



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22-07-2026

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THE HON'BLE MR.JUSTICE MOHAMMED SHAFFIQ

**WP No. 32103 of 2025
and WMP Nos.35998 and 35999 of 2025**

1. Indumathi
W/o.Deepu P.R., No.932/4,Evr Periyar 2nd
Lane, Purasawalkam, Chennai-600 084.
2. Deepu P.R
S/o.Revappan.P.S., No.932/4,evr Periyar 2nd
Lane, Purasawalkam Chennai-600 084

..Petitioner(s)

Vs

1. State Of Tamil Nadu
Rep By its Principal Secretary To Government,
Health And Family Welfare Department
Secretariat, Chennai
2. The Director
The Directorate Of Medical And Rural Health
Service, No.359, DMS Complex,
361, Anna Salai, Chennai-600 006
3. Joint Director Of Medical And Rural Health
Service (Surrogacy Acts), O/o.Joint Director
Of Health Service, Chennai-600 006.

..Respondent(s)

PRAYER: Writ Petition filed under Article 226 of the Constitution of India, pleaded to issue a Writ of Certiorarified Mandamus, to call for the records on the file of the 3rd respondent dated 24.3.2025 in Ref.No.037044/E7/3/2024 and quash the same and consequently direct the 2nd and 3rd respondents to issue eligibility certificate for the petitioners being the intending couples to undergo



the surrogacy Procedure under Assisted Reproductive Technology (Regulation) Act, 2021 and Surrogacy (Regulation) Act 2021 and further direct the 3rd respondent to permit the petitioners to undergo further surrogacy procedures.

For Petitioner(s): Mr.K.V.Sajeev Kumar

For Respondent(s): Mr.J.V.Sakthi Baalakrishnan
Govt Counsel for R1 and R2

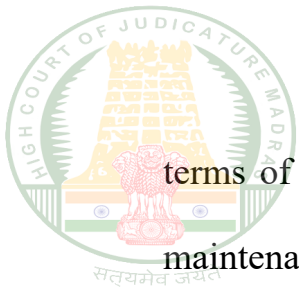
ORDER

The present writ petition is filed challenging the impugned proceedings dated 24.03.2025, whereby second respondent had rejected petitioners' request seeking permission to undergo a surrogacy procedure. Rejection was on the premise that first petitioner has an existing child from a previous marriage and also the applicant/intending mother has crossed the age limit of 50 years as on 24.12.2024.

2. Learned counsel for petitioners would submit that both reasons contained in the impugned order are unsustainable.

3. Brief Facts:

3.1. Petitioner was married to one P. Balasubramanian in the year 1999. Out of the wedlock, a female child, B.Suvetha, was born on 14.10.2004. Due to differences between first petitioner and her husband Balasubramanian, a divorce petition was filed in HMOP 2327 of 2014, which was allowed on 28.5.2015. In



terms of the agreement entered into in the said HMOP, the custody, care and maintenance of the child were granted to the father P.Balasubramanian.

Thereafter, first petitioner married second petitioner herein on 02.09.2017. Although first petitioner conceived, she suffered a miscarriage in the year 2019. Petitioners herein decided on the basis of medical advice to undergo surrogacy using a donor oocyte and second petitioner's sperm. In accordance with the treatment plan, the hospital collected and froze the second petitioner's sperm in the year 2019.

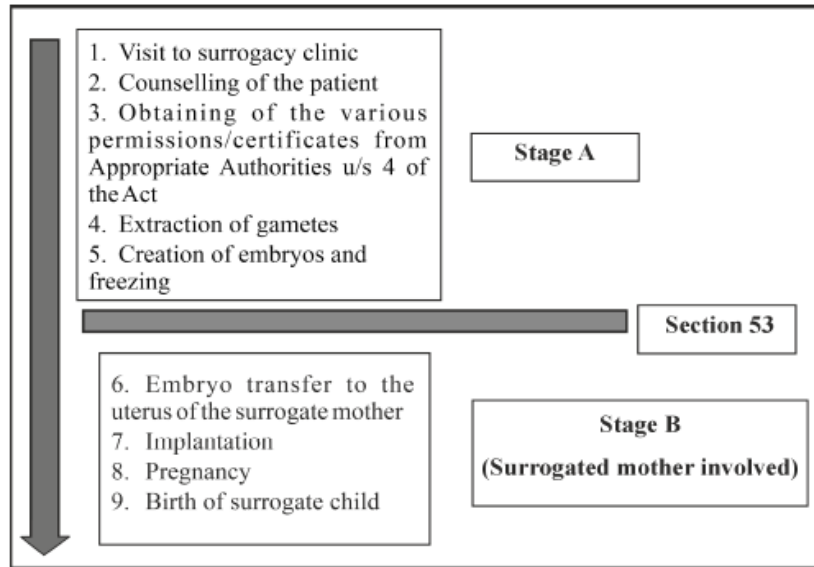
3.2. Learned counsel for petitioners would further submit that petitioners were looking for a surrogate mother. While so, the Surrogacy (Regulation) Act, 2021 came into effect on 25.12.2021. When petitioners approached a private hospital, they were directed to obtain permission from the competent authority under the Act. Thereafter, petitioners applied to second respondent, who passed the impugned order rejecting their request. The present writ petition has been filed challenging the impugned order dated 24.03.2025.

