the procedure. Hence, when a woman wants to undergo an IVF procedure, only her age is considered relevant, irrespective of her husband’s age, and the same principle applies conversely to men. The above interpretation leads to an inevitable conclusion that the legislature has treated men and women as distinct legal entities under the Act rather than imposing uniform couple-centric legislation.

20. On the contrary, if the respondents' contention is accepted that both spouses must satisfy the age criteria, it would create an unconstitutional classification, treating married women and single women as separate and distinct classes. Take, for example, a hypothetical situation where a married woman is ineligible for an ART procedure solely because her husband has surpassed the age limit; the woman would become eligible immediately on her legal separation or becoming a widow. Such a classification would be a fallacy and would put married women at an

unfair disadvantage when compared to single women to access ART procedures. It can never be presumed that the Parliament intended such an inequitable classification within a benevolent statute like the Act. It is a well-established legal principle that no one can supplement conditions not explicitly provided in the statute. Without any express provision in the Act restricting commissioning couples on the basis of their composite age, there is no legal bar in a woman who is otherwise eligible under Section 21 (g) (i) from applying the ART procedure even if her husband has surpassed the age limit. The same rationale applies to men, ensuring that single and married individuals enjoy equitable access to reproductive assistance. The above discussions conclude that there is no legal bar for the 4th respondent to apply the ART procedure on the 1st petitioner. The experience of childlessness is a silent anguish known to only those who walk that path.

In light of the above discussions, I answer the question in favour of the 1st petitioner by allowing the

writ petition and directing the 4th respondent to provide ART services to the 1st petitioner as per the provisions of the Act after obtaining the consent of the 2nd petitioner.

Sd/- C.S.DIAS, JUDGE

ma/08.04.2025

APPENDIX OF WP(C) 1395/2025

PETITIONER EXHIBITS

Exhibit P1	**TRUE COPY OF THE AADHAR CARD OF THE 1ST PETITIONER BEARING NO.9312 1232 7935**
Exhibit P2	**TRUE COPY OF THE AADHAR CARD OF THE 2ND PETITIONER BEARING NO.6092 4066 7145**
Exhibit P3	**TRUE COPY OF THE TREATMENT SUMMARY OF THE 1ST PETITIONER ISSUED BY THE 4TH RESPONDENT HOSPITAL DATED 08.11.2024**
Exhibit P4	**TRUE COPY OF THE RELEVANT PAGES OF THE NATIONAL GUIDELINES FOR ACCREDITATION, SUPERVISION AND REGULATION OF ART CLINICS IN INDIA' ('NATIONAL GUIDELINES'), PREPARED BY THE INDIAN COUNCIL FOR MEDICAL RESEARCH ('ICMR') AND NATIONAL ACADEMY OF MEDICAL SCIENCES (NAMS), ON BEHALF OF THE UNION MINISTRY OF HEALTH AND FAMILY WELFARE, OF THE YEAR 2005**