

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 21<sup>ST</sup> DAY OF APRIL, 2023

BEFORE

THE HON'BLE MR. JUSTICE M. NAGAPPASANNA

WRIT PETITION No. 5861 of 2023 (GM-RES)

**R**

**BETWEEN:**

... PETITIONERS

(BY SRI SAMPATH A., ADVOCATE)

**AND:**

- 1 . THE UNION OF INDIA  
BY ITS SECRETARY  
NEW DELHI - 110 001.
- 2 . THE DEPARTMENT OF  
HEALTH AND FAMILY WELFARE,  
UNION OF INDIA,

NEW DELHI – 110 001.  
REPRESENTED BY SECRETARY

3 . THE KARNATAKA STATE  
ASSISTED REPRODUCTIVE TECHNOLOGY AND  
SURROGACY BOARD,  
DEPARTMENT OF HEALTH AND  
FAMILY WELFARE  
GOVERNMENT OF KARNATAKA,  
VIKASA SOUDHA,  
BENGALURU – 560 001.  
REPRESENTED BY ITS SECRETARY

4 . APPROPRIATE AUTHORITY UNDER THE,  
SURROGACY ACT ,  
K.C.GENERAL HOSPITAL,  
MALLESHWARAM,  
BENGALURU – 560 003.  
REPRESENTED BY ITS SECRETARY

... RESPONDENTS

(BY SRI M.N.KUMAR, CGC FOR R1 AND R2)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 OF THE CONSTITUTION OF INDIA PRAYING TO QUASH SECTION 4(iii)(c)(I) OF THE SURROGACY REGULATION ACT, 2021 BNO.CG.DL-E.251220-21-232118 AT ANNEXURE-D RECEIVED ASSENT OF HONBLE PRESIDENT ON 25.12.2021 IN SO FAR AS IT RELATES TO DISQUALIFYING THE PETITIONER NO.1 FROM BECOMING AN INTENDEND FATHER DUE TO HIS AGE AND ALSO QUASH SECTION 2(1)(zg) AT ANNEXURE-D IN SO FAR IT MANDATES THAT THE SURROGATE MOTHER SHOULD BE RELATED TO THE INTENDED COUPLE OR THE INTENDING WOMAN.

THIS WRIT PETITION HAVING BEEN HEARD AND RESERVED FOR ORDERS ON 31.03.2023, COMING ON FOR PRONOUNCEMENT THIS DAY, THE COURT MADE THE FOLLOWING:-

**ORDER**

***"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," says Robert Brown. The altered perspective is what forms the kernel of this conundrum.***

The petitioners are before this Court calling in question validity of Section 2(1)(zg) and Section 4(iii)(c)(I) of the Surrogacy (Regulation) Act, 2021 (hereinafter referred to as 'the Act' for short).

2. *Shorn* of unnecessary details, facts in brief, are as follows:

The petitioners are husband and wife, from their wedlock had a son. The mother owing to certain health problems, undergoes surgery for removal of her uterus and, therefore, the uterus is no longer a part of the body of the mother. The son of the petitioners, completes his MBBS course and was undergoing internship at a

College in Mangalore. The son on 13-12-2022, dies due to a road traffic accident. The couple on losing their son go into depression.

3. The 1<sup>st</sup> petitioner is working as a First Division Assistant in the Government Arts College, Bengaluru and the second petitioner is a home maker and a business woman, is what is averred in the petition. The further averment in the petition is that, the 1<sup>st</sup> petitioner visited several Shishu Kendras/ home for children, who informed him about the process of registering with Central Adoption Resource Authority, which is a nodal body of the Central Government monitoring and regulating in-country and inter-country adoption under the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000. The 1<sup>st</sup> petitioner was told that there is large number of prospective parents registered in the organization and it would take minimum of 3 years for the petitioners to get a child in adoption. Later on medical consultancy, the petitioners come to know that they could have a child by way of surrogacy, within nine months and are told that surrogacy is regulated by the Surrogacy (Regulation) Act, 2021 ('the Act' for

short) and the Surrogacy (Regulation) Rules, 2022 framed under the Act.

