IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.11143 OF 2026

X-1 & Anr. .. Petitioners

Versus

Union of India through the Secretary, Ministry of Health and Family Welfare, Government of India & Ors. .. Respondents

...

Mr.Utkarsh R. Pondkule with Mr.Jagdish Deore and Mr.Akshay Desai for the Petitioners.

Mr.Anil C. Singh, Additional Solicitor General of India with Ms.Savita Ganoo, Mr.Krishnakant Deshmukh and Mr.Aadarsh Vyas for the Respondent No.1/UOI.

Mr.Sharan Jagtiani, Senior Advocate and Amicus Curiae with Ms.Surabhi Agrawal, Mr.Siddharth Joshi and Ms.Avanti Divan.

Mr.Ketan V. Joshi, 'B' Panel Counsel with Mr.A.A.Alaspurkar, A.G.P. for the State/Respondent Nos.3, 4 and 6.

Ms.Chaitrali Deshmukh for the Respondent No.5.

CORAM: BHARATI DANGRE &
ASHISH S. CHAVAN, JJ.

RESERVED ON : 26th OCTOBER, 2026
PRONOUNCED ON : 04th NOVEMBER, 2026

...

JUDGMENT (PER BHARATI DANGRE, J.)

" Of all the Rights of Women, the greatest is to be a Mother."

Lin.Yutang

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It is this right to be a 'Mother' is what is claimed before us through present Petition filed by X-1, a female aged 54 years and X-2, a male aged 53 years, being the legally wedded spouses, both together constituting "intending couple" within the scope of the Surrogacy (Regulation) Act, 2021 (hereinafter referred to as *"Surrogacy Act"*).

2. The Petitioners have instituted the Writ Petition, being aggrieved by the rejection of their application for issuance of an Eligibility Certificate under Section 4(iii)(c) of the Surrogacy Act, solely on the ground that X-1 has crossed the upper age limit prescribed under Section 4(iii)(c)(I) of the Act.

The Petitioners seek judicial review of the said order and consequential relief for enforcement of their right under Articles 14 and 21 of the Constitution of India.

Pleading that the Petitioners have made serious and continuous efforts to conceive naturally, but the prolonged attempts remaining unsuccessful, they consulted the qualified infertility specialists and underwent detailed clinical evaluation and infertility investigations. Acting upon the expert medical advice, they underwent Assisted Reproductive Technology ('ART') procedures, including multiple cycles of In Vitro Fertilization ('IVF') at recognised fertility centres. It is the pleaded case of the Petitioners that despite undergoing ART procedures under expert supervision and faithfully complying with every prescribed medical protocol, the treatment did not result in a successful clinical pregnancy. It is on 27/06/2026, on consulting an IVF Specialist in Nashik, a medical opinion is issued as below :-

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"7. That in view of the prolonged infertility history, repeated unsuccessful IVT attempts, passage of substantial time since commencement of treatment and the present age of the intending mother, the possibility of achieving pregnancy through conventional methods has become increasingly challenging from a medical perspective.

8. That the couple continues to have a genuine desire to have a child and complete their family. Their desire of parenthood has remained consistent over the years and is supported by their long history of undergoing infertility treatment.

9. .. .. ..

10. .. .. ..

11. That in my professional opinion, the present case deserves compassionate and equitable consideration in light of the peculiar facts and circumstances, namely :-

a. Long-standing history of infertility;

b. Multiple IVF and embryo transfer attempts undertaken over several years;

c. Repeated unsuccessful treatment outcomes despite sincere efforts;

d. Advanced maternal age and reduced reproductive prospects;

e. Continued bona fide desire of the couple to have a child and experience parenthood."

3. In light of the aforesaid opinion recommending gestational surrogacy, the Petitioners submitted an application before the Appropriate Authority of Nashik Municipal Corporation under the Surrogacy (Regulation) Act, 2021, i.e. Respondent No.5, seeking issuance of Eligibility Certificate in accordance with Section 4(iii)(c), and they simultaneously initiated the process of obtaining the Medical Indication Certificate from District Medical Board.

Respondent No.5, on 14/07/2026, rejected the application filed by the Petitioners by stating thus :-

"Age of X-1 is 54 years and under the Surrogacy Act, 2021, the age of the woman, shall not exceed 50 years and, therefore, the Eligibility and Essentiality Certificate cannot be issued to the Petitioners."

4. It is this rejection, which has constrained the Petitioners to file the present Writ Petition calling in question the order

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dated 14/07/2026 passed by Respondent No.5 and seeking the following reliefs :-

> "B. Issue an appropriate writ, order or direction declaring that Section 4(iii)(c)(I) of the Surrogacy (Regulation) Act, 2021 is required to be interpreted purposively and harmoniously with the object of the Act. Rule 14 of the Surrogacy (Regulation) Rules, 2022 and the constitutional guarantees under Articles 14 and 21 of the Constitution of India, so as to permit consideration of exceptional medically justified cases on their individual merits;
>
> C. In the alternative, if this Hon'ble Court concludes that Section 4(iii)(c)(I) is incapable of receiving such a purposive interpretation, declare the said provision unconstitutional to the limited extent that it mandates an inflexible age-based disqualification without permitting consideration of exceptional medically justified cases supported by objective medical evidence, thereby resulting in arbitrary and disproportionate deprivation of rights guaranteed under Articles 14 and 21 of the Constitution of India.
>
> D. Issue an appropriate writ, order or direction in the nature of Mandamus directing Respondent No.5, the Appropriate Authority under the Surrogacy (Regulation) Act, 2021, Nashik Municipal Corporation, to reconsider the Petitioners' application for issuance of the Eligibility Certificate afresh in accordance with law and in the light of the interpretation and directions issued by this Hon'ble Court.
>
> E. Issue an appropriate writ, order or direction in the nature of Mandamus directing Respondent No.6, the District Medical Board, Nashik, to examine the Petitioners' case and issue the Certificate of Medical Indication, if the Petitioners satisfy the medical requirements prescribed under the Surrogacy (Regulation) Act, 2021 and the Surrogacy (Regulation) Rules, 2022, in the light of the judgment of this Hon'ble Court."

5. When the Petition appeared before us on 01/09/2026, we observed thus :-

> "4 The Petition, therefore, involve interpretation of the provisions of the Act of 2021 read with the Rules framed thereunder. It would also have the involvement of Assisted Reproductive Technology (Regulation) Act, 2021 as this enactment regulate the Assisted Reproductive Technology clinics and the Assisted Reproductive Technology banks, which is an organization responsible for collection of gametes, storage of gametes and embryos and supply of gametes to the Assisted Reproductive Technology clinics for their use.
>
> 'Gamete' is defined in the Act as sperm and oocyte and 'Gamete donor' is a person who provides sperm or oocyte to the object of enabling an infertile couple or a woman to have a child.

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5 As it is the contention of the Petitioners that Petitioner No.1's eggs are not to be put to use, but they are seeking a donor who shall be a Gamete donor within the meaning of the ART (Regulation) Act, 2021 and the interface between the two statutes alongwith the medical opinion that is expressed by the experts, where the Petitioners are undertaking the treatment and have made multiple attempts through IVF, but not being successful, they want to resort to the technology of surrogacy, but in the wake of the restrictions and embargo imposed on the age limit of the intending parents, and in this case the mother i.e. Petitioner No.1, they do not stand a chance at the outset itself.

6 In the wake of the the issue that is arising before us, we deem it appropriate to have an assistance through an Amicus curie and we request the learned senior counsel Mr.Sharan Jagtiani to render his assistance to us, in dealing with the reliefs in the Writ Petition.

We request the counsel for the Petitioner to furnish a copy of the Petition to him, so that he shall be in a position to address the issue that we have broadly framed in the backdrop the pleadings in the Petition and the reliefs sought therein.

In the meantime, we also request the learned AGP to obtain instructions from Respondent No.3 as well as Respondent No.6. We also deem it appropriate to direct the learned counsel for the Petitioners to serve a copy of the Petition upon the learned Additional Solicitor General Mr. Anil Singh, so that he can choose to mark appearance himself or relegate the matter to some competent counsel representing Union of India.

We also deem it appropriate to issue notice to Respondent No.5, which is an Authority established under the Nashik Municipal Corporation. Hamdast granted.

We direct the Petition to be listed on 22/09/2026 on Supplementary Board."

6. By further order of 28/09/2026, we expected the Ministry of Health and Family Welfare, Union of India as well as Public Health Department of the State, alongwith the State Assisted Reproductive Technology and Surrogacy Board and the Appropriate Authority under the Surrogacy (Regulation) Act, 2021 to file their affidavits-in-reply and expected the pleadings to be completed, considering that X-1 as on date, was 54 years old and when the challenge was raised by her to the embargo imposed for grant of Eligibility Certificate, as she has crossed the maximum age limit, time was running short for her.

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On the pleadings being completed and the Union of India, the contesting party, having filed its reply and also the reply of Respondent No.5 being placed on record, we directed the Petition to be listed for hearing.

By consent of the learned counsel appearing for the respective parties, we issue 'Rule' by making it returnable forthwith.

7. According to the learned counsel for the Petitioners, the impugned order violates the fundamental right of the Petitioners guaranteed under Article 21 of the Constitution of India and by placing reliance upon the decision in the case of *Suchita Srivastava Vs. Chandigarh Administration*[1], it is submitted that the Hon'ble Supreme Court has recognised that a woman's reproductive choice is an integral facet of personal liberty under Article 21 and the reproductive autonomy includes the freedom to make decisions concerning procreation and it is protected by the constitutional guarantee of personal liberty.

According to Mr.Utkarsh Pondkule, the learned counsel for the Petitioners, the gestational surrogacy, as recognised and regulated under the Surrogacy (Regulation) Act, 2021 constitute a lawful means through which an intending couple may realise their reproductive aspirations where natural conception or conventional assisted reproductive treatment has failed. He make it clear that the Petitioners do not claim an unrestricted or absolute right to surrogacy, but only seek a fair, reasonable and constitutionally compliant application of the statutory framework governing gestational surrogacy.

1 (2009) 9 SCC 1

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Contending that the Petitioners have undergone prolonged infertility treatment and multiple unsuccessful IVF procedures, the gestational surrogacy, as per the expert medical opinion, is the only option available and in such circumstances, their physical and mental fitness shall not become an embargo in availing the limited choice available. Further submitting that when the Parliament itself has recognised gestational surrogacy as a lawful medical procedure, it is contended that access thereto cannot be denied through an interpretation, that would cause violence to the object of the Legislation by ignoring the relevant medical evidence and disproportionately restricting the exercise of right, which is constitutionally protected in form of reproductive choice. Therefore, according to the learned counsel, the impugned order imposes a disproportionate restriction upon the Petitioners' right to dignity, decisional autonomy and reproductive choice guaranteed under Article 21 of the Constitution and, hence, it is prayed to be quashed and set aside.