3.3. Learned counsel for petitioners would submit that as far as the age limit is concerned, the issue stands covered by the judgment of the Supreme Court in the case of *S. Vijaya Kumari and others vs Union of India*, wherein it has been held that the Act applies only prospectively and shall not apply to cases where the surrogacy procedure has already commenced. The Supreme Court also explained different stages of surrogacy procedure, in this regard, it is relevant to refer to the following paragraphs:



WEB COPY “13.9. The learned ASG drew our attention to Para 97 of her written submissions, which shows that the process of surrogacy consists of two stages: Stage A and Stage B. The same is extracted as under:

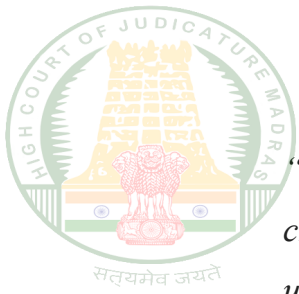
“97. The process of surrogacy broadly entails the following stages:



3.4. The Supreme Court then explained that right to surrogacy is an exercise of reproductive autonomy a facet under Article 21 of the Constitution as could be seen from the following observations:

“Surrogacy as an exercise of reproductive autonomy

“24. In recent jurisprudence, the Supreme Court has often recognised that “reproductive autonomy” is part of the constellation of rights afforded to all people under Article 21 of the Constitution. In 2009, a three-Judge Bench of this Court in Suchita Srivastava v. State (UT of Chandigarh) [Suchita Srivastava v. State (UT of Chandigarh), (2009) 9 SCC 1 : (2009) 3 SCC (Civ) 570] (“Suchita Srivastava”) observed as follows: (SCC p. 15, para 22)



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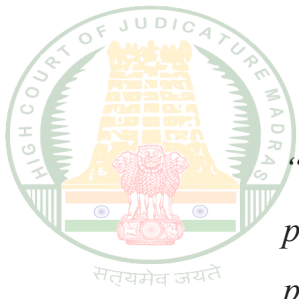


“22. There is no doubt that a woman's right to make reproductive choices is also a dimension of “personal liberty” as understood under Article 21 of the Constitution of India. It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods.”

24.1. In K.S. Puttaswamy (Privacy-9J.) v. Union of India [K.S. Puttaswamy (Privacy-9J.) v. Union of India, (2017) 10 SCC 1] , which recognised a right to privacy within the contours of Article 21, Dr D.Y. Chandrachud, J. (as he then was), observed as follows: (SCC p. 472, para 248)

“248. Privacy has distinct connotations including (i) spatial control; (ii) decisional autonomy; and (iii) informational control. [Bhairav Acharya, “The Four Parts of Privacy in India”, Economic & Political Weekly (2015), Vol. 50 Issue 22, at p. 32.] Spatial control denotes the creation of private spaces. Decisional autonomy comprehends intimate personal choices such as those governing reproduction as well as choices expressed in public such as faith or modes of dress.”

24.2. Indeed, the freedom to make procreative choices as a facet of a right to privacy was recognised even as far back as this Court's judgment in R. Rajagopal v. State of T.N. [R. Rajagopal v. State of T.N., (1994) 6 SCC 632] , in which it was observed that: (SCC p. 640, para 9)



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“9. ... Any right to privacy must encompass and protect the personal intimacies of the home, the family, marriage, motherhood, procreation and child-rearing.”

3.5. Apex Court then contrasted the legal position as it existed prior and post introduction of Surrogacy Act and observed as under :

“24.6. Therefore, at the time that intending couple Nos. 1 to 3 herein generated and froze their embryos, they had qualified for surrogacy under the prevailing law. Thus, they came to possess a right to surrogacy as a part of reproductive autonomy and parenthood. Before 25-1-2022, we find that there were no binding laws, certifications, etc. regarding age restrictions on intending couples wishing to avail surrogacy (such as intending couple Nos. 1 to 3 herein). Therefore, for couples above the (statutory) age-limits under the Act, the right to access surrogacy or their entitlement to surrogacy was not conditional on their age and was freely available to couples under the prevailing law.