4. In furtherance of the intention of the petitioners to have a child on surrogacy, the sister-in-law of the 1<sup>st</sup> petitioner, one Smt. S.M.Prathiba comes forward to donate her egg and a close family friend Smt. Priyasarvanan, aged about 25 years and a mother of two children had agreed to be a surrogate mother and the sperm of the 1<sup>st</sup> petitioner would be used to fertilize the donated egg. It is averred that, it is purely for altruistic purpose and no commercial intentions are behind it. What comes as an embargo, are the provisions of the Act which prohibit the petitioners and the like to have a child by way of surrogacy. It is in the wake of provisions of the Act placing such embargo and the desire of the 2<sup>nd</sup> petitioner to become a mother by surrogacy, has led the petitioners to this Court, in the subject petition, calling in question those provisions which place an embargo upon the intention of the petitioners to have a child by way of surrogacy.

5. Heard Sri A. Sampath, learned counsel appearing for the petitioner and Sri M.N. Kumar, learned Central Government Council appearing for respondents 1 and 2.

6. The learned counsel appearing for the petitioners would submit that the petitioners were a happy family of couple with a child/ boy, who was about 23 years old. The boy meets with a road accident and dies. On the death of the only child, the health of the 2<sup>nd</sup> petitioner began to completely deteriorate due to acute depression. The couple then wanting another child by way of adoption, were told that it is going to take 3 or 4 years and on further consultation told that surrogacy was the only method to bear the child. Sister in-law of the 1<sup>st</sup> petitioner who is 35 years old has come forward to donate her egg and a family friend aged 25 years and having two children has agreed to be a surrogate mother and the sperm of the 1<sup>st</sup> petitioner would be used to fertilize the donated egg. In the entire process, there is no financial consideration as they are all closely knit family or like a family. However, certain provisions of the Act are coming in the way of the 2<sup>nd</sup> petitioner becoming a mother. It is, therefore, those provisions

are called in question, as according to the learned counsel for the petitioners, those provisions have nothing to do with the object sought to be achieved, for enacting the Act. Therefore, the petitioners call them in question, in this petition.

7. On the other hand, Sri M.N.Kumar, learned Central Government Counsel representing respondents 1 and 2 would vehemently refute the submissions to contend that merely because it does not suit the petitioner, a provision cannot be held to be contrary to law. Detailed deliberations have gone into while promulgating the Act as the country had become a hub of lending a womb for surrogacy, for people in India and abroad who are affluent, who would exploit the plight of poor women, in the rural areas of the country. He would contend that the petitioners will have to approach State Surrogacy Board, under the Rules for redressal of their grievance and cannot call in question the provisions of the Act. He would further submit that identical issues are pending consideration at the hands of the Apex Court where various provisions of the Act have been called in question and this

petition will have to await the outcome of proceedings before the Apex Court.

8. I have given my anxious consideration to the submissions made by the respective learned counsel and have perused the material on record. In furtherance whereof, the issue that falls for consideration is, *whether the petitioners will be entitled to the prayers that are sought for?*

9. Before embarking upon the consideration of the issue of surrogacy brought up before this Court in the *lis*, I deem it appropriate to notice the judgment of the Apex Court rendered in the case of **BABY MANJI YAMADA VS. UNION OF INDIA AND ANOTHER** reported in **(2008) 13 SCC 518**, wherein, the Apex Court considered what is surrogacy and different kinds of surrogacy while observing as follows:

***"8. Surrogacy is a well-known method of reproduction whereby a woman agrees to become pregnant for the purpose of gestating and giving birth to a child she will not raise but hand over to a contracted party. She may be the child's genetic mother (the more traditional form for surrogacy) or she may be,***



***as a gestational carrier, carry the pregnancy to delivery after having been implanted with an embryo. In some cases surrogacy is the only available option for parents who wish to have a child that is biologically related to them.***

***9. The word "surrogate", from Latin "subrogare", means "appointed to act in the place of". The intended parent(s) is the individual or couple who intends to rear the child after its birth.***

***10. In traditional surrogacy (also known as the Straight method) the surrogate is pregnant with her own biological child, but this child was conceived with the intention of relinquishing the child to be raised by others; by the biological father and possibly his spouse or partner, either male or female. The child may be conceived via home artificial insemination using fresh or frozen sperm or impregnated via IUI (intrauterine insemination), or ICI (intracervical insemination) which is performed at a fertility clinic.***