8. We will refer to the submissions of the learned Amicus a little later and at present, we would deal with the stand adopted by the Union of India, Ministry of Health and Family Welfare.

The Under Secretary to the Department of Health Research, Ministry of Health and Family Welfare, Government of India, has affirmed an affidavit on 21/10/2026 and Mr.Singh, the learned Additional Solicitor General, would rely upon the said affidavit.

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Mr.Singh would place reliance upon the report of the Parliamentary Select Committee on Health and Family Welfare in regards to the issue of prescribing age limits for men and women for surrogacy services and according to him, the report has suggested that the intending couple should be 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 so as to be considered eligible to receive surrogacy services. It is also submitted by him that the issue of age restriction in Section 4(iii)(c)(I) of the Surrogacy Act was referred to the expert members of the National ART and Surrogacy Board, which expressed its consensus with the recommendations of the Select Committee of Parliament of India and further went to add that the future of the child to be born through surrogacy is of paramount importance and, hence, the National Board was of the opinion that the existing provision restricting the age limit appears to be appropriate.

The affidavit also states that various provisions of the Surrogacy Act, including Section 4(iii)(c)(I) are already under challenge before the Hon'ble Supreme Court in WP(C) No.756 of 2022 (*Arun Muthuvel Vs. Union of India*) and other connected cases and an additional affidavit has been filed before the Hon'ble Apex Court on behalf of the Union of India and the matter is pending before the Apex Court for consideration.

9. Relying upon the report of the Expert Committee, Mr.Singh would submit that the Act has prescribed the age bracket for a male and female and a married Indian woman

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and man, being intending couple, who have a medical indication necessitating gestational surrogacy as per the provision of Section 2(1)(r) of the Surrogacy Act.

In prescribing the maximum limit for receiving the surrogacy services, it is urged by Mr.Singh that the age criteria cannot be dispensed despite Petitioners having the medical condition read with Rule 14 of the Surrogacy (Regulation) Rules, 2022 and in fact, fixation of upper age limit for men and women is purely a technical matter and was done after consultation/studies of Experts in the field and after much deliberation. According to Mr. Singh, the prescription of the maximum age limit is to balance the interests of the parents and the child, considering the trend of delayed marriages in India. According to him, the rights and welfare of the unborn child should not be neglected in the process of fulfilling the desire of a couple to become parents, as the child so born, also has a right to enjoy parental care at par with the children born out of normal reproduction.

Reliance is placed by Mr.Singh upon the decision of the Delhi High Court in W.P.(C) No.19380 of 2025 (*XX Vs. Union of India & Ors.*), which has upheld age restriction under Section 4(iii)(c)(I) of the Act.

In addition, Mr.Singh would invoke the principle of law laid down by the High Court of Kerala at Ernakulam in the case of *Sajithanand S. @ Sajitha Manoharan & Anr. Vs. Union of India & Ors.* (W.P.(C) No.31918 of 2025, when the writ petition challenging the constitutional validity of age limit prescribed in the Surrogacy Act failed and the Court observed thus :-

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> "22. The age restrictions are grounded on medical sciences, ethical necessity and social welfare and they meet the constitutional standards of reasonableness and proportionality. Age restrictions are not an infringement of rights, but it acts as a protective frame work. Regulation of reproductive technology is not a denial of liberty, but a structured exercise of it.
>
> 24. The age limits prescribed under the Surrogacy Regulations Act, 2021 are constitutionally valid and they represent a carefully designed regulatory mechanism to ensure that surrogacy is practised in a safe, ethical and non-exploitative manner consistent with constitutional principles.
>
> 26. It is true that the right to make decisions relating to reproduction and parenthood forms part of personal liberty under Article 226 of the Constitution of India. But the said rights are not absolute and are subject to reasonable restrictions imposed by the law. The statutory restrictions regarding age governing surrogacy are constitutionally valid and it has a rational link to the object and purpose of the enactment. The restrictions regarding the age are reasonable and it is not arbitrary and not disproportionate. The age limits are clearly linked to the concerns of parental capacity, health, longevity and the welfare of the child."

10. Mr.Singh's emphasis is on the report of the Expert Committee on "Implication of Conception at Advanced Parental Age" and he would submit that the said Committee was constituted by the Department of Health Research, Ministry of Health and Family Welfare, Government of India to examine the implications of conception at advanced parental age on maternal outcomes, offspring health, and long-term child well-being with respect to upper age restrictions i.e. 50 years for women and 55 years for men stipulated under the ART Act, 2021 and the Surrogacy Act, 2021. According to him, the Committee comprised of eminent multidisciplinary experts in ART, genetics, reproductive biology, paediatrics, clinical psychology and social sciences, who undertook a comprehensive and evidence-based evaluation and it examined various aspects of advanced age parenting,

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including medical implications as well as psychological and caregiving implications. The Committee, according to Mr.Singh, highlighted that the parents of advanced age may experience progressive decline in health, stamina and functional capacity during the critical formative years of the child and this decline may result in caregiving disruptions, emotional insecurity and heightened psychological stress for the child, thereby compounding the risks associated with advanced parental age and impacting the child's overall well-being and development. According to him, by implementing the age restrictions, the law aims to uphold the child's right to grow in an environment where they are not disadvantaged due to their parents age or ability to care for them.

11. Mr.Singh, the learned ASG, would submit that the Surrogacy Act has defined the term 'intending couple' alongwith an 'intending woman', who are entitled to avail surrogacy, but definitely within the four corners of the statute. According to him, surrogacy is permissible for an 'intending couple' i.e. a legally married Indian man and woman and the Act consider them as one unit for consideration. Focusing his attention on the statutory mandate set out in Section 4(i) to the effect that the surrogacy procedure is permitted to be carried out only after satisfying the conditions specified in clause (iii), he would submit that the statute make it imperative to fulfill the conditions and this include the Eligibility Certificate for an intending couple on fulfillment of the conditions.

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12. Highlighting upon the condition of the maximum age limit for the intending couple, in case of a female, it being prescribed as 50 years and male as 55 years as on the date of certification, according to him, the said provision contemplate its compliance by the couple as a whole and individual age parameters to each of them within the couple are prescribed, but they are not individual bars nor individual restrictions and the requirement is qua the couple itself. According to him, the conjunctive nature of stipulation set out in Section 4(iii)(c)(I) is clearly indicative of compliance with all the three requirements, namely, (a) couple should be married, (b) age of the female should be between 23 to 50 years (c) age of the male should be between 26 to 55 years. Thus, according to him, the age requirement is to be satisfied by both the individuals and satisfaction of age requirement by one of them would not give them the benefit of adopting the process of surrogacy as 'intending couple'.

To reflect upon the intention of legislature, Mr.Singh would submit that in Section 4, when the legislature intended to refer to an individual partner within a couple, it has expressly done so, as Section 4(iii)(a)(I) provides that, 'a certificate of medical indication in favour of either or both members of the intending couple or intending woman necessitating gestational surrogacy from a District Medical Board.' According to him, the distinction of recognising either partner, stands to reason since surrogacy may be required on account of medical indication of either party and it is not necessary that both the partners have medical indication, which do not allow them to have natural pregnancy.

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Therefore, according to him, the legislature in its wisdom, as and when it deem fit and necessary, has referred to the members of the couple separately, but as far as the age criteria is concerned, since the essentiality is to be determined as a couple, it is necessary for both of them to ensure statutory compliance. According to him, since there is no ambiguity in the said provision, it shall be read as the intention of the legislature, keeping in mind the objective of the Act, being to balance the rights of parents and also achieve long-term welfare of the child.

13. Mr.Singh is very assertive in his submission that since there is no ambiguity in Section 4(iii)(c)(I) of the Surrogacy Act, the plain and literal meaning of the provision must be considered and even if the purposive interpretation is applied, considering the purpose and intent of the Surrogacy Act, according to him, it would also lead to same inference that both the members of the intending couple must satisfy the age criteria. His emphasis is on the opinion expressed in the report of the National Board and the report of the Expert Committee, which has expressed the serious concern about the medical health of the intending couple and the long-term child care to provided to the child born out of surrogacy, which may have some impact on account of advanced age of the female even though the male continues to remain in permissible age bracket. He would submit that the purposive interpretation of the provision would reflect that it must meet the intent of the Act, namely, the betterment of the child and in no way, the child shall be left in lurch in the wake of the fact that the parents, on account of their advanced age, are unable to cater

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to his needs and this he intends to apply with regards to the psychological implications of the advanced age on the child development.

According to him, prescribing age criteria for intending couple, thus help in striking balance both the medical and psychological implications and this is what has been clearly set out in the report, that being in the permissible age criteria not only balances medical needs, but it also ensures the welfare of the child since caregiving ability of the parents reduces with the advancing age of the intending couple.

14. He would take benefit of the observations of the Delhi High Court speaking through Justice Purushaindra Kumar Kaurav, in the case of *XX Vs. Union of India & Ors.*, (WP(C) No. 19380 of 2025) on considering the "Report of the Expert Committee on the Implications of Conception at Advanced Parental Age", observed thus :-

> "20. Insofar as the respondents have placed reliance upon the document titled *"Report of the Expert Committee on the Implications of Conception at Advanced Parental Age"*, this Court does not consider it necessary to adjudicate upon the medical merits. The age bar under Section 4(iii)(c)(I) is a legislative choice made by Parliament, and it is not for this Court to examine the medical wisdom underlying that choice. Suffice it to observe that the expert committee report reinforces the rationale for the age restriction that Parliament has already imposed."

In response to the Petition, the Union of India has, therefore, adopted a specific stand that the legislative wisdom in fixing the maximum age limit for the intending couple do not call for any dilution merely because some hardship or inconvenience is being faced by the Petitioners.