24.7. To reiterate, we are concerned solely with the question of age-restrictions in these three cases. The short point is, that on the issue of age alone, the right to surrogacy as a facet of autonomy under Article 21 was unrestricted prior to the enforcement of the Act under consideration. In other words, the right to decide that despite one's age, one wishes to have children through surrogacy, was afforded to intending couples under Article 21 prior to the enforcement of the Act. Now with the enforcement of the Act, can that right be stultified?

Retrospective application of age-restrictions



25. *In the case of intending couple Nos. 1 to 3, they had exercised this decisional autonomy and commenced the process of surrogacy, to the extent of freezing their embryos in preparation for transfer to the womb of the surrogate mother. They were at the last step of Stage A as per the diagram (supra).*

26. *Therefore, the real issue is whether a statutory regulation may apply retrospectively and frustrate a right which had and has the imprimatur of the Constitution under Article 21 and had been exercised by intending couples who had commenced the process of surrogacy prior to the enforcement of the Act.*

.....

35. *For intending couples who undertook surrogacy procedures prior to the Act, age-related considerations were entirely their prerogative and as explained earlier, an exercise of their rights under Article 21 of the Constitution. Therefore, we have no hesitation in observing that the right to make autonomous decisions regarding the age at which one wished to pursue surrogacy, had vested in intending couple Nos. 1 to 3. Hence, since there is no manifest intention in the provisions of the Act to apply the age-limits retrospectively, we are of the view that the same is not permissible. Further, the intending couples in the present cases could have opted for adoption of children under personal law in the absence of an age restriction. In such a situation, the argument regarding quality parenting would be futile and of no consequence.*

3.6. Apex Court then proceeded to examine as to when the surrogacy procedure may be treated as having commenced.

“Commencement” of the surrogacy procedure



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40. The next question that arises is the proper meaning of the term “commencement” of the surrogacy procedure. When can it be said that couples have “commenced” the process of surrogacy before the enforcement of the Act, and hence may be allowed to continue despite the subsequent age-limits? In this regard, we find it helpful to refer to the diagram submitted by the respondent-Union of India, referred to in an earlier paragraph of this order.

41. We can see that the last step in Stage A is the ‘freezing of embryos’, which marks the last step before the commencement of Stage B, which involves the surrogate mother inasmuch as the embryos are transferred to the uterus of the surrogate mother by implantation. At this point, the intending couple has already completed the process of extracting gametes which included both the sperm and oocyte; fertilising them to form zygotes, and freezing the resulting ‘embryos’, which means a developing or developed organism after fertilization till the end of fifty-six days. Section 2(c) defines “fertilisation” to mean the penetration of the ovum by the spermatozoan and fusion of genetic materials resulting in the development of a zygote. The word ‘zygote’ is defined in Section 2(zh) to mean the fertilised oocyte prior to the first cell division. Further, from the fifty-seventh day after fertilization onwards, the organism is called a ‘foetus’ which is defined to mean a human organism during the period of its development beginning on the fifty-seventh day following fertilisation or creation (excluding any time in which its development has been suspended) and ending at birth.

This is the stage at which intending couple Nos.1 to 3 found themselves before the commencement of the Act. They were thus ready to transfer the embryo to the womb of the surrogate mother.

42. Now, if the transfer to the womb had been effected before the commencement of the Act, then Section 53 would have operated



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as a 'gestational' (transitional) period to the benefit of the surrogate mother in which the age restrictions on the intending couple would not have applied at all. Therefore, even if a surrogate child is born within ten months after the Act is enforced then the age bar would not apply insofar as the intending couples are concerned. Hence, the submission of learned ASG is that the age-limits can be transgressed only when the surrogate mother has been introduced into the surrogacy procedure. However, we do not find this to be a valid argument. This would mean that even if the intending couple had crossed the age restriction prior to the enforcement of the Act, and the transitional provision applied, the concerns of them being too old to have children and concerns regarding the quality of their parenting would vanish and be disregarded. Such a position cannot be accepted as the same in effect frustrates the right of intending couples attempting to have a surrogate child, which is a constitutional right regulated by statute. Hence, there is a need to strike a balance between the provision regarding the age restriction, the transitional provision (Section 53 of the Act) and the rights of the intending couples to have a surrogate child when they had commenced the surrogacy procedure prior to the commencement of the Act and were in the midst of the said procedure when the Act has placed age restrictions on them. In the instant case, the intending couples were a step away from involving the surrogate mother in the process.

43. 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,



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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.

.....

55. 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.



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56. 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.

57. Thus, if an intending couple had:

(i) commenced the surrogacy procedure prior to the commencement of the Act i.e. 25-1-2022; and

(ii) were at the stage of creation of embryos and freezing after extraction of gametes (Stage A of the diagram set out in para 13.9); and

(iii) on the threshold of transfer of embryos to the uterus of the surrogate mother (Stage B of the diagram set out in para 13.9),

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.”