***11. In gestational surrogacy (also known as the Host method) the surrogate becomes pregnant via embryo transfer with a child of which she is not the biological mother. She may have made an arrangement to relinquish it to the biological mother or father to raise, or to a parent who is themselves unrelated to the child (e.g. because the child was conceived using egg donation, germ donation or is the result of a donated embryo). The surrogate mother may be called the gestational carrier.***

***12. Altruistic surrogacy is a situation where the surrogate receives no financial reward for her***

***pregnancy or the relinquishment of the child (although usually all expenses related to the pregnancy and birth are paid by the intended parents such as medical expenses, maternity clothing, and other related expenses).***

**13.** *Commercial surrogacy is a form of surrogacy in which a gestational carrier is paid to carry a child to maturity in her womb and is usually resorted to by well-off infertile couples who can afford the cost involved or people who save and borrow in order to complete their dream of being parents. This medical procedure is legal in several countries including in India where due to excellent medical infrastructure, high international demand and ready availability of poor surrogates it is reaching industry proportions. Commercial surrogacy is sometimes referred to by the emotionally charged and potentially offensive terms "wombs for rent", "outsourced pregnancies" or "baby farms".*

**14.** *Intended parents may arrange a surrogate pregnancy because a woman who intends to parent is infertile in such a way that she cannot carry a pregnancy to term. **Examples include a woman who has had a hysterectomy, has a uterine malformation, has had recurrent pregnancy loss or has a health condition that makes it dangerous for her to be pregnant. A female intending parent may also be fertile and healthy, but unwilling to undergo pregnancy.***

*(Emphasis supplied)*

In the light of what is considered by the Apex Court, surrogacy is an arrangement in which a women (surrogate) agrees

to carry and give birth to a child on behalf of another person or couple (the intended, intending or commissioning parents). Surrogacy involves a process known as in vitro fertilization (IVF), a procedure by which, embryos are created in a lab and implanted into the surrogate. There are 2 types of surrogacy medically evolved, now known:

(i) **Gestational surrogacy:**

In gestational surrogacy, the surrogate's egg is not used in conception, therefore the surrogate (the gestational carrier) has no genetic link to the baby and is not a biological mother. The embryo transferred into the surrogate would be created using the intended parents' sperm and egg or at times, donor embryos also would be used.

(ii) **Traditional surrogacy:**

Traditional surrogacy involves an egg from the surrogate. Fertility treatment, either artificial insemination or even IVF is used with the intending father's sperm. In traditional surrogacy the surrogate carries the pregnancy and gives birth to a child that they are genetically related to.

The difference between the two is that, in gestational surrogacy, the baby born, has no genetic link to the surrogate; in traditional surrogacy, the baby has a genetic link to the surrogate.

10. Surrogacy became popularly known as a 'womb on rent', all over the globe. India had become a hub of commercial surrogacy, as rent a womb practice, mushroomed in all parts of India, whereby, plenty of women impoverished, were being exploited by the affluent for taking the womb on rent. When such cases of exploitation became rampant, the Parliament thought it fit to regulate surrogacy in India. Therefore, a Bill came to be introduced which prohibits commercial surrogacy, but permits altruistic surrogacy. The altruistic surrogacy involves no monetary compensation, to the surrogate mother other than medical expenses and insurance coverage during the said pregnancy. Commercial surrogacy, in contrast, was undertaken for monetary benefit or reward either in cash or kind exceeding the basic medical expenses and insurance coverage. The misuse of surrogacy and exploitation of woman became a heated debate in the Parliament which initially led to a Bill being introduced in the Parliament called

the Surrogacy (Regulation) Bill, 2016. The Bill was debated in the Parliament. Certain corrections were suggested to the Bill. One such correction was that the baby need not be genetically related to the intending couple. This was accepted and finally the Act was promulgated on 25-12-2021. Therefore, Surrogacy is now regulated under the Act.

