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

+ **W.P.(C) 12395/2023**

MRS. D & ANR.

..... Petitioners

Through: **Mr. Nalin Tripathi and Mr. Nischal Tripathi, Advocates.**

versus

UNION OF INDIA & ANR.

..... Respondents

Through: **Mr. Chetan Sharma, ASG with Mr. Amit Gupta, Mr. Saurabh Tripathi and Mr. Vikramaditya Singh, Advocates for UOI.**
Ms. Monika Arora, CGSC with Ms. Prakriti Bandhan and Mr. Subhrodeep Saha, Advocates for UOI.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE SANJEEV NARULA

ORDER

% **10.10.2023**

C.M. APPL. 48909/2023 *(for exemption from filing certified copy/ fair/ original annexures)*

1. Exemption is granted, subject to all just exceptions.
2. The Petitioners shall file legible and clearer copies of exempted documents, compliant with practice rules, before the next date of hearing.
3. Disposed of.

C.M. APPL. 48908/2023 *(for non-disclosure of identity of Petitioners)*

4. Considering the peculiar facts of the case and the nature of issues



involved, the application is allowed. It is directed that the Petitioners' names and associated details shall not be disclosed to the public.

5. The application is disposed of.
6. The memo of parties with redacted names is taken on record.

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7. The Petitioners, an intending couple aging nearly 51 years, find themselves precluded from commissioning a surrogacy due to the age bar introduced through the Surrogacy (Regulation) Act, 2021 [“SR Act”], despite having initiated the process before the date of enforcement of the Act. Through this petition, they seek a declaration that Section 4(iii)(c)(I) of the SR Act, which imposes an age restriction in respect of intending parents, impinges on their reproductive autonomy, protected by Article 21 of the Constitution of India, 1950.

8. Petitioner No. 1 is the intending mother, who is presently 50 years and 11 months old. She had been married previously, however, on account of marital discord, she parted ways with her partner in 2018. Petitioner No. 1 later married Petitioner No. 2 on 15th July, 2021. Desirous of attaining parenthood, on the advice of a gynaecologist, Petitioner No. 1 retrieved and froze her eggs in 2016-17, while the divorce proceedings were ongoing, and in 2021, Petitioner No. 2's sperm were also frozen. As their attempts to conceive a child naturally were unsuccessful, the Petitioners opted for In-Vitro Fertilization [“IVF”] process on 03rd December, 2021. Unfortunately, both their attempts at IVF were unsuccessful, with the second attempt resulting in the foetus of 22 weeks, being stillborn on 02nd May, 2023. Given their unsuccessful attempts and medical complications involved due to



advanced age, the Petitioners seek to avail surrogacy using the embryos produced through fertilization of the frozen gametes. They are however, now faced with another impediment – the upper age limit of 50 years and 55 years for intending female and male, respectively, fixed under Section 4(iii)(c)(I) of the SR Act.

9. Mr. Nalin Tripathi, learned counsel for the Petitioners, argues that the afore-noted age bar is irrational. The SR Act is intended to aid infertile couples to become parents, and restricting its application to persons falling within the given age bracket, defeats the Act’s objectives. He further draws the Court’s attention to similar criteria entailed in Section 21(g) of the Assisted Reproductive Technology (Regulation) Act, 2021 [“ART Act”] to submit that the criteria for prescribing age limit for undergoing assisted reproductive technology [“ART”] procedures, where the embryo is inseminated inside the intending mother, cannot be applied for surrogacy. The scope of these two provisions contained in both legislations, is entirely distinct. So long as the surrogate mother fulfills the age criteria (of being between 25 to 35 years of age), age of the intending couple should not affect their eligibility for surrogacy. Mr. Tripathi states that Section 4(iii)(c)(I) curtails the reproductive rights of all parents who exceed the given age limit. Further, in view of Petitioner No. 1’s advanced age, her health conditions, previous attempts, and stipulation in Section 21(g) of the ART Act, the Petitioners have no recourse, other than surrogacy, for attaining parenthood.

10. Mr. Tripathi further emphasizes that in the present case, the IVF procedure was initiated on 03rd December, 2021, and embryos were created before the introduction of the SR Act on 25th December, 2021, which came into force on 25th January, 2021. Therefore, the Petitioners must be



permitted to utilize the embryos that were already in existence on the date of enforcement of the SR Act. In this regard, reliance is placed upon the judgement in *Nandini K and Anr. v. Union of India and Ors.*¹

11. The Court has carefully examined the afore-noted contentions. The Petitioners' efforts to conceive, bear, and deliver a child have regrettably yielded no success. Petitioner No. 1, the mother, has also surpassed the age criteria stipulated in the ART Act, rendering her ineligible for further IVF treatment to facilitate childbirth. Their only remaining option is gestational surrogacy. However, they now face a significant dilemma due to the contentious provision in question – Section 4(iii)(c)(I) of the SR Act, which reads as follows:

“4. Regulation of surrogacy and surrogacy procedures - On and from the date of commencement of this Act, -

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(iii) no surrogacy or surrogacy procedures shall be conducted, undertaken, performed or initiated, unless the Director or in-charge of the surrogacy clinic and the person qualified to do so are satisfied, for reasons to be recorded in writing, that the following conditions have been fulfilled, namely:-

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. .*

(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”

[Emphasis Supplied]

12. The Petitioners have encountered a roadblock in obtaining the eligibility certificate, primarily due to their age exceeding the prescribed

¹ In W.P.(C) No. 24058/2022 and connected matters.



limits. However, it is essential to note that the Petitioners commenced their IVF treatment, and embryo was created on 03rd December, 2021, when the age restrictions outlined in both the SR Act and the ART Act, were not yet in effect. Furthermore, it is essential to emphasize that the embryos were created through the fertilization of gametes that were recovered and frozen when the Petitioners' ages were well below the age limit introduced under the impugned provision. *Prima facie*, the impugned provision cannot be applied retrospectively, thereby disqualifying individuals who had already initiated or undergone the ART process, in accordance with the prevailing laws. Mr. Chetan Sharma, learned Additional Solicitor General, has also fairly pointed out that the legal implications of the provision should be prospective in nature. Considering these crucial facts, in our opinion, the impugned provision should not be interpreted as an obstacle to the Petitioners' pursuit of surrogacy.

13. At this juncture, we must reference a judgment passed by the High Court of Kerala in *Nandini K (Supra)*, as it bears significant relevance to the issue at hand. In that case, the Court was dealing with Section 21(g) of the ART Act, which prescribes the age limit for couples desirous of availing ART. It was held that if the prohibition under Section 21(g) is understood to be preventing continuance of ART services that had already commenced, it would amount to unreasonable and unjustified restriction on the reproductive choice of the commissioning couple, and would militate against the liberty guaranteed under Article 21 of the Constitution. As a result, the Court determined that couples who had initiated IVF treatment prior to 25th January, 2022 (the date of the enforcement of the ART Act) should not be adversely affected by the age prescription outlined in the ART



Act. This precedent, set by the High Court of Kerala, sheds significant light on the prospective applicability of standing provisions, and reinforces the argument in favour of the Petitioners.

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 recognizes the paramount importance of relieving the Petitioners from this agonizing 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.

16. Respondents are granted further four weeks' time to file a counter affidavit. Rejoinder thereto, if any, be filed within two weeks thereafter.

17. Re-notify on 15th December, 2023.

SATISH CHANDRA SHARMA, CJ

SANJEEV NARULA, J

OCTOBER 10, 2023
AS