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15. Since we have requested the learned senior counsel Mr.Sharan Jagtiani to assist the Court as an Amicus, he has advanced his submissions by not adopting a contesting approach, but in assisting the Court in arriving at a just decision in order to deal with the Petition filed before the Court in the background that the Petitioners are aggrieved by the order dated 14/07/2026 refusing them the Eligibility Certificate under Section 4(iii)(c) of the Surrogacy Act on the ground that one of them i.e. X-1 has crossed the upper age limit prescribed under the statute. According to him, what the Petitioners seek is a harmonious and purposive interpretation of Section 4(iii)(c)(I) of the Surrogacy Act to be read alongwith Rule 4 of the Surrogacy Rules, 2022, so that the said provision meaningfully result into accomplishment of the constitutional guarantees enshrined under Articles 14 and 21 of the Constitution and permit consideration of exceptionally medically justified cases on their individual merits. According to Mr.Jagtiani, alternatively the Petitioners have sought a relief of declaring the provision unconstitutional to the extent that it mandates inflexible age based disqualification, without taking into consideration exceptionally medically justified cases and the case of the Petitioners may be considered within that bracket.

According to the learned Amicus, this Court may not test the validity of the provision as prayed for, but make out a way for the Petitioners for exempting them from the rigours of the upper age limit that has been prescribed under Section 4(iii)(c)(I) of the Act. The learned Amicus has formulated two questions for consideration and we deem it appropriate to reproduce the same:-

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"(i) Whether Section 4(iii)(c)(I) of the Surrogacy Act prescribes absolute and inflexible age limits which would render any intending couple *per se* ineligible to avail of the provisions of the Act if they are outside the stated age limits, or whether Section 4(iii)(c)(I) of the Surrogacy Act must be interpreted in a manner where it is sufficient compliance with the provision if one of the constituents of the intending coupe is within the stated age limits.

(ii) In the event it is held that the age limits in Section 4(iii)(c)(I) are absolute and inflexible, whether Section 4(iiii)(c)(I) is liable to be read down, or declared unconstitutional to a limited extent, insofar as it operates as an absolute, non-derogable bar admitting no case-by-case exception for medically exceptional circumstances."

16. The learned Amicus has taken us through the statutory scheme of the Surrogacy Act, which came into force on 25/01/2022 alongwith an agnate statute in form of Assisted Reproductive Technology (Regulation) Act, 2021 (for short, "ART Act") and by pointing out the similarity between the two statutes, the learned Amicus would submit that the Surrogacy Act has referred to the ART Act and the Board, which is constituted under the said enactment under Section 2(1)(e), is a common Board, in form of the National Assisted Reproductive Technology and Surrogacy Board to exercise the powers and perform the functions conferred under the said enactment.

This Board, according to him, is responsible for advising the Central Government on policy matters relating to surrogacy and also to supervise the functioning of State Assisted Reproductive Technology and Surrogacy Board.

Further, the 'surrogacy procedure' defined in the said enactment under Section 2(1)(zf) involve all gynaecological, obstetrical or medical procedures, techniques, tests, practices or services involving handling of human gametes and human embryo in surrogacy, the only difference being in case of

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Assisted Reproductive Technology, the embryo is placed in the body of the mother, whereas in surrogacy, the same is placed in the body of a surrogate mother.

17. According to Mr.Jagtiani, the Surrogacy Act does not operate in isolation, but it must be read together with the ART Act and rather the said two statutes, which came into force on the same day, complement each other, as the ART Act seeks to prevent the misuse of ART services and ensure followance of safe and ethical procedure by the stakeholders, including the persons who are desirous of becoming parents or those who preserve gametes, embryos, or embryonic tissues for future use due to infertility or any other medical concerns. The definition of 'Assistant Reproductive Technology' under Section 2(1)(a), involves all techniques that attempt to obtain a pregnancy by handling the sperm or oocyte outside the human body and transferring the gamete or the embryo into the reproductive system of a 'woman'. This 'woman', according to Mr.Jagtiani, may be the 'original (natural) mother' or 'surrogate mother'.

The transfer of embryo in the surrogate mother, according to him, falls within the definition of ART and the fact that she carries the child for the intending couple and does not intend to be the child's legal mother, does not alter the character of the procedure. Thus, by specifically contending that the two statutes together form a statutory framework, which assist the intending couple under the Surrogacy Act and the commissioning couple under the ART Act to seek assistance of the reproductive technology through the

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procedure that has been set out and ultimately, they would satisfy their desire to have a child, and according to him, the child born out of the surrogacy or the child born with the adoption of ART technology, shall enjoy the same right and in case of a surrogacy, he/she shall be deemed to be a biological child of the intending couple or intending woman and shall be entitled to all the rights and privileges available to a natural child under any law for the time being in force.

18. Though the learned Amicus clarify that no submission shall be construed to call in question the legislative wisdom in prescribing the eligibility conditions for the purposes of regulating surrogacy and surrogacy procedure, and particularly as prescribed in Section 4, as it impose certain restrictions on a surrogate mother and has also imposed conditions on the intending couple, including the age bracket of each constituent of the said couple. According to him, the report of the Expert Committee on Implication of Conception at Advanced Parental Age, is a report which is prepared after the two statues have come into force, and in any case, he would submit that the report is submitted by the Expert Committee, so as to examine the implications of conception at advanced parental age on maternal outcomes, offspring health and long-term child well being with respect to the upper age restrictions for a man and a woman, under the ART Act, 2021 and Surrogacy Act, 2021.

Not even for a moment, the factors highlighted in the said report are questionable according to Mr.Jagtiani, and in specific the aspect of psychological and caregiving implications

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of advanced parental age, but according to him, the said factors are equally applicable to a child born out of surrogacy or a child born with the aid of Assisted Reproductive Technology.

It is in light of his specific contention that the two statutes were drafted with an overlap over one another and they being allied and cognate statutes, the learned Amicus would urge before us that the question that falls for consideration before this Court, through the facts highlighted by the intending couple i.e. the Petitioners deserve an appreciation also in light of the provisions of the ART Act, which has received interpretation from various High Courts.

Inviting our attention to the condition of eligibility as prescribed in the Surrogacy Act, and in specific Section 4 qua the 'intending couple/intending woman', Mr.Jagtiani would invoke the provisions in the ART Act, where 'commissioning couple', is an infertile married couple who approach an ART clinic or ART bank for availing its services. Though the ART Act has not prescribed the minimum/maximum age limit for the commissioning couple, the Act had defined 'woman' as any woman above the age of 21 years, who approaches an ART clinic/bank seeking assistance.

Comparing the two i.e. the 'intending couple' vis-a-vis 'commissioning couple', Mr.Jagtiani would submit that there is no Eligibility Certificate contemplated under the ART Act. As against this, by prescribing an eligibility criteria to be satisfied under Section 4(iii)(c)(I), where the Eligibility Certificate shall be obtained by the intending couple from the Appropriate Authority on fulfilling the conditions,one of which being that

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the couple is married and the female in the couple is between the age group of 23 to 50 and the male is between the age of 26 to 55 on the date of certification.

Since, according to the learned Amicus, the two statutes form a scheme as they came into force on the same date and each of them expressly incorporates the other, apart from the fact that both the statutes are administered through common institutions like the Board constituted under Section 17 of the Surrogacy Act/the State Boards. It is in this background, he would refer to precedents from various High Courts, involving the provisions of the ART Act, which has not prescribed the age limit for the commissioning couple, but in Section 21(g), a duty is cast on the ART clinics/banks to apply the ART services (i) to a woman above the age of 21 years and below the age of 50 years; and (ii) to a man above the age of 21 years and below the age of 55 years.

The ratio flowing from those decisions is relied upon by Mr.Jagtiani to submit that under Section 21(g), where the benefit of ART services shall be availed within a particular age bracket by a woman and a man separately, his submission is, the ratio flowing from these decisions would also govern the eligibility that is prescribed under the Surrogacy Act.

We would refer to the said decisions in brief, so as to appreciate the submissions of the learned Amicus.

(1) *Sanchita Ghosh & Anr. Vs. Union of India & Ors.*[2]*;*

(2) *Devayani S. & Anr. Vs. Union of India & Ors.*[3] *which is upheld by the Division Bench of Kerala High Court in Union of India Vs. Devayani S & Ors..*[4]

2 2024 SCC OnLine Cal 12155
3 2025 SCC OnLine Ker 1516
4 2025 SCC OnLine Ker 11786

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(3) *Shewta Tuteja & Anr. Vs. Union of India & Ors.*[5]*;*

(4) *Babitha A. Singh & Ors.Vs. State of Madhya Pradesh & Ors.*[6]*;*

(5) *X2 Vs. Chief Medical Officer cum Civil Surgeon & Ors.*[7]

In the aforesaid cases, according to Mr.Jagtiani, one of the constituent of the 'commissioning couple', had crossed the age limit, but the Courts have considered them together as a couple for whom, there is no age limit prescribed, and merely because one of the spouse in that couple was outside the age limit prescribed, it is held that the bar in Section 21(g) was not applicable. The Delhi High Court, while allowing a woman aged 50 years and 2 months to undergo transfer of cryopreserved embryos, clarified that the statutory framework imposed age restrictions individually upon men and women, and not upon a 'commissioning couple' as a 'composite unit' and the Court permitted a woman above 50 to carry a pregnancy herself, by specifically observing that, '*the object of the enactment is to ensure ethical and safe ART practices and not to create insurmountable barriers defeating legitimate continuation of treatment processes already lawfully undertaken."*

19. The learned Amicus, therefore, would request the Court to consider the issue before it not with a view point of whether the prescription of the maximum age limit, independently for the husband and wife in the intending couple is a prerogative of legislation and whether or not the Court shall interfere with the legislative wisdom, but according to him, the question shall

5 2026 SCC OnLine Del 4606
6 2026 SCC OnLine MP 25565
7 2026 SCC OnLine Guj 6712

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be considered from a point when a 'couple' – comprising of a husband and wife, who seek a child through surrogacy and one of them has crossed the maximum age limit, but the other continued to be still in the bracket, then the interdiction that is faced by one of them, shall not put the other in a disadvantageous position.

In all the decisions cited before us, the learned Amicus would submit that either the male or female in the 'commissioning couple' under the ART Act, who had crossed the age limit was still permitted to participate in the process of ART, as they were considered as a 'composite unit'. Citing Gujarat High Court decision, the learned Amicus would submit that it quashed the rejection of the commissioning couple's eligibility to avail IVF, where the wife was menopausal and above 50, while the husband was 54. The Court found that the husband, "falls within the eligibility criteria" and the couple was looked at as a unit.

20. The submission of Mr.Jagtiani is, much like the ART Act, the Surrogacy Act prescribe no age limit in the definition of 'intending couple'. But by contrast, where the surrogacy is sought by a single woman, the Act has fixed age range in the definition itself, by prescribing in Section 2(1)(s)- that the 'intending woman' must be between 35 and 45 years. In this case, her upper age limit of 45 is lower than the age limit of 50 for a woman, who is a part of an 'intending couple'.