11. Certain provisions of the Act are germane to be noticed. Section 2 deals with definitions. Certain definition clauses are significant for consideration of the issue in the *lis*. I deem it necessary to quote those clauses of Section 2, they are: Sections 2(1)(a), (b), (e), (g), (i), (n), (r), (s), (v), (x), (zb), (zd), (zf) and (zh) and they run as follows:

**"2. Definitions:**

- (1) *In this Act, unless the context otherwise requires,—*
- (a) *"abandoned child" means a child born out of surrogacy procedure who has been deserted by his intending parents or guardians and declared as abandoned by the appropriate authority after due enquiry;*
- (b) **"altruistic surrogacy" means the surrogacy in which no charges, expenses, fees, remuneration or monetary incentive of whatever nature, except the medical**

**expenses and such other prescribed expenses incurred on surrogate mother and the insurance coverage for the surrogate mother, are given to the surrogate mother or her dependents or her representative;**

- (e) **"Board" means the National Assisted Reproductive Technology and Surrogacy Board constituted under Section 17;**
- (g) **"commercial surrogacy" means commercialisation of surrogacy services or procedures or its component services or component procedures including selling or buying of human embryo or trading in the sale or purchase of human embryo or gametes or selling or buying or trading the services of surrogate motherhood by way of giving payment, reward, benefit, fees, remuneration or monetary incentive in cash or kind, to the surrogate mother or her dependents or her representative, except the medical expenses and such other prescribed expenses incurred on the surrogate mother and the insurance coverage for the surrogate mother;**
- (i) **"egg" includes the female gamete;**
- (n) **"gamete" means sperm and oocyte;**
- (r) **"intending couple" means a couple who have a medical indication necessitating gestational surrogacy and who intend to become parents through surrogacy;**
- (s) **"intending woman" means an Indian woman who is a widow or divorcee between the age of 35 to 45 years and who intends to avail the surrogacy;**
- (v) **"oocyte" means naturally ovulating oocyte in the female genetic tract;**
- (x) **"prescribed" means prescribed by rules made under this Act;**
- (zb) **"State Board" means the State Assisted Reproductive Technology and Surrogacy Board constituted under Section 26;**

- (zd) *"surrogacy" means a practice whereby one woman bears and gives birth to a child for an intending couple with the intention of handing over such child to the intending couple after the birth;*
- (zf) *"surrogacy procedures" means all gynaecological, obstetrical or medical procedures, techniques, tests, practices or services involving handling of human gametes and human embryo in surrogacy;*
- (zg) *"surrogate mother" means a woman who agrees to bear a child (who is genetically related to the intending couple or intending woman) through surrogacy from the implantation of embryo in her womb and fulfils the conditions as provided in sub-clause (b) of clause (iii) of Section 4;"*

*(Emphasis supplied)*

Section 2(1)(b) defines 'altruistic surrogacy' to mean surrogacy in which no charges, expenses, fees, remuneration or monetary incentive of whatever nature, except the medical expenses incurred on surrogate mother are given to the surrogate mother or her dependent or her representative; Section 2(1)(g) defines 'commercial surrogacy' which is completely in contrast with altruistic surrogacy. Selling or buying of human embryo or trading in sale or purchase of human embryo or gamete or selling or buying the surrogate motherhood all of which would come under the umbrella of commercial surrogacy; Section 2(1) (i) defines 'egg' to

include a female gamete; Section 2(1)(n) defines 'gamete' to mean sperm and oocyte; Section 2(1)(s) defines 'intending woman' to mean an Indian woman who is a widow or a divorcee between the age of 35 to 45 and who intends to avail the surrogacy; Section 2(1)(v) defines 'oocyte' to mean naturally ovulating oocyte in the female genetic tract; Section 2(1)(zd) defines 'surrogacy' to mean a practice whereby one woman bears and gives birth to a child for an intending couple after the birth; Section 2(1)(r) defines an 'intending couple' to mean a couple who have a medical indication necessitating gestational surrogacy and who intend to become parents through surrogacy; Section 2(1)(zg) defines 'surrogate mother' to mean a woman who agrees to bear a child, which would be genetically related to intending couple through surrogacy from the implantation of embryo in her womb and fulfills all other conditions; Section 2(1)(zb) defines 'State Board' to mean the State Assisted Reproductive Technology and Surrogacy Board. Section 2(1)(e) defines a Board which would mean a National Assisted Reproductive Technology and Surrogacy Board constituted under Section 17. The appropriate authority is notified under Section 35 of the Act and Section 36 prescribes functions of the appropriate



authority. The applications filed by the intending couple are to be placed before the appropriate authority who in terms of Section 36 has the power to accept or reject it within 90 days. It is further germane to notice Sections 4, 35 and 36 of the Act and they read as follows:

Section 4 deals with regulation of surrogacy and surrogacy procedures and reads as follows:

