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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Judgment pronounced on: 27.10.2025**

+ **W.P.(C) 3953/2025**

TAPAS KUMAR MALLICK & ANR.Petitioner

Through: Mr. S.M. Tripathi, Mr. Divyanshu
Priyam, Advs.

versus

UNION OF INDIA & ANR.Respondents

Through: Ms. Arunima Dwivedi (CGSC) along
with Mr. Akash Pathak (GP), Ms.
Himanshi Singh, Ms. Monalisha
Pradhan, Ms. Priya Khurana, Advs.

CORAM:

HON'BLE MR. JUSTICE SACHIN DATTA

SACHIN DATTA, J. (Oral)

1. The present petition has been filed by the petitioners, an ‘intending couple’ within the meaning of Section 2(r) of the Surrogacy (Regulation) Act, 2021(hereinafter referred to as ‘the Act’), aggrieved by the upper age limit prescribed under Section 4(iii)(v)(c)(I)¹ of the Act.

2. As per Section 4(iii)(v)(c)(I) of the Act, a male must be between 26 and 55 years of age, and a female must be between 23 and 50 years of age to

¹ (c) an eligibility certificate for intending couple is issued separately by the appropriate authority on fulfilment of the following conditions, namely:—

(I) the intending couple are married and between the age of 23 to 50 years in case of female and between 26 to 55 years in case of male on the day of certification;



be eligible for surrogacy as an advanced fertility treatment. Petitioner no.1 (husband) is aged 57 years (approx.) and petitioner no.2 (wife) is aged 42 years (approx.).

3. The narrow conspectus in the backdrop of which the present petition arises is that after multiple unsuccessful attempts at conception (including through IVF), and in consideration of their medical condition, the petitioners were advised by medical practitioners to pursue surrogacy as the only feasible option to achieve parenthood.

4. It is the case of the petitioners that, petitioner no. 1, having crossed the upper age limit prescribed under Section 4(iii)(v)(c)(I) of the Act, has been rendered ineligible for the surrogacy procedure. This disqualification has operated to the detriment of the petitioners, despite the fact that the petitioners initiated the requisite process as far back as on 06.01.2021, prior to the commencement of the Act, which came into force on 25.01.2022.

5. It is submitted that a rigid application of Section 4(iii)(v)(c)(I) of the Act is discriminatory, arbitrary and infringes upon the petitioners' fundamental right to reproductive autonomy.

6. Learned counsel for the petitioners has drawn attention to the fact that the procedure for retrieval of embryos was conducted on 06.01.2021, and the said embryos were cryo-preserved (frozen) on 12.01.2021 until 12.07.2021. The Cryo-Preservation Summary, evidencing the same, is annexed to the present petition as Annexure P-1 (Colly). The said Summary, which precedes the enforcement of the Act, is reproduced as under:



**Center of IVF and Human Reproduction
Sir Ganga Ram Hospital, New Delhi**

Cryo-Preservation Summary

Name of patient: Amushree Mallick

Age: 37 Yrs

Date of egg pickup: 6.1.2021

Consultant: Dr. Abha

Date of Freezing(D3): 9.1.2021

Reg No: 2557889

Date of freezing(D6): 12.1.2021

Freezing Report

Embryo

Number: 1-1 Straw

Number: 1 BL- 1 Straw

Developmental Stage: Day 3

Developmental Stage: Day 6

Embryo Score*:1-10C (gr4,good)

Embryo Score*:1-gr3BB

Embryos frozen till: 12.7.21

Embryos/Eggs will be normally kept frozen for a period of six months from date of freezing. If you wish to extend this period, you will need to renew the freezing contract before the expiry date. If we do not hear from you before that time, then your eggs/embryos will be disposed off.

Thawing Report

| s.no. | Date of Cryo ET | Number of embryo's thawed | Number of embryo's survived | Number of embryo's transferred | Balance embryo's in storage | Renewal Date |
|-------|-----------------|---------------------------|-----------------------------|--------------------------------|-----------------------------|--------------|
| | | | | | | |

Note:

Embryos may not survive the freezing thawing procedure, which means upon thawing you may not have any viable embryos left for transfer

Only those embryos, which survive and will be considered to be of good quality, shall be transferred. The remaining poor quality, arrested, or damaged embryos will be discarded

Blastocyst Grading

3 – Blastocyst, 4 – Expanding Blastocyst, 5 – Hatching Blastocyst; ICM: A – Good B – Avg C – Poor, TE: A – Good B – Avg C – Poor

Grade 4(good): ≥8C with equal blastomeres & no fragmentation
Grade 3: ≥6 C with unequal blastomeres or 10-30% fragmentation
Grade 2: ≥5C with unequal blastomeres and >30% fragmentation

Grade 4: ≥6C with slightly unequal blastomeres or ≤10% fragmentation



7. Learned counsel for the petitioners placed reliance on the orders dated 10.10.2023 and 08.04.2024, passed by this Court in W.P.(C) 12395/2023, captioned as "***Mrs. D & Anr. vs. Union of India***", which was in a similar conspectus. The relevant extract of the order dated 10.10.2023 reads as under:

