



2026:AHK-LKO:43965-DB

AFR

**HIGH COURT OF JUDICATURE AT ALLAHABAD
LUCKNOW**

WRIT - C No. - 6292 of 2026

.....Petitioner(s)

Versus

Union Of India, Ministry Of Health And Family
Welfare Deptt. Thru. Secy. New Delhi And
Another

.....Respondent(s)

Counsel for Petitioner(s) : Rohan Pathak, Vineet Mani Tripathi
Counsel for Respondent(s) : A.S.G.I., C.S.C.

Court No. - 3

**HON'BLE SHEKHAR B. SARAF, J.
HON'BLE ABDHESH KUMAR CHAUDHARY, J.**

1. Learned counsel appearing on behalf of the petitioners wishes to implead the Chief Medical Officer, Lucknow as respondent No.3 in the array of the parties
2. He is permitted to carry out the necessary amendment during the course of day.
3. Heard learned counsel appearing on behalf of the petitioner, Shri S.B. Pandey, learned Senior Advocate & DSGI assisted by Ms. Harsha Yadav, learned counsel appearing on behalf of the respondent and Shri Pankaj Khare, learned Additional Chief Standing Counsel for the State-respondent.
4. This is a writ petition under Article 226 of the Constitution of India wherein the writ petitioner has prayed for the following substantial relief(s):

"(a) Allow the present writ petition and permit the petitioner to proceed with altruistic surrogacy despite the age limitation-imposed under Section 4(iii)(v)(c)(I) of the Surrogacy Act, 2021."
5. It has been submitted that the petitioners are legally wedded for the last more than 17 years and unfortunately de hors the fertility treatment, were

unable to conceive naturally and as such had to undergo In Vitro Fertilization (IVF) procedure. It has been further submitted that even the said In Vitro Fertilization procedure was not promising in the sense that successive embryo transfer failed as they were unsuccessful attempts at conception. Thus, in consideration of their precarious medical condition to conceive naturally have been advised by the Medical Practitioners to pursue surrogacy.

6. Learned counsel for the petitioners has highlighted the fact that the petitioners are 'intending couple' within the meaning of Section 2 (r) of the Surrogacy (Regulation) Act, 2021 and are basically aggrieved by the upper age permitted under Section 4 (iii) (v) (c) (1) of the said Act. According to him, as per Section 4 (iii) (v) (c) (1) of the said Act, a male must be between 26 to 55 years of age and a female must be between 23 to 50 years of age to be eligible for surrogacy as an advanced fertility treatment. However, in the present case the petitioner No.1 (wife) is aged little more than 50 years and since she exceeded the age limit prescribed under the said provisions of the Surrogacy Act, which came into force on 25.01.2022, she cannot avail the assistance of the surrogacy and could not fulfill the dreams of parenthood.

7. Thus, the crux of the matter according to the learned counsel for the petitioners is that although three embryo has been preserved by the petitioners on 18.07.2015, however, they were not able to achieve parenthood through assisted reproductive method because of the age factor.

8. Learned counsel in order to buttress his submission has relied upon the medical prescription as well as on the judgements of the Delhi High Court in **Tapas Kumar Mallick and another Vs. Union of India and another** reported in **2025 SCC OnLine Del 10922** and the Punjab & Haryana High Court in **Shobhini Mala Vs. Union of India**, CWP-6726-2026 (O&M), decided on 21 April 2026. He has specifically contended that the Hon'ble Supreme Court in the case of **Vijaya Kumari S & another Vs. Union of India** reported in **(2025) SCC OnLine SC 2195** has specifically held relevant to the context that:-

"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.

15.9. We therefore hold that creation of embryos and freezing of the same is crystallisation 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; and (iv) extraction of gametes of Stage A, are no doubt part of surrogacy procedure but are stages prior to the crystallisation 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."

9. Upon considering the arguments advanced by learned counsel for the petitioners as well as by learned counsel for the Union of India, we are of the view that the rigid application of age restriction under Surrogacy (Regulation) Act, 2021 infringes the fundamental right of the reproductive autonomy recognized as a part of personal liberty under Article 21 of the Constitution of India. Hon'ble Supreme Court in similar circumstances, wherein fertility treatment was started prior to the enforcement of the Surrogacy Act has granted relief to an intending couple who has frozen embryo prior to January 25, 2022 in the case of **Arun Muthuvel Vs. Union of India** reported in **2024 SCC OnLine SC 140**.

10. In light of the judgement of **Vijaya Kumari (supra)** and considering that the petitioners initiated the surrogacy procedure prior to the enforcement of the Act, this Court is of the considered opinion that Section 4 (iii) (v) (c) (I) of the said Act is not applicable to the petitioners herein.

11. Accordingly, the petitioners are allowed to move forward with the surrogacy process and in that respect, they are permitted to file a proper application before the appropriate authority/Chief Medical Officer, Lucknow in terms of Section 35 of the Surrogacy Act, 2021. If such an application is filed within a period of three weeks from date, the authority concerned is directed to grant an opportunity of hearing to the petitioner, and thereafter, pass a reasoned order keeping in view the various judgements of the Hon'ble Supreme Court on the subject of the surrogacy as well as the Surrogacy Act, 2021.

12. With the above directions, the writ petition is **disposed of**.

(Abdhesh Kumar Chaudhary,J.) (Shekhar B. Saraf,J.)

July 7, 2026

Ashutosh