**"4. Regulation of surrogacy and surrogacy procedures.**—On and from the date of commencement of this Act,—

- (i) *no place including a surrogacy clinic shall be used or cause to be used by any person for conducting surrogacy or surrogacy procedures, except for the purposes specified in clause (ii) and after satisfying all the conditions specified in clause (iii);*
- (ii) *no surrogacy or surrogacy procedures shall be conducted, undertaken, performed or availed of, except for the following purposes, namely:—*
  - (a) *when an intending couple has a medical indication necessitating gestational surrogacy:*

*Provided that a couple of Indian origin or an intending woman who intends to avail surrogacy, shall obtain a certificate of recommendation from the Board on an application made by the said persons in such form and manner as may be prescribed.*

*Explanation.—For the purposes of this sub-clause and item (I) of sub-clause (a) of clause (iii) the expression "gestational surrogacy" means a practice whereby a surrogate mother carries a child for the intending couple*

through implantation of embryo in her womb and the child is not genetically related to the surrogate mother;

- (b) when it is only for altruistic surrogacy purposes;
  - (c) when it is not for commercial purposes or for commercialisation of surrogacy or surrogacy procedures;
  - (d) when it is not for producing children for sale, prostitution or any other form of exploitation; and
  - (e) any other condition or disease as may be specified by regulations made by the Board;
- (iii) no surrogacy or surrogacy procedures shall be conducted, undertaken, performed or initiated, unless the Director or in-charge of the surrogacy clinic and the person qualified to do so are satisfied, for reasons to be recorded in writing, that the following conditions have been fulfilled, namely: –**
- (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.**

**Explanation.—For the purposes of this item, the expression "District Medical Board" means a medical board under the Chairpersonship of Chief Medical Officer or Chief Civil Surgeon or Joint Director of Health Services of the district and comprising of at least two other specialists, namely, the chief gynaecologist or obstetrician and chief paediatrician of the district;**

**(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 surrogate 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) the surrogate mother is in possession of an eligibility certificate issued by the appropriate authority on fulfilment of the following conditions, namely:—**

**(I) no woman, other than an ever married woman having a child of her own and between the age of 25 to 35 years on the day of implantation, shall be a surrogate mother or help in surrogacy by donating her egg or oocyte or otherwise;**

**(II) a willing woman shall act as a surrogate mother and be permitted to undergo surrogacy procedures as per the provisions of this Act:**

*Provided that the intending couple or the intending woman shall approach the appropriate authority with a willing woman who agrees to act as a surrogate mother;*

**(III) no woman shall act as a surrogate mother by providing her own gametes;**

- (IV) *no woman shall act as a surrogate mother more than once in her lifetime:*

*Provided that the number of attempts for surrogacy procedures on the surrogate mother shall be such as may be prescribed; and*

- (V) *a certificate of medical and psychological fitness for surrogacy and surrogacy procedures from a registered medical practitioner;*

- (c) *an eligibility certificate for intending couple is issued separately by the appropriate authority on fulfillment 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."***

*(Emphasis supplied)*

**"35. Appointment of appropriate authority.—**(1) *The Central Government shall, within a period of ninety days from the date of commencement of this Act, by notification, appoint one or more appropriate authorities for each of the Union territories for*

*the purposes of this Act and the Assisted Reproductive Technology Act.*

**(2) The State Government shall, within a period of ninety days from the date of commencement of this Act, by notification, appoint one or more appropriate authorities for the whole or any part of the State for the purposes of this Act and the Assisted Reproductive Technology Act.**

*(3) The appropriate authority, under sub-section (1) or sub-section (2), shall,—*

- (a) when appointed for the whole of the State or the Union territory, consist of—*
  - (i) an officer of or above the rank of the Joint Secretary of the Health and Family Welfare Department—Chairperson, ex officio;*
  - (ii) an officer of or above the rank of the Joint Director of the Health and Family Welfare Department—Vice Chairperson, ex officio;*
  - (iii) an eminent woman representing women's organisation—member;*
  - (iv) an officer of Law Department of the State or the Union territory concerned not below the rank of a Deputy Secretary—member; and*
  - (v) an eminent registered medical practitioner—member:*

*Provided that any vacancy occurring therein shall be filled within one month of the occurrence of such vacancy;*