"14. Thus, while the Court deliberates on the challenge to the validity of Section 4(iii)(c)(I) of the SR Act, considering the Petitioners' situation and the peculiar facts and circumstances of this case, we are inclined to grant an interim relief. It is imperative to acknowledge the profound emotional and psychological distress endured by the petitioners as a consequence of their present predicament. Their inability to proceed with the surrogacy procedure has placed them in a state of anguish and uncertainty, deeply affecting their mental and emotional well-being. Such circumstances underscore the pressing need for interim relief and compassionate consideration. The Court recognises the paramount importance of relieving the Petitioners from this agonising wait, and granting them the opportunity to pursue their aspiration of parenthood, especially when the embryos in question were created during a time when these legal constraints were not in effect, As discussed above, Petitioner No.1's egg retrieval and freezing were done in 2016-17, and Petitioner No.2's sperm were frozen on 29th November, 2021, before the enforcement of SR Act and ART Act. Furthermore, Petitioners intend to commission surrogacy through a woman who fulfils the eligibility criteria prescribed under Section 4(iii)(b) of SR Act. 15. Therefore, we are inclined to allow the Petitioners to continue with their treatment through gestational surrogacy. Accordingly, we direct that, subject to fulfilment of all other conditions under the SR Act and other applicable laws, an eligibility certificate be issued to the Petitioners, enabling them to avail the surrogacy procedure from the embryos already created through their IVF treatment."

8. Further, reliance is placed on the decision of the Supreme Court in ***Vijaya Kumari S & Another v. Union of India***, W.P(C) 331/2024 (and connected matters), wherein it has been held as under:

"14.3 Therefore, we deem it appropriate to observe that the 'commencement' of the surrogacy process for the limited purpose of determining when the age-limits under the Act must be applied prospectively and not retrospectively takes place after the intending



couple has completed the extraction and fertilisation of gametes and has frozen the embryo with an intention to and for the purposes of, transfer to the womb of the surrogate mother. There is no additional step to be undertaken by the couple themselves. All subsequent steps would involve only the surrogate mother. There is nothing else for the couple to do by themselves, that would strengthen the manifestation of their intention to pursue surrogacy. Therefore, the freezing of embryos for the purpose of surrogacy is a stage at which one can say that the intending couple has taken multiple bona fide steps and had manifested their intention to pursue surrogacy and all that remained was involvement of the surrogate mother herself in Stage B of the diagram, which could not be gone through due to various circumstances including the intervention of Covid-19 Pandemic in these cases.

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15.9 We therefore hold that creation of embryos and freezing of the same is crystallization of the said process as it clearly demonstrates the intention of the couples i.e., intending couples, in the instant cases. The earlier stages, namely, (i) Visit to surrogacy clinic, (ii) Counselling of the patient, (iii) Obtaining of the various permissions / certificates from Appropriate Authorities under Section 4 of the Act, (iv) Extraction of gametes of Stage A, are no doubt part of surrogacy procedure but are stages prior to the crystallization of the intention of the couple to undertake a surrogacy procedure an interpretation we are giving in the context of age barriers. Therefore, when there was no age restriction at the stage of creation of embryos and freezing them i.e., prior to the enforcement of the Act, when the intending couples are at the threshold of Stage B, the age restriction under the Act cannot be permitted to operate retrospectively on such intending couples as in the present cases so as to frustrate not just the surrogacy procedure but also their right to have a surrogate child or become parents, the latter being a constitutional right under Article 21 of the Constitution.

15.10 Therefore, the rule against retrospective operation of statutes applies in the instant case in order to preserve the rights of intending couples such as the petitioners/applicant in the present case. If we do not apply the aforesaid principle of interpretation of statutes we would failing in our duty to uphold the constitutional right of such intending couples under Article 21 of the Constitution. Therefore, we hold that the age bar does not apply to intending couples such as the ones we are considering in the present cases.

16. Thus, if an intending couple had –



(i) commenced the surrogacy procedure prior to the commencement of the Act i.e., 25.01.2022; and

(ii) were at the stage of creation of embryos and freezing after extraction of gametes (Stage A of the diagram); and

(iii) on the threshold of transfer of embryos to the uterus of the surrogate mother (Stage B of the diagram)

The age restriction under Section 4(iii)(c)(I) of the Act would not apply. The competent authority, on being satisfied about the aforesaid conditions (i), (ii) and (iii) above shall issue the certification provided Rule 14 of the Rules are satisfied by the intending couples.”

9. In light of **Vijaya Kumari S** (supra), and considering that the petitioners initiated the surrogacy procedure prior to the enforcement of the Act, this Court is of the view that Section 4(iii)(v)(c)(I) of the Act shall not be applicable to the petitioners herein. Accordingly, the petitioners are allowed to move forward with the surrogacy process, notwithstanding the age of petitioner no.1. The petitioners are exempted from seeking the eligibility certification, provided they satisfy all other applicable conditions under the Act and the Surrogacy (Regulation) Rules, 2022.

10. The petition stands disposed of in the above terms.

SACHIN DATTA, J

OCTOBER 27, 2025/ss