(emphasis supplied)

4. The learned counsel for respondents raised a preliminary objection that an appellate remedy is available against the impugned order. It is trite that existence of alternative remedy is not an absolute bar. Rule of alternate remedy is more of self imposed restriction. In the circumstance this Court is inclined to entertain the writ petition.



5. In the present case, learned counsel for petitioners would submit that second petitioner's embryos were vitrified that is frozen in other words surrogacy procedure commenced as early as 2019 i.e., prior to the enactment of the Surrogacy Act. Surrogacy Act having been held by Supreme Court to be prospective is thus inapplicable to the facts of the case.

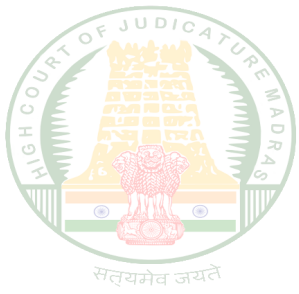
6. Secondly, he would also submit that if Section 4 of the Surrogacy (Regulation) Act, 2021 is applicable only prospectively, there is no reason why Section 4(c)(I)(II) of the Surrogacy (Regulation) Act, 2021 should be applied retrospectively, inasmuch as the surrogacy procedure has commenced even prior to the introduction of the Act. This Court finds that may not have to be examined in the present case and the question is left open.

7. It appears that restrictions/embargo contained in Section 4(c)(I)(II) of the Surrogacy (Regulation) Act, 2021, may not apply to the facts of the present case. Before proceeding further, it is relevant to refer to Section 4(c)(I)(II) of the Surrogacy (Regulation) Act, 2021, which reads as under:

“4. Regulation of surrogacy and surrogacy procedures:-

“(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



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55 years in case of male on the day of certification;

(II) the intending couple have not had any surviving child biologically or through adoption or through surrogacy earlier.”

7.1. From a reading of the above provision, it will be clear that an Eligibility Certificate shall be granted by the appropriate authority, provided the

“intending couple have not any surviving child biologically or through adoption or through surrogacy earlier”.

7.2. The expression 'couple' and 'intending couple' are defined under Sections 2(h) and 2(r) of the Surrogacy (Regulation) Act, 2021 which reads as under:

“2(h) “couple” means the legally married Indian man and woman above the age of 21 years and 18 years respectively.

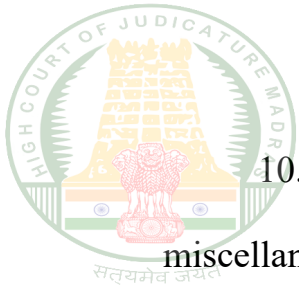
2(r) “intending couple” means a couple who have a medical indication necessitating gestational surrogacy and who intend to become parents through surrogacy.”

8. As could be seen from the facts set out supra, the child B.Suwetha was born to first petitioner and Mr. Balasubramanian. Admittedly, first petitioner marriage with Mr.Balasubramanian has ended in divorce and child’s custody is also given to Mr.Balasubramanian. Admittedly first petitioner herein does not have any child with second petitioner to whom first petitioner was married after



her divorce, thus the restriction contained in Section 4(c)(I)(II) would not have any applicability to the present petitioners. I say so, for if Section 4(c) (I)(II) is read with Sections 2(h) and 2(r) of the Surrogacy (Regulation) Act, there is no doubt that it is first and second petitioner who are “intending couple” and it is not in dispute that they have not had any surviving child biologically or through adoption or through surrogacy earlier. Thus, the impugned order rejecting petitioner’s application for permission to undergo surrogacy procedure only on the premise there is an existing child in previous marriage and also the applicant intending mother has crossed the age limit of 50 years on 24.12.2024, cannot be sustained in the light of the above discussion.

9. In that view of the matter, this Court is inclined to set aside the impugned order and direct respondent authorities to consider the petitioners' request. The respondent authority shall pass a fresh order and issue an Essentiality Certificate if otherwise petitioner is entitled to. The above exercise shall be completed within a period of two weeks from the date of uploading of web copy without waiting for receipt of certified copy of the order.



10. Hence the Writ Petition is allowed. Consequently connected miscellaneous petitions are closed. There shall be no order as to costs.

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22-07-2026

Index: Yes/No
Speaking/Non-speaking order
Neutral Citation: Yes/No

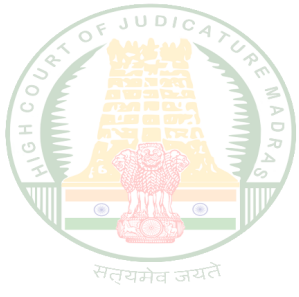
jv

To:

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Government Of Tamil Nadu
Health And Family Welfare Department Secretariat, Chennai

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O/o.Joint Director Of Health Service, Chennai-600 006.



WEB COPY

WP No. 32103 of 2



MOHAMMED SHAFFIQ, J.

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WP No. 32103 of 2025

22-07-2026