- (b) when appointed for any part of the State or the Union territory, be officers of such other rank as the State Government or the Central Government, as the case may be, may deem fit.*

**36. Functions of appropriate authority.**—*The appropriate authority shall discharge the following functions, namely:—*

- (a) to grant, suspend or cancel registration of a surrogacy clinic;*
- (b) to enforce the standards to be fulfilled by the surrogacy clinics;*

- (c) to investigate complaints of breach of the provisions of this Act, rules and regulations made thereunder and take legal action as per provision of this Act;*
- (d) to take appropriate legal action against the use of surrogacy by any person at any place other than prescribed, suo motu or brought to its notice, and also to initiate independent investigations in such matter;*
- (e) to supervise the implementation of the provisions of this Act and rules and regulations made thereunder;*
- (f) to recommend to the Board and State Boards about the modifications required in the rules and regulations in accordance with changes in technology or social conditions;*
- (g) to take action after investigation of complaints received by it against the surrogacy clinics; and*
- (h) to consider and grant or reject any application under clause (vi) of Section 3 and sub-clauses (a) to (c) of clause (iii) of Section 4 within a period of ninety days.***

*(Emphasis supplied)*

What is germane to be noticed for the issue in the *lis* is sub-section (b)(I) and sub-section (c)(I) of Section 4. Section 4(b) directs that the surrogate mother who is in possession of an eligibility certificate issued by the appropriate authority must fulfill certain conditions, they are, no woman, other than a married woman having a child of her own and between the age of 25 to 35 on the day of implantation, shall be a surrogate mother or help in surrogacy by donating her egg or oocyte or otherwise. Section 4(c) imposes

certain conditions for grant an eligibility certificate. Section 4(c)(I) mandates that the intending couple should be married and the female should be between the age of 23 to 50 and the male should be between 26 to 55 on the date of certification. Another Act was notified along with the Surrogacy (Regulation) Act, called the Assisted Reproductive Technology (Regulation) Act, 2021 (hereinafter referred to as 'the ART Act' for short). The ART Act prescribes the reproductive assistance and its regulation. This is the broad frame work of the Act which deals with the intention and procedure for intending couple to become surrogate parents.

**APPLICABILITY OF THE LAW TO THE FACTS:**

12. The facts as afore-narrated, though not in dispute, would require reiteration. The petitioners are a couple who did bear a child who in the year 2021-22 was at the age of 23 years. The son on a fateful day i.e., 13.12.2022 dies, out of a road traffic accident, leaving the family devastated. The mother unable to bear the shock, agony and trauma goes into depression. The sudden loss of a son or a daughter, in the prime of youth, is a terrible blow to the parents. It is said that, one of the most painful moments of one's

life, is to be the pall bearer of a deceased son or a daughter. Even, medical science finds that a large number of parents tend to go into deep depression due to sudden loss of their children. This emotional vacuum is what is prayed to be filled up in the case at hand.

13. The agonizing and depressed condition of the mother drives the 1<sup>st</sup> petitioner/husband to all the adoption centers only to be told that there was long waiting period as adoption has to be done in terms of the provisions of Juvenile Justice Act. These circumstances lead the couple to scout for a method of having a child to get over the unbearable agony. This leads to an intention of having a child by way of surrogacy as the 2<sup>nd</sup> petitioner/mother whose uterus had been removed could not bear a child and could not even give egg / gamete. Therefore, the sister-in-law of the husband comes forward to donate her eggs / gamete. After finding a donor of the eggs a family friend comes forward to bear the child or become a surrogate mother. The sperm of the husband would be used to fertile the donated egg of the sister in-law of the husband. The averment in the petition is that it is purely for



altruistic purpose and notwithstanding this the couple would be unable to bear the child owing of two provisions under the Act. One being definition in Section 2(1)(zg) supra which mandates a surrogate mother can only be a women who agrees to bear a child who is genetically related to the intending couple or intending woman. In the case on hand, the surrogate mother is not genetically related to the petitioners though the donor of the egg is related to the couple.