According to him, if the submission of the learned Additional Solicitor General Mr.Singh, based on the report of the Expert is to be accepted, as it has projected the advanced

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age limit of the parents as an inherent disability to raise the child and the likely duration of the parents' presence in the child's life and it is evidently clear that when it is a single woman, the maximum age prescribed is 45 years, but when she comes forward for having a child through IVF alongwith her partner/husband, then the age prescribed is 50, as the responsibility will be shared and that is how the child's care and welfare is assured so long as one of them is within the prescribed age limit. According to Mr.Jagtiani, if the ART Act by Section 21(g) has included an individual prescription, and if the Surrogacy Act is allied and cognate statute, he poses a question as to why the same parameters shall not be made applicable to the provisions of the Surrogacy Act, where one of the component in an 'intending couple' is deprived of the benefit of having a child through surrogacy only because his/her's spouse has crossed the age limit. It is, therefore, his contention that the reason, logic and rationale applied by various High Courts to Section 21(g) of the ART Act ought to be applied with equal force to Section 4(iii)(c)(I) of the Surrogacy Act, 2021.

21. Mr.Jagtiani, with reference to Article 14 of the Constitution, would submit that if the two statutes are allied statues and in fact, they form a single code and almost every surrogacy permitted under the Surrogacy Act is carried out through Assisted Reproductive Technology, which involve a medical procedure to be carried out and then the embryo is transferred to the surrogate mother or to the intending mother, he would postulate the situations under the two

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different Acts, as in a couple who seeks IVF using donor eggs and husband's sperm, with the embryo transferred to the wife, under the ART Act the couple is eligible, because the husband is still within the age limit though the wife is 54 years. Whereas a couple who seeks IVF using donor eggs and husband's sperm, but if the wife cannot carry a pregnancy and the embryo is to be transferred to a surrogate, the prohibition would come into operation, as the couple would be rendered ineligible because the wife has crossed the maximum age limit, she being 54.

By drawing a comparison between the two situations, it is the submission of the learned Amicus that it would make little sense to give the ART Act one interpretation and the Surrogacy Act another, when surrogacy cannot take place without ART, and rather in maximum number of surrogacy cases, ART is involved.

Relying upon the well settled principle that Article 14 permits a classification only if it is founded on an intelligible differentia which has a rational nexus to the object sought to be achieved, he would submit that the only feature that distinguished the second couple from the first is that the mother is not able to carry the pregnancy and the couple needs a surrogate. However, this feature has no rational nexus to the object prescribed i.e. to assist the parents in having a child by adopting artificial reproductive technology. According to Mr.Jagtiani, the objectives which are highlighted, so as to have the maximum age limit, namely, maternal health, quality of gametes and parents' ability to take care of the child until childhood also has no nexus with this differentia that is

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created and it would be rather discriminatory for the two types of parents depending upon the method they are adopting i.e. IVF or surrogacy.

To treat the second couple less favourably than the first, according to him, would result in discrimination, resting on no intelligible differentia. According to him, if the provision is open for two interpretations, the Court should prefer the interpretation that avoids anomaly and keeps the provision within the ambit of Article 14 and rather attempt to fulfill the legislative intention and achieve the purpose and spirit of the enactment and avoid any absurdity or practical inconvenience.

According to Mr.Jagtiani, it would be most appropriate to apply purposive interpretation to the provision in the Surrogacy Act, as the Act do not intend to arbitrarily deny opportunities for intending couple, but it aims in regulating surrogacy within the structural legal framework. According to him, there is no indication in the scheme of the Act to deny eligibility to an intending woman upto her reaching age 51 years. It is also his contention that based on the assumption that if the woman attains age 50 years and the man attains the age of 55 years then they will not be able to cater to the future of the child is also unreasonable as the longevity in the country is on the rise and in any case, according to him, motherhood is a deeply personal and fundamental aspect of life and any interpretation that results in depriving a woman of her right causing an irreparable loss to her would be undoing the object underlying the Act.

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It is for these submissions, according to the learned Amicus, it would be plausible to conclude that the Surrogacy Act should be interpreted in a manner, where it would amount to sufficient compliance of Section 4(iii)(c)(I), if one of the constituents of the 'intending couple' is within the stated age limit. In the facts of the case, since X2 is 53 years i.e. below the age of 55 years, as stated in Section 4(iii)(c)(I) and X-1 alongwith X-2 as an 'intending couple', they can avail the provisions of the Surrogacy Act notwithstanding that X-1 is above the age limit stated in 4(iii)(c)(I).

By interpreting the provision in such a way, according to Mr.Jagtiani, it is not necessary for this Court to examine the constitutionality of the said provision and in any case, since the Appropriate Authority retains the discretion under Section 4(iii)(c)(I) read with Section 36(h), it ought to be directed to reconsider the Petitioners' application in the exercise of that discretion.

22. We have thoughtfully considered the submissions advanced, by keeping before us a couple, who having attempted to beget a child, was unable to do so and lastly was medically advised to resort to 'surrogacy'.

X-1 and X-2 before us is the 'intending couple', who seeks recourse to the Surrogacy (Regulation) Act, 2021 and when they collectively approached the Appropriate Authority constituted under the Act, seeking an Eligibility Certificate, the same was refused to them on the ground that the female in the intending couple has crossed the upper age limit of 50 years prescribed under Section 4(iii)(c)(I) of the Surrogacy Act. The

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Respondents have not disputed the couple's marital status, their medical history, their bona fide desire to bear a biological child, their physical and mental fitness or any other statutory requirement governing gestational surrogacy.

Therefore, the controversy involved in the Petition lies in the narrow compass before us, which has the involvement of the relevant provisions contained in Section 4 of the Surrogacy Act.

Section 4 which exists in the statute book in form of surrogacy and surrogacy procedure, contemplates that no surrogacy or surrogacy procedure 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,

> "(a) the intending couple is in possession of a certificate of essentiality issued by the appropriate authority, after satisfying itself, for the reasons to be recorded in writing, about the fulfilment of the following conditions, namely :-
>
> (I) a certificate of a medical indication in favour of either or both members of the intending couple or intending woman necessitating gestational surrogacy from a district Medical Board.
>
> (II) an order concerning the parentage and custody of the child to be born through surrogacy, has been passed by a Court of the Magistrate of the first class or above on an application made by the intending couple or the intending woman and the surrogate mother, which shall be the birth affidavit after the surrogacy child is born; and
>
> (III) an insurance coverage of such amount and in such manner as may be prescribed in favour of the surrogate mother for a period of thirty-six months covering postpartum delivery complications from an insurance company or an agent recognised by the Insurance Regulatory and Development Authority established under the Insurance Regulatory and Development Authority Act, 1999 (41 of 1999)
>
> (b) ... ...

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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;

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

Provided that nothing contained in this item shall affect the intending couple who have a child and who is mentally or physically challenged or suffers from life threatening disorder or fatal illness with no permanent cure and approved by the appropriate authority with due medical certificate from a District Medical Board; and

(III) Such other conditions as may be specified by the regulations."

23. The Petition raises substantial questions concerning the extent to which the eligibility criteria prescribed with regards to the age bracket prescribed in clause (I) and the question put forth for consideration before us is, whether this criteria can be applied as an inflexible disqualification, despite the fact that the intending couple has exhausted recognised infertility treatment, and satisfied all other statutory requirements and seek to avail gestational surrogacy on the basis of the established medical opinion.

24. 'Surrogacy' is an arrangement whereby a woman (a surrogate) carries the pregnancy and gives birth on behalf of another person or couple, who become the child's legal parents after birth. There may be various reasons why surrogacy is pursued and this may include reasons like infertility, danger of undesirable factors of pregnancy or when the pregnancy in natural way is medically impossible.

A surrogacy relationship or legal agreement involves the person who carries the pregnancy and gives birth and the

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person or persons, who take custody of the child after birth. The woman, who agreed to bear a child through surrogacy from the implantation of embryo in her womb, is the 'surrogate mother', provided such surrogacy is regulated by the Surrogacy Act. A child through a surrogate mother can be sought under the Surrogacy Act by an 'intending woman', who in terms of 2(s) means an Indian woman, who is a widow or divorcee between the age of 35 to 45 years or the 'intending couple', defined in Section 2(r), as a couple who have a medical indication necessitating gestational surrogacy and who intend to become parents through surrogacy.

'Couple' for the purposes of the Act means the legally married Indian man and woman above the age of 21 years and 18 years respectively.

The Surrogacy (Regulation) Act, which received the assent of President and came into force on 25/12/2021, is an Act to constitute National Assisted Reproductive Technology and Surrogacy Board, State Assisted Reproductive Technology and Surrogacy Boards and for appointment of appropriate authorities for regulation of practice and process of surrogacy and for matters connected therewith or incidental thereto.

The Statement of Objects and Reasons in introducing the Surrogacy Act indicate thus :-

> "India has emerged as a surrogacy hub for couples from different countries for past few years. There have been reported incidents of unethical practices, exploitation of surrogate mothers, abandonment of children born out of surrogacy and import of human embryos and gametes. Widespread condemnation of commercial surrogacy in India has been regularly reflected in different print and electronic media for last few years. The Law Commission of India has, in its 228th Report, also recommended for prohibition of commercial surrogacy by enacting a suitable legislation. Due to lack of legislation to regulate surrogacy, the practice of surrogacy has been misused by the surrogacy clinics,

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> which leads to rampant of commercial surrogacy and unethical practices in the said area of surrogacy. In the light of above, it had become necessary to enact a legislation to regulate surrogacy services in the country, to prohibit the potential exploitation of surrogate mothers and to protect the rights of children born through surrogacy.

25. The Surrogacy (Regulation) Bill, 2019 provided for various key aspects and as it focused upon permitting ethical altruistic surrogacy to the intending infertile Indian married couple between the age of 23-50 years and 26-55 years for female and male respectively. The Bill, so introduced, contemplated the intending couples should be legally married for at least five years and should be Indian citizens to undertake surrogacy or surrogacy procedure and it also prescribed that the surrogate mother should be a close relative of the intending couple and should be an ever married woman having a child of her own and she should be between the age of 25 to 35 years.

The Surrogacy (Regulation) Bill 2019, as passed by the Lok Sabha on 05/08/2019, was referred to the Select Committee comprising of 23 Members of Rajya Sabha on a motion adopted by House for examination of the Bill and present its report.

The Select Committee submitted its report to the Parliament of India (Rajya Sabha) by taking note that, “Surrogacy per se and The Surrogacy (Regulation) Bill 2019, in particular, is a unique amalgamation of social, ethical, moral, legal and scientific issues and it is necessary to harmonise the conflicting interests inherent in the process of surrogacy to ensure betterment of child while protecting rights of surrogate mother.”

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With reference to the legal issues relating to surrogacy being manifested in number of court cases, the vexatious issue debated all over the world and the prominent among it, whether both commercial and altruistic surrogacy be legalised and regulated to protect the rights and interests of all the parties and at the same time, ensuring human dignity, surrogacy in various forms all over the world were discussed. With two extreme paths available, some of the countries permitting commercial surrogacy and other countries where surrogacy in all forms was banned, it was deemed appropriate to find a midway, which facilitated surrogacy but in a regulated way by striking a fine balance between the two squarely opposite ideas and it was observed that the law is to act both as an ardent defender of human liberty and an instrument of distributor of positive entitlements and it must keep pace with the emerging/developing technologies, so that their positive benefits could be availed by those in need.

The Report perceived the Surrogacy (Regulation) Bill, 2019 as a step which seeks to regulate surrogacy procedure in a way to stop exploitation of poor vulnerable woman; to ensure protection of rights of the child born out or surrogacy and to facilitate needy infertile couple and widow and divorced woman to have child to complete their family. The Bill, therefore, prescribed for prohibiting commercial surrogacy and allowing only altruistic surrogacy, on par with countries like Australia, Canada, Netherlands, Israel, Vietnam, United Kingdom etc.

26. The Surrogacy Act, therefore, emanated from the need of regulating the procedure, which in absence of any lack of

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legislation, was susceptible of misuse and even the Law Commission of India in its 228th Report, recommended prohibiting commercial surrogacy, as due to unregulated procedures being followed, it was leading to rampant commercial surrogacy and unethical practices and a statute was needed to regulate the procedure of surrogacy in India.

The Report submitted by the Select Committee, after due deliberation in various meetings, discussed the issue of single woman, widows and divorcees and while discussing the availability of this procedure for an 'intending woman', who is a widow or divorcee, it was observed that there may be conditions under which a single woman genuinely needed to avail surrogacy option to have a child and one such situation was cited, where a young age widow, who is otherwise capable but cannot carry a child because of fear of social stigma attached to pregnancy by a widow. Noting that she cannot explain to everyone that the child in her own womb is of surrogacy and, therefore, it was opined that such single person should be given option of surrogacy within permitted regulation under the Bill. A divorced lady was also found to be in a similar situation, who decide not to re-marry, but is desirous of having a child. In the wake of the above, single woman (divorcee or widow) was made eligible for commissioning surrogacy, by amending Clause 4 and the expression 'single woman' was introduced by defining 'intending woman' in Section 2(r)(a).

27. From a careful reading of the Report of the Select Committee, with the general recommendations contained

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therein, we find the comparison between the Assisted Reproductive Technology (Regulation) Rules, 2022 vis-a-vis Surrogacy (Regulation) Bill, 2019 and most of the stakeholders, as recorded, demand that the ART Bill could have been brought before the Surrogacy (Regulation) Bill, 2019, as there is no separate surrogacy clinic to undertake the surrogacy procedure and ART clinics are rather undertaking the surrogacy procedure and, therefore, an opinion was expressed that they need to be regulated first.

28. The Department of Health Research informed the Committee that the Surrogacy Bill is based on social, legal, ethical and moral aspects, whereas Assisted Reproductive Technology Bill addresses highly technical, medical and scientific aspects. Further, surrogacy involves a third person other than the intending couple and exploitation of the third party was becoming rampant, while ART involved unethical practices by the ART clinics and banks and it is in this background, the Committee sought opinion of the Department of Legal Affairs, Ministry of Law & Justice, which opined that it is for the administrative Ministry to explain as to why ART Bill 2019 should be passed before passing of Surrogacy (Regulation) Bill, 2019 or otherwise in terms of the objectives of both the legislations.

The Select Committee expressed its agreement with the opinion of the Department of Health Research that the intent of the two Bills was different and they should be dealt with separately, but the Committee expressed its opinion as below :-
“The Committee finds that the Surrogacy (Regulation) Bill,

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2019 also involves highly technical, scientific and medical aspects, which would appropriately be addressed through ART Bill. There is hardly any clinic in the country which provides only surrogacy services. The Committee also finds that the surrogacy clinics as defined in Clause 2(zd) of the Bill includes centers or labs conducting ART services, in-vitro fertilization services, etc. The Surrogacy (Regulation) Bill also deals with such highly medical terminologies as storage of embryo, gamete, oocyte etc. which could better be dealt with in the ART Bill for the purpose of their regulation."

The Committee, therefore, recommended that the ART Bill should be brought before the Surrogacy (Regulation) Bill 2019, so that all the highly technical and medical aspects could be properly addressed in the Surrogacy (Regulation) Bill, 2019. It also recommended that the National and State Boards constituted for surrogacy regulation shall also act as the Boards for regulation of ART.

29. Surrogacy is a beacon of hope for individuals and couples unable to conceive naturally.

Globally, surrogacy laws differ dramatically ranging from full legality to outright ban with diverse regulations across globe. The statement of objects and reasons in introducing the Surrogacy (Regulation) Act, 2021, when compared with the statement of objects and reasons of the Assisted Reproductive Technology (Regulation) Act, 2021, would indicate that India, over the years, had become one of the major centres of global fertility industry, with reproductive medical tourism becoming a significant activity. Clinics in India are equipped to offer all

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ART services, including genetic gamete donation, intrauterine insemination, in-vitro fertilisation, pre-implantation and gestational surrogacy. However, it was found that the standardisation of protocols was still inadequate and there was no law regulating the ART and need was felt to regulate the same, as it was necessary to protect the affected women and children from exploitation. It was also necessary to regulate ART clinics and banks by establishing a Board, which could supervise over the procedures that are carried out in the clinics and the banks.

The focus on enacting the Surrogacy Act was to transform the form of surrogacy from commercial surrogacy to an altruistic surrogacy, which does not involve any charges, expenses, fees, remuneration or monetary incentive of whatsoever nature except bearing of the medical expenses for the surrogate mother and insurance coverage provided.

30. The word 'surrogate' with its original and Latin term 'surrogates' meaning a substitute person appointed to act in place of another. In the wake of growing cases of infertility and technological advances like the Assisted Reproductive Technology, resulting into a pregnancy by handling the sperm or oocyte outside the human body and transferring the gamete or embryo into the reproductive system of a woman, was received with all hope for the couple desirous to have a child. The conventional mode of a couple not able to bear a child, opting for adoption, was substituted by the unconventional Assisted Reproductive Technology, where the pregnancy is caused by artificial or partially artificial means with the aid of Assisted Reproductive Technology clinic, which is equipped

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with requisite facilities and Medical Practitioners registered with the National Medical Commission for carrying out the procedure related to the Assisted Reproductive Technology. This procedure also has involvement of the 'Assisted Reproductive Technology Bank' meaning an organisation which is responsible for collection of gametes, storage of gametes and embryos and supply of gametes to the clinics or their patients, who are desirous of obtaining the services of the clinic or the bank for giving birth to a child through the use of ART.

31. The ART Act,2021, which received the assent of the President on 18/12/2021, but brought into force on the same day as the Surrogacy (Regulation) Bill 2019, was enacted for regulation and supervision of the clinics and banks offering the assisted reproductive technology, so as to prevent its misuse and have safe and ethical practices being applied at various stages of the procedure.

The 'assisted reproductive technology', being defined in the ART Act, involved all those techniques for obtaining a pregnancy by handling the sperm or the oocyte outside the human body and transferring the gamete or embryo into the reproductive system of a woman, who may be either the natural mother or a surrogate mother.

The ART Act, 2021 defines a 'woman' to be any woman, above the age of 21 years, who approaches the ART clinic or bank for availing its authorised services.

All cases of surrogacy would involve assisted reproductive technology as the sperm or the oocyte shall be handled outside the human body and then transferred into the

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reproductive system of a woman. For the purposes of the ART Act, it is the 'commissioning couple', who would seek assistance of the ART clinic/bank and as per Section 2(e) of the Act, and it means an infertile couple, who seeks assistance of the ART clinic/bank. 'Infertility' is defined as inability to conceive after one year of unprotected coitus or other proven medical condition preventing a couple from conception.

32. The Surrogacy Act and the ART Act having come into force on the same day with their object unfolded, through the statement of objects and reasons as well as preamble , we have compared the provisions of the two statutes.

Reading of the two statutes would reveal that they are part of a single Code and we agree with the submissions of the learned Amicus that the two statues are allied and cognate statutes and they were brought into force on the same day, though the ART Act was passed by the Parliament a few days before the Surrogacy Act received the assent.

In *J.K.Steel Ltd. Vs. Union of India & Ors.*[8], the Apex Court was dealing with the Central Excises and Salt Act, 1944 and the Tariff Act, cognate legislations and it was noted that they are pari materia i.e. they form one code and, therefore, they must be taken together as forming one system while interpreting and enforcing each other. It is by reading the two statutes, it was held that duty cannot be considered as an additional duty over and above the duty imposed under entry 26AA of the First Schedule of the Act.

As per Justice G.P.Singh on Principles of Statutory Interpretation (15th Edn.), :-

8 AIR 1970 SC 1173

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> "As stated by Lord Mansfield: 'Where there are different statutes in pari materia and not referring to each other, they shall be taken and construed together, as one system and as explanatory of each other.'
>
> The meaning of phrase pari materia has been explained in American case in following words:
> "Statutes are in pari materia which relate to same person or thing, or to the same class of persons or things. The word par must not be confounded with the word simils. It is used in opposition to it-intimating not likeness merely by identity. It is phrase applicable to public statutes or general laws made at different times and in reference to same subject."

33. Pertinent to note that each of the Act incorporates the other and what is pertinent to note is that both the Acts are administered through the National Assisted Reproductive Technology and Surrogacy Board constituted under Section 17 of the Surrogacy Act and the same Board also supervises the implementation of the ART Act. Procedurally speaking, the process of Assisted Reproductive Technology, which is made applicable to obtain a pregnancy by handling the sperm and oocyte i.e. the gametes outside the human body and upon its fertilisation, in form of an 'embryo', the process contemplates its transfer into the reproductive system of a 'woman'.

ART Act does not restrict the scope of this woman and she can be a surrogate or a natural mother, who after the ART procedure carries the embryo into her own body to give birth to a child. The surrogacy, which is largely prevalent, is gestational surrogacy in which an embryo is implanted in the surrogate mother and such surrogacy contemplates an embryo to be created outside the body, ordinarily through IVF in the surrogacy clinic and then transferred to the surrogate. The procedure of surrogacy, therefore, necessarily has the involvement of Assisted Reproductive Technology and the procedure contemplated under Section 2(1)(a) is not

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restricted by the legislature and it is kept open by merely permitting transferring of the gamete or embryo into a reproductive system of a 'woman'.

The Surrogacy Act, which defines the term 'surrogacy procedures' in Section 2(1) (zf) covers all gynaecological, obstetrical or medical procedures, techniques, tests, practices or services involving handling of human gametes and human embryo leading to surrogacy, although Section 2(1)(zd) defines 'surrogacy' to mean a practice whereby one woman bears and gives birth to a child for an intending couple with the intention of handling over such child to the intending couple after the birth.

Thus, reading of the two statutes would lead to an inference that they are to be read together, as the Surrogacy Act necessarily involves the Assisted Reproductive Technology even for a surrogate mother. The Surrogacy (Regulation) Rules, 2022 framed in exercise of the powers conferred by Section 50 of the Surrogacy (Regulation) Act, 2021, by Rule 14 suggests as to when a woman may opt for surrogacy and this include an intended parent or woman, who has repeatedly failed to conceive after multiple In vitro fertilization or Intra-cytoplasmic sperm injection attempts, which are nothing but assisted reproductive techniques and if this attempt is not successful, then a woman may opt for surrogacy.

34. As we take note of the interface between the two statutes, which came into force on the same day, we must also take note of the eligibility criteria prescribed therein.

The Surrogacy Act mandates that the 'intending couple' should possess an Eligibility Certificate issued in their favour

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separately by the Appropriate Authority and it is necessary that the couple is married and the female in the couple is in the age bracket of 23 to 50, whereas the male is between the age bracket of 26 to 55 on the day of certification.

As far as the 'intending woman' is concerned, who is also entitled to avail the benefit of surrogacy, she can be widow or a divorcee and since she is all alone, her age must be in the bracket of 35 to 45 years.

As against this, under the ART Act, no age limit is prescribed for a 'commissioning couple' and the woman, who is entitled to avail the benefits of ART is the one, who has crossed 21 years of age.

Under Section 21, which has cast the general duties on the ART clinics and banks, clause (g) prescribes that it is open for the clinics to apply the assisted reproductive technology services to a woman, who is in the age bracket of 21 years and 50 years and a man in the age group of 21 years and below the age of 55 years.

It is this age bracket with which we are concerned, as we have a case where the intending couple, who was desirous of availing surrogacy has been refused the Eligibility Certificate because one of the components of the 'intending couple', being the female, has crossed the maximum age prescribed i.e. 50 years.

35. A somewhat similar issue received consideration from various High Courts under the provisions of the ART Act, where one of the constituent member of the 'commissioning couple' was beyond the age range as set out in clause (g) of Section 21.

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In case of *Sanchita Ghosh Vs. Union of India* (supra), which is the fountainhead of all the Judgments, the Calcutta High Court dealt with the challenge to the vires of Section 21(g) and noted that the ART Act defined 'woman' and 'commissioning couple' separately and 'woman' for the purposes of the Act is any woman above age of 21 years, who is desirous of availing ART services. In the definition of 'commissioning couple', there is no age limit prescribed, but clause (g) of Section 21 of the ART Act imposes a restriction on the clinic in extending the benefit of ART services and such services can only be extended to a woman above the age of 21 years and below the age of 50 years and to a man above the age of 21 years and below the age of 55 years.

It is in the peculiar facts, when a woman, petitioner No.1 being married to a man, petitioner No.2, exceeded the age limit, but she herself continued to be within the age bar prescribed i.e. below 50 years, made a grievance about her predicament that in view of the bar prescribed in clause(g)(ii) of Section 21, as the petitioner No.2-the husband is debarred from approaching the appropriate clinics for ART, she as a wife is also deprived of availing the ART services, as they being married to each other constituted a 'commissioning couple' within contemplation of the Act.

The female in this 'commissioning couple' urged that such debarment fall upon her only because she is a married woman and had not she been in the matrimonial relationship, then there was no restriction imposed as to the age when she could have availed the ART services.

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Dealing with this contention, the Single Judge of Calcutta High Court emphasized on the thrust of the statute in the following words :-

> "11. As such, the thrust of the statute is two-fold- first, it is to provide a healthy channel for couples who are willing to have a baby but are unable to do so due to certain inability, clinical or otherwise, to avail of assisted reproductive technology and second, to regulate and govern such process in order to curtail rampant abuse and exploitation of such eager couples by unruly and unlawful elements.
>
> 12. The purpose is noble and as such has to be read in a liberal context insofar as the beneficiaries of the statute, that is, childless couples are concerned.
>
> 13. The first thing which strikes the eye even on a primary reading of the statute is that there is no specific bar or age limit in respect of 'commissioning couples' for availing assistive reproductive technologies.
>
> 14. The bar is stipulated in Section 21(g) separately and specifically in respect of women and men,described independently by their genders.
>
> 15. However, whereas a woman has been separately defined in Section 2(1)(u), there is no such definition of a man under the statute.
>
> 16. Since Section 2(1)(e) defines a 'commissioning couple' independent of a 'woman', it has to be construed that the said terms have been used and intended to be used separately.
>
> 17. Whereas under Section 2(e) a commissioning couple is an infertile married couple who approach for assistive technology, Section 21(g) does not put in any rider to restrict their collective age and/or their individual age limits, if acting as a couple.
>
> 18. On the other hand, the restriction put in is to an individual man or a woman who is apparently not married or does not come within the purview of commissioning couple."

It is in this conundrum, it is held that two interpretations of the bar stipulated under Section 21(g)(i) vis-a-vis a woman are possible, the first and restrictive interpretation being that a woman as contemplated in Section 21(g) is a woman, who does not fall within the purview of 'commissioning couple' and the second, a more liberal view i.e. that the Section encompasses woman as a class- both in or outside matrimony.

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Noting that the restriction in Section 21(g)(i) is specifically applicable to a woman irrespective whether she is married or is not married, it was pertinently noted that, "by applying the said test, the petitioner No.1 is a woman who, by chance, is in a matrimonial bond but remains a woman within the contemplation of the statute. It is in this context, the Court declared as follows :-

> "28. In so taking into consideration, we have to take into account that collectively as a 'commissioning couple', there is no age limit or upper ceiling of age.
>
> 29. Forging the said lack of restriction for commissioning couples with Section 21(g)(i) and (ii), the only possible interpretation is that unless the restriction is applicable to both the spouses who comprise of the commissioning couple, there is no bar in the commissioning couple to approach the appropriate clinic for assistive reproductive technology services.
>
> 30. In the event either the woman or the man comprising the commissioning couple are eligible to have assistive reproductive technology, there is no reason why the bar stipulated for individual women and men should be incorporated into the purview of the commissioning couple as well. The age-related ineligibility of one of the spouses need not affect the other, if they comprise of a 'commissioning couple'.
>
> 31. Thus read, the bar available in Section 21(g), clauses (i) and (ii) shall be read as follows:-
>
> i) If a commissioning couple approaches a clinic/bank for assisted reproductive technology services, no upper age limit restriction will be applicable to them unless both spouses of the commissioning couple are debarred respectively under sub-clauses (i) and (ii) of sub-Section (g) of Section 21 of the 2021 Act.
>
> ii) In the event either of the couples qualify in respect of the age limits as stipulated in Section 21(g), he or she can approach the clinic to have assisted reproductive technology service, irrespective of the fact that he or she is the constituent of a commissioning couple and her spouse is not eligible age-wise.
>
> iii) In the second scenario above, the commissioning couple, as a commissioning couple, shall be permitted to avail the facilities of assisted reproductive technology services, since there is no bar on a commissioning couple acting as such, to have such reproductive technology irrespective of any age bar.

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iv) It is made clear that in the event one of the spouses is eligible under Section 21(g) and the other is not, it will be at the option of the clinic whether or not to use the gamete donated by the ineligible spouse in the process of assisted reproductive technology."

36. The Calcutta High Court in *Sanchita Ghosh*, that the bar in Section 21(g)(i) applies to a woman "irrespective of whether she is or is not married" and a commissioning couple as such has no age limit, it was held that 21(g) creates 'no unreasonable discrimination between married and unmarried woman and was *intra vires'* and the challenge to the said provision was rejected, by holding that on being properly construed, no such discrimination arises.

37. This decision was followed by various High Courts and though various decisions are placed before us, we would refer to some prominent amongst them and this include the decision of Kerala High Court in *Devayani S. Vs. Union of India* (supra), where the Union of India urged that the spouses being the commissioning couple, must satisfy both limits in Section 21(g) simultaneously.

The Kerala High Court rejected the contention and it noted that the Parliamentary Standing Committee had before it a suggestion that "the combined age of the couple (woman and man) should not be beyond 90 years" and held that Parliament has consciously omitted incorporating any age criteria for a 'commissioning couple'. The Kerala High Court was dealing with a situation where the male component in the commissioning couple had surpassed the age of 55 years and despite taking recourse to IVF procedures, they could not procreate a child.

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In order to have insight of the legislative intent in introducing Section 21(g), reference was made to Report No.129 of the Parliamentary Standing Committee on Health and Family Welfare Suggestions on clause 21(g) and the Committee Recommendation was specifically noted as below :-

> "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".

38. In this background, the observations of the Kerala High Court are most relevant and we reproduce the same :-

> "16. 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.
>
> 17. ... ...

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20. A holistic understanding of the Act and the associated ART procedures and services reveals 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.

21. 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.

22. 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."

39. A somehow similar approach was adopted by Delhi High Court in *Shewta Tuteja & Anr. Vs. Union of India & Ors.*

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(supra), when the petitioner No.1 while within the age bracket, created six embryos, which were cryopreserved and by applying the purposive interpretation, it was held that the age restriction under Section 21(g) of the Act applies at the stage of initiation of ART treatment and cannot bar continuation of a lawfully commenced IVF process involving cryopreserved embryos, as the Court recognised the reproductive autonomy, decisional privacy, and personal liberty under Article 21 to include the right to utilise cryopreserved embryos created during a period of statutory eligibility

Recently, the Gujarat High Court in *X2 Vs. Chief Medical Officer cum Civil Surgeon & Ors.* (supra), a decision dated 02/09/2026, once again applied the same analogy, when the petitioners, who lost their 25 year-old-son to suicide, sought IVF after the wife become menopausal, but by holding that the upper age bar under Section 21(g) operates individually qua the man and woman and not collectively, when the couple act as unit, permitted to avail IVF services, despite the wife having crossed 50 years of age and the husband being within the prescribed age limit of 55 years.

40. We do not intend to multiply the pronouncements of various High Courts, as various other decisions where either of the component in the 'commissioning couple' had crossed the age bracket, but the other had not and in such a situation the Court considered the collective age of the commissioning couple and deemed it appropriate to permit availing of ART services through the ART clinic.

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41. In the reply affidavit responding to the challenge in the Petition, while justifying the prescription of the age limit for man and woman for surrogacy services, reference is made to the report of the Parliamentary Select Committee on Health and Family Welfare, and in particular paragraph 4.54 thereof is relied upon. The said paragraph in the Report of the Select Committee mentions that consequent to the deletion of clause 2(p), which existed in the Bill, to be read with clause 2(r), 4(ii)(a) and 4(iii)(a)(I) provide the eligibility criteria for availing surrogacy procedure.

A serious objection was raised to the definition of term 'infertility', as the inability to conceive after five years of unprotected coitus on the ground that it was a too long period for a couple to wait for the child. It was urged that World Health Organisation defines 'infertility' as a disease of the reproductive system defined by the failure to achieve a clinical pregnancy after 12 months or more by regular unprotected sexual intercourse. It was, therefore, opined that the period of five years required for availing the procedure of surrogacy needs to be relaxed . An objection was also raised as regards the condition of obtaining the certificate of infertility, as it would be insulting and offending and, therefore, it was proposed to revise the said clauses.

42. The Department of Health, however, justified the period of five years as it provide the intending couple the opportunity to exhaust all the possible means of having a child of their own, rather than take resort to the surrogacy procedure in haste.

The Committee, however, was not convinced with the submission of the Department, as it was of the view that the

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period was too long in cases where normal pregnancy is ruled out for N number of reasons and it is medically proven beyond doubt that surrogacy is the only option. The Committee also expressed that the requirement of obtaining a certificate of proven infertility is not at all justified.

Therefore, the Committee recommended deletion of Clause 2(p).

Consequent to the deletion of Clause 2(p), which defined 'infertility', the Committee recommended that Clause 2(r), which defined 'intending couple', as the couple who was medically certified as 'infertile couple', was sought to be amended as follows:

> "Intending couple" means a couple who have a medical indication necessitating gestational surrogacy and who intend to become parents through surrogacy."

As we have already noted that in regards to a widow or a divorcee who is desirous of having a child, but on account of social stigma attached to her pregnancy, she may not be able to openly carry the pregnancy and surrogacy become the last option. Under Section 2(s), an 'intending woman' was defined to cover a widow or a divorcee between the age of 35 - 45 years who was desirous of availing surrogacy.

43. The learned ASG, Mr. Singh, has placed heavy reliance upon the Report of the Expert Committee on the Implications of Conception at Advanced Parental Age and this report is submitted by an Expert Committee appointed by the Department of Health Research, Ministry of Health and Family Welfare, to examine the implications of conception at advanced parental age on maternal outcomes, offspring health and the

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long-term child well-being with respect to upper age restrictions i.e. 50 years for a woman and 55 years for a man stipulated under the ART Act, 2021, and the Surrogacy (Regulation) Act, 2021. There can be no second opinion about the aspect of medical implications of advanced parental age, as the Committee has pointed out the health risks associated with a woman carrying pregnancy at an advanced maternal age, (gestational and obstetric outcomes) also presenting health risks to children born to couples of advanced parental age.

In addition to this, the said report also emphasises on the psychological and caregiving implications of advanced parental age and highlights the following as the major factors:

(i) Reduced caregiving capacity.

(ii) Increased risk of parental illness or early loss.

(iii) Higher parenting stress.

(iv) Risk to parental mental health and the parent-child relationship.

(v) Risk to child development and long-term well-being.

The report, therefore, highlights one critical aspect, being when the child born to a couple at an advanced age reaches adolescence, the parents may already be elderly, leading to wider generational gaps, communication challenges and reduced adaptability. Apart from this, it also relied upon studies indicating higher risk of depressive symptoms and severe mental illness in the offspring of older parents, raising concerns regarding sustained psychological support and long-term caregiving capacity.

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On careful consideration of the discussion and examination of scientific literature, clinical evidence, psychosocial research and international practices, the Committee expressed it's conclusions as follows:

> "The upper-age limits of 50 years for women and 55 years for men, prescribed under the ART (Regulation) Act, 2021, and the Surrogacy (Regulation) Act, 2021, are reasonable and are founded on well-established medical, genetic, epigenetic, psychosocial and child-welfare considerations."

44. It is noted by us that the justification for prescribing the maximum age limit for the intending/commissioning couple under the two statutes, however, was not based on any scientific study at the relevant time when the Surrogacy Bill, 2019, was presented to Rajya Sabha and the report of the Select Committee, deemed it appropriate to introduce the definition of intending couple when it recommended the deletion of Clause 2(p) from the Surrogacy Act, which defined infertility. Similarly, while prescribing the age bracket for the intending couple and each of the components in this couple on the day of certification, the Report of the Committee merely record a reasoning that, consequent to the deletion of Clause 2(p), on the ground that five-year period is too long for a couple to have a child and the couples of Indian origin may also be permitted to avail surrogacy, the Committee recommended that Clauses 4(iii)(c)(I) and 4(iii)(c)(II) may be amalgamated and amended.

However, we do not find any study being carried out before prescribing the maximum age limit, as it may be medically deleterious, or it may have to be looked at from the perspective of the psychological and caregiving implications of advanced parental age. The Report of the Expert Committee is

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quite recent and definitely did not form the basis of prescription of the maximum age limit when the Surrogacy Act was brought into force, after a threadbare examination of the Surrogacy Bill, 2019, by the Select Committee presented to the Rajya Sabha.

45. From the Report of the Expert Committee dated 21/01/2026, which is assertively invoked by the learned ASG, one thing becomes clear, that the implications of conception at advanced parental age on maternal outcomes, offspring health and long-term child well-being, with respect to the upper-age restrictions, are equally applicable to the ART Act, 2021, and the Surrogacy (Regulation) Act, 2021. In fact, what we find is that the medical implications of advanced parental age involve health risks associated with a woman carrying a pregnancy at an advanced maternal age, but in case of surrogacy, if the surrogate mother is within the age limit that is prescribed under the Act, i.e. between the age bracket of 25 and 35 years, she does not face such risks though in case of ART technology, the embryo or the gamete is transferred into the reproductive system of a woman, which may also include the natural mother and then definitely, it would pose risk associated with carrying a pregnancy at an advanced maternal age. Since the child is grown in the womb of a surrogate mother who is within the prescribed age limit, and the embryo or gamete is developed outside the body by handling the sperm or the oocyte and is then transferred into the reproductive system of the woman, the health risks contemplated under the heading of medical implications may not be applicable in the case of surrogacy.

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The psychological and caregiving implications of advanced parental age, apply with equal force to a child born out of surrogacy or a child born through the use of assisted reproductive technology. What is highlighted by the Report of the Expert Committee equally applies in both cases, if the rationale in prescribing the age limit is the inhibition on part of the parents, on account of their age, and which may impair their active caregiving, emotional availability and parenting capacity during the child's formative years, and by considering an important aspect that children require stable guardianship for at least two decades, but we fail to understand as how this factor can be made applicable only to a child born through surrogacy to an intending couple, and not be applied to a child born through the use of ART techniques to a commissioning couple.

46. The Hon'ble Apex Court in *Vijaya Kumari S. & Anr. Vs. Union of India*[9] heard together with *Arun Muthuvel* (supra) was dealing with a common legal question, as regards the application of age restrictions on intending couples under Section 4(iii)(c)(I) of the Surrogacy (Regulation) Act, 2021.

In the wake of the said provision being introduced in a statute which came into force on 25/01/2022 requiring an intending couple to possess an 'eligibility certificate' stating that the couple is married and is between the age of 23 and 50 years in case of female and 26 to 55 years in case of male on the date of certification, the common grievance of petitioners/ appellants was with regards to the upper age limit so fixed.

9 (2026) 2 SCC 96

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In the facts placed before the Court, dealing with two couples who were unable to conceive a child naturally and had engaged themselves in multiple unsuccessful attempts to conceive, and had made embryos at a fertility centre but, on the onset of the COVID-19 pandemic in 2020, they were prevented from continuation of the process of surrogacy. In the meantime, one of the constituents of the 'intending couple' crossed the prescribed age limit.

The contention advanced before the Apex Court was very specific, that the intending couples had begun their surrogacy procedure by freezing their embryos and when this process was begun, it was completely within the ambit of the then-prevailing law, which prescribed no upper-age limit, either for a man or a woman to avail surrogacy but on account of the statute coming into force and prescribing eligibility criteria, one of them fell within the age cap and was prohibited from continuing the process.

It was also urged that the fixation of an upper-age limit lacks rational or justifiable basis, since the physical, emotional and financial capability to raise a child are not merely a function of age alone, and the restriction had no nexus with the core concerns of the Act. i.e. protecting surrogate mothers from exploitation and helping infertile parents have children.

In short, it was urged that the age restrictions under the Act were contrary to the constitutional right afforded to a woman to make unhindered decisions regarding her reproductive choices. It is in this background facts where the challenge was staked on the basis of the classification created by prescribing age limits by testing the same under Article 14

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of the Constitution. A specific contention was also advanced that the provisions of the statute not been made applicable retrospectively when the procedure had already commenced before the Act came into force.

47. It is in this background, it was canvassed that the surrogacy procedure had commenced prior to the date enforcement of the Act and while the couple was in the midst of such a procedure, the Act brought in an embargo in the form of an age limit, thereby making the couple ineligible to avail themselves of surrogacy.

The Hon'ble Apex Court exhaustively dealt with the history of the procedure of surrogacy as contemplated under the Surrogacy Act and described the procedure of surrogacy, wherein the surrogate mother becomes pregnant via embryo transfer with a child of which she is not the biological mother. It noted the distinction between altruistic surrogacy and commercial surrogacy, and with reference to the 228th Report of the Law Commission of India in 2009, which flagged the problem of India becoming a 'reproductive tourism destination', noted that multiple attempts were made to introduce appropriate legislation through various Bills from time to time but it is finally the 2019 Bill which paved the way for the enactment of the Surrogacy (Regulation) Act, 2021.

The pertinent observation in the Law Report deserve a reproduction though it was restricted to the parties before the Court :-

> "12. 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 vs.

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Chandigarh Admn., (2009) 9 SCC 1 ("Suchita Srivastava") observed as follows:

> "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." (underlining by us)

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

> "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." (underlining by us)

12.2 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 vs. State of T.N., (1994) 6 SCC 632, in which it was observed that "any right to privacy must encompass and protect the personal intimacies of the home, the family, marriage, motherhood, procreation and child-rearing".

48. In *P. Geetha v. The Kerala Livestock Development Board Ltd. & Anr.*[10] the learned Single Judge of the Kerala High Court, Mr. Justice Dama Seshadri Naidu, (as His Lordship then was) dealing with the issue of motherhood and the right of a mother to avail leave and the benefits under the Maternity Benefit Act, 1961 in respect of a child born through the process of surrogacy, but she being a genetic or biological mother in his inimitable style noted thus :-

10 2015 SCC OnLine Ker 71

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> "2. For Robert Brown all love begins and ends with motherhood, by which a woman plays the God. Glorious it is as the gift of nature, being both sacrosanct and sacrificial, though; now again, science has forced us to alter our perspective of motherhood. It is no longer one indivisible instinct of mother to bear and bring up a child. With advancement of reproductive science, now, on occasions, the bearer of the seed is a mere vessel, a nursery to sprout, and the sapling is soon transported to some other soil to grow on. Now, it is Law's turn to appreciate the dichotomy of divine duty, the split motherhood."

Upon an in-depth discussion on the issue, a conclusion was drawn that the petitioner did not physically bear the child. However, she cannot be denied maternity benefits merely on the ground that she obtained the baby through surrogacy. In view of the dichotomy between maternity and motherhood, it was held that the petitioner is entitled to all the benefits that an employee could have after delivery, sans the leave involving the health of the mother after delivery.

49. The Highest Court of this Country, the Supreme Court of India, by this time has recognised the right of reproductive autonomy as a facet of Article 21 of the Constitution and the bodily integrity and personal autonomy is notably established. In the decision of *Justice K.S.Puttaswami Vs. Union of India*[11] and *Vijaya Kumari S. & Anr.* (supra), it is recognised that the personal liberty shall include the right to make intimate decisions regarding reproduction, contraception, pregnancy and family planning, without State coercion.

With reference to the Medical Termination of Pregnancy Act, 1971, the choice of a woman whether to continue or terminate the pregnancy, has received recognition from the Constitutional Courts, and forcing an individual (including a minor) to carry an unwanted pregnancy has been accepted to be violation of a dignity, mental health and personal liberty.

11 (2017) 10 SCC 1

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The landmark judgments delivered in this regard have, therefore, permitted adherence to a framework, which would allow safe abortion access, by extending the rights to unmarried woman equally as to married woman. Though, at some point of time, adoption was accepted as an expression of reproductive and decisional autonomy, with an objective of linking the experience of motherhood to emotional bonding rather than giving birth to a child biologically, with the advancement of science and technology and introduction of assisted reproductive technology, with all its grammatical variations and cognate expressions finding place in the ART Act, 2021, in our view, the jurisprudence that has evolved with regards to the right of reproductive autonomy definitely extend to the right to have a child by resorting to assisted reproductive technology, which may allow a woman to carry the embryo in her womb or hire a womb for development of the embryo.

The right to make reproductive choices, being recognised as a facet of personal dignity enshrined in Article 21 of the Constitution definitely must operate with full force by keeping in mind the progressive interpretation of laws, in alignment with international norms and changing social dynamics, so that it ultimately ensures every couple/an individual woman to avail the reproductive rights to its fullest by addressing the societal and systematic barriers in its way.

50. We also had an opportunity to consider the age limits that are prescribed in various countries where the recourse is taken to assisted reproductive technology and surrogacy, to

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find that there is a variance in the age limit of the surrogate mother as well as the age prescribed for the couple, who intend to avail the assistance of assisted reproductive technology. Different parameters are applied over the globe depending upon the type of surrogacy, as some countries permit commercial surrogacy whereas some others prohibit it completely.

The eligibility criteria for the 'commissioning parents' also differ, as it is left for the surrogacy clinics to consider the eligibility. In absence of any specific research being carried out that a woman, who had crossed the age limit of 50 and a man, who had crossed the age limit of 55, and who are the 'intending couple' cannot cater to the needs of the child, both emotional and psychological, and on the other hand, the course adopted by different High Courts in accepting the collective age of the 'commissioning couple' under the ART Act, we see no reason why the said principle shall not be made applicable to the Petitioners before us, as the husband (X-2) in the intending couple is within the age bracket and together they can cater to the child to be born through the process of surrogacy.

51. The Madras High Court, recently in *Indumathi & Anr. Vs. State of Tamil Nadu & Ors. (Writ Petition No.32103 of 2025),* was dealing with a rejection faced by the couple, who sought permission to undergo surrogacy procedure and it was so refused on the ground that the applicant/intending mother had crossed the age limit of 50 years as on 24/10/2024.

Taking note of the peculiar facts that the petitioner was married to a man and a female child was born out of the said

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relationship, but the marriage was subsequently dissolved by divorce and she married the petitioner No.2 and though she conceived, she suffered a miscarriage and based on medical advice, she decided to undergo surrogacy by using a donor oocyte and the second petitioner's sperm. In accordance with the treatment plan, the hospital collected and chose the second petitioner's sperm in the year 2019. It is in these circumstances, when they approached the concerned authority, the impugned order was passed rejecting the request.

With reference to the decision of the Apex Court in the case of *Vijaya Kumari S. & Anr.* (supra), that the Act shall apply prospectively and shall not apply to the cases where the surrogacy procedure already commenced, the Court proceeded to determine the issue of age bracket. By falling back on the authoritative pronouncements of the Apex Court, the impugned order was set aside and the petitioners' request was directed to be considered.

52. We have referred to the aforesaid decision, only to be conscious of the fact that if the age restriction is sought to be justified by the Union of India on the ground that after a woman crossing the age of 50 and a man crossing the age of 55, they may not be compatible with the child both, psychologically and emotionally as well as will not bear the strength to care to him for atleast 20 years, which are the formative years of his life, then in a case like *Indumathi* (supra), by holding that if the procedure of surrogacy has commenced prior to the Act coming into force, in that case the

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Court permitting a child to be born out of the surrogacy procedure after 2024, when the mother has already crossed the age of 50, we see no justification in denying the benefit to the Petitioners before us.

53. We must clarify that we have not ruled upon the validity of the provision prescribing the maximum age limit and whenever such challenge is faced, all the relevant aspects, including the study of impact of age in rearing up children at advanced age will receive due consideration. As we find that the Expert Committee Report, which is pressed into service, comprise of such detailed and exhaustive study, but we find that this Report was not the basis of introducing the age bracket in the Surrogacy Act or the ART Act, but the research is carried out in the year 2026 and it may provide guidance for the legislature to suitably bring changes, if it so desire.

However, we do not pronounce upon the issue of its validity, as we are conscious of the fact that the Court in exercise of its jurisdiction, shall have limited or rather very little scope to interfere with the legislative wisdom unless and until it is established that its implementation results into arbitrariness and which can be tested on the well settled touchstones of testing arbitrariness.

However, in the present case, we found ourselves guided by the reasoning evolved by various High Courts in case of the age limit of 'commissioning couple' under the ART Act, where one of them has crossed the maximum age limit, but the other did not. A woman, who is otherwise entitled to avail the benefit of assisted reproductive technology when put to

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hardship only because she approaches the Authority as a part of 'commissioning couple', was held, cannot be discriminatory and this equally applies to a situation vice versa.

Since it should always be the endeavour of a Court to adopt a purposive interpretation and ensure that the object behind a legislation is achieved, by adopting an interpretation, which assists in attaining the object and as far as the Surrogacy Act is concerned, it is a regulatory statute regulating the practice and process of surrogacy and aimed at prohibiting potential exploitation of surrogate mothers and to protect the rights of the children born through surrogacy.

54. X-1 and X-2 before us are denied the Eligibility Certificate, as one of them has crossed the age bracket and we express our agreement with the learned Amicus, Mr.Jagtiani, who has brought before us another perspective of purposively interpreting Section 4(iii)(c)(I), and particularly when this is so applied to a 'commissioning couple' under the ART Act.

Hence, we deem it appropriate to assist the Petitioners, the 'intending couple' before us, by issuing the following directions :-

(1) We quash and set aside the order dated 14/07/2026 passed by the Appropriate Authority under the Surrogacy (Regulation) Act, 2021, Nashik Municipal Corporation (Respondent No.5) by which the Petitioners' application for issuance of an Eligibility Certificate under Section 4(iii)(c) of the Surrogacy (Regulation) Act, 2021 has been rejected on the

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ground that Petitioner No.1 has crossed the upper age limit as set out under Section 4(iii)(c)(I) of the Act.

(2) By adopting purposive interpretation, we issue writ of mandamus to the Appropriate Authority under the Surrogacy (Regulation) Act, 2021, Nashik Municipal Corporation (Respondent No.5) to issue an Eligibility Certificate in favour of the Petitioners, in the wake of the reasoning indicated by us in our Judgment and declare that the Petitioners are eligible for undergoing the process of surrogacy and the factum that one of them i.e. X-1 has crossed the age of 50, shall not pose an embargo in they being subjected to the procedure of surrogacy and if required, the ART procedure.

(3) We also issue writ of mandamus to District Medical Board, Nashik (Respondent No.6) to issue the Certificate of Medical Indication, if the Petitioners otherwise satisfy the medical requirements prescribed under the Surrogacy (Regulation) Act, 2021 and the Surrogacy (Regulation) Rules, 2022.

The Petition is made absolute in the aforesaid terms.

(ASHISH S. CHAVAN, J.) **(BHARATI DANGRE, J.)**

55. At this stage, Mr.Mehta, the learned counsel representing the Union of India, requests for stay to the Judgment, as it would like to test the decision delivered by us before the Hon'ble Apex Court.

In our view, we have clarified that we have purposively interpreted the relevant provisions in the Surrogacy

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(Regulation) Act, 2021 to be read with the provisions of the Assisted Reproductive Technology (Regulation) Act, 2021, and conferred the right on the Petitioners to avail the benefit of the procedure of surrogacy under the Surrogacy (Regulation) Act, 2021 and we have not determined the validity of the provision prescribing the age bracket for the 'intending couple'.

The request is, therefore, rejected.

(ASHISH S. CHAVAN, J.) **(BHARATI DANGRE, J.)**

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