14. The other provision is Section 4(c)(I) which mandates that interding couple should be married and the woman should not have crossed 50 years of age and the man should not have crossed 55 years of age. The mother in the case at hand comes within the provisions of law as she is yet to cross 50 years. The father/1<sup>st</sup> petitioner suffers a disability as he has crossed 55 years of age and he is 57 years now. In the light of these provisions placing an embargo upon the motherhood of the wife, the petitioners have called these provisions in question. It becomes germane now to notice the prayer that is sought in the petition and it reads as follows:

"Wherefore, the petitioners pray that this Hon'ble Court may be pleased to –

- (a) Issue a Writ in the nature of Certiorari quashing **Section 4(iii)(c)(I) of the Surrogacy Regulation Act, 2021** BRO:CG-DL-E-25122021-232118 at **Annexure-D** received assent of Hon'ble President on 25-12-2021 insofar as it relates to disqualifying the petitioner No.1 from becoming an intended father due to his age and **also quash Section 2(1)(zg) at Annexure-D** insofar as it mandates that surrogate mother should be related to the intended couple or the intending woman.
- (b) Issue a Writ in the nature of Mandamus directing the Respondent No.4 to make appropriate regulations in view of the facts of this case, as prescribed under Section 4 Clause (e) of the Act of 2021 or alternatively direct the respondents 3 and 4 to issue the essentiality and eligibility certificate as prescribed under the Act by relaxing the age of the petitioner No.1 and by accepting a non-relative of the petitioners as a surrogate mother.
- (c) Pass such other order or further orders as this Hon'ble Court deems fit to grant in the facts and circumstances of the case and in the interest of justice and equity."

The challenge is to Section 4(iii)(c)(I) and 2(1)(zg) which are extracted hereinabove. I deem it appropriate to quote them again.

**"4. Regulation of surrogacy and surrogacy procedures.**—On and from the date of commencement of this Act,—

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

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

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

*(Emphasis supplied)*

.. .. .

**"2. Definitions:**

*(1) In this Act, unless the context otherwise requires,—*

**(zg) "surrogate mother" means a woman who agrees to bear a child (who is genetically related to the intending couple or intending woman) through surrogacy from the implantation of embryo in her womb and fulfils the conditions as provided in sub-clause (b) of clause (iii) of Section 4;"**

*(Emphasis supplied)*

What offends the petitioners according to the averment is that the intending couple, married should be between the age of 23 to 50 in the case of a female and between 26 to 55 in the case of a male. This is as on the date of the certificate being issued for eligibility to the intending couple by the appropriate authority. The 1<sup>st</sup> petitioner/husband is now 57 years old. The 2<sup>nd</sup> petitioner/wife is 45 years old. In terms of the afore-quoted provision the 1<sup>st</sup>

petitioner loses eligibility to become a father by way of surrogacy. The wife has no problem. Therefore, the argument is the age restriction has no rationale behind it and has to be obliterated. According to the counsel, it should be made age free, both to the husband and the wife who are intending couple.

15. The mother, on account of certain health ailment has undergone hysterectomy. Therefore, cannot ovulate or donate eggs/ gamete for surrogacy. Sister of the wife has come forward to donate the eggs. The embryo would be an amalgam of the eggs from the sister-in-law of the husband and the sperm of the husband. The law prohibits it, as the husband is beyond 55 years as noted above. The emphatic submission of the petitioner is that, there is no rationale behind the prescription of the cut off age and there being no rationale, the provision is unconstitutional. I decline to accept the submission that there is no rationale behind the stipulation of the cut off age of 55 years for the husband to become an intending father by way of surrogacy, but this Court has to salvage the situation that is brought before the Court. It is therefore, in the opinion of this Court it is necessary to iron out the

creases in the legislation. Ironing out the creases by the constitutional Courts of the provisions of law as promulgated without disturbing the content of the statute is permitted exercise of judicial review, as the law makers at the time of making the law would not have envisaged a situation of the kind that is generated in the case at hand. Reference being made to the judgment of the Court of Appeal, England, in the case of **SEAFORD ESTATE V. ASHER**<sup>1</sup>, becomes apposite, in which Lord Denning observes as follows:

***"Whenever a statute comes up for consideration it must be remembered that it is not within human powers to foresee the manifold sets of facts which may arise, and, even if it were, it is not possible to provide for them in terms free from all ambiguity. The English language is not an instrument of mathematical precision. Our literature would be much the poorer if it were. This is where the draftsmen of Acts of Parliament have often been unfairly criticized. A judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it, and of the mischief which it was passed to remedy,***

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<sup>1</sup> 1949(2) ALL.E.R. 155

**and then he must supplement the written word so as to give "force and life" to the intention of the legislature.**

*That was clearly laid down by the resolution of the judges in Heydon's case<sup>18</sup>, and it is the safest guide to-day. Good practical advice on the subject was given about the same time by Plowden in his second volume Eyston v. Studd<sup>19</sup>. Put into homely metaphor it is this: A judge should ask himself the question: If the makers of the Act had themselves come across this ruck in the texture of it, how would they have straightened it out? He must then do as they would have done. A judge must not alter the material of which it is woven, but he can and should iron out the creases.*

*Approaching this case in that way, I cannot help feeling that the legislature had not specifically in mind a contingent burden such as we have here."*

*(Emphasis supplied)*

Therefore, on such ironing out, I deem it appropriate to evolve a triple test theory to permit the petitioners to avail of procedure of surrogacy, in the peculiar facts of this case by directing conduct of 3 tests. The first petitioner has to cross the wall of the triple tests to become eligible to become a father by surrogacy. All the tests directed are aspects which are in public domain. The tests would be:

- (i) Genetic Test.**
- (ii) Physical Test and**
- (iii) Economic Test.**

(i) **Genetic Test:**

In medical parlance, what is needed for an embryo is a healthy sperm and an egg. Therefore, it is imperative to test the strength of the sperm as the sperm contains genetic information necessary to make a new individual. The genetic information is densely packed into the head of the sperm. The sperm contains 23 chromosomes. These 23 chromosomes will pair up with 23 chromosomes in the egg to give out 46 chromosomes necessary for a healthy human embryo. It is again medically determined that men over the age of 35 to 40 typically experience a decrease in sperm health. Since the petitioner is now aged 57 years, it would become necessary for him to undergo the genetic test for determination of the health of the sperm, so that the child born out of the embryo of which the sperm of the petitioner is impregnable part, is not born with any disorder or infirm.

(ii) **Physical Test:**

The intending couple must be in a position to take care of the child and cannot abandon the child on the ground that they are themselves infirmed to handle the child, failing which, it would

be bringing a child to life, on the face of the earth, for making the life of the child miserable. This cannot be countenanced. Therefore, the couple must have the physical capacity to handle the child, though not physical capacity *stricto sensu* to carry the child everywhere, but to manage the child.

(iii) **Economic Test:**

The intending couple must be economically sound and should not lead the child to penury the moment it is born. Therefore, affidavits of both the intending couple should be filed before the Board/appropriate authority with regard to their assets and liabilities which would become helpful for the Board/appropriate authority to decide the economic capacity of the intending couple. It may become necessary to protect the child by making future investments on the child by the intending couple. The procedure and the nuances of seeking such economic tests is best left open to the Board/appropriate authority to decide, but such economic test is imperative.



16. The aforesaid observation and direction is owing to the peculiarity of the circumstances generated in the case at hand. For the law to be corrected, it is for the legislature to ponder over the issue, as the Act nowhere leaves any discretion to the Board be it National or the State, to the Appropriate Authority be it Center or the State to have any play in the joints to salvage any unique situation, to consider and issue eligibility certificate to the intending couples. As it is trite, when the legislature enacts a law, it does not say everything on the subject as every conceivable eventuality of the future would not be present at the time when the law makers make the law. It is those legislative silences that generate relief of the kind that is sought to be granted in the case at hand. As observed, this Court is concerned with the case at hand and intends to iron out the crease, direct conduct of triple test upon the 1<sup>st</sup> petitioner and on such tests, direct consideration of the case for grant of eligibility certificate from the hands of the Authority under Sections 35 and 36 of the Act.

17. The other provision that is under challenge is Section 2(1)(zg) of the Act. Section 2(1)(zg) defines who is a surrogate mother. The woman i.e., the surrogate mother has to be genetically related to the intending couples. Here lies the choke to the petitioners. The intention behind the provision is, misuse of the method of surrogacy. Therefore, the surrogate mother who seeks to lend her womb for surrogacy should do so only in cases of altruistic surrogacy and not commercial surrogacy. What is permitted under the Act is altruistic surrogacy and not commercial surrogacy. Therefore, it becomes necessary to notice what is altruism.

18. Altruism, as defined in plethora of dictionaries would mean, when a person acts to promote someone else's welfare, even at the risk or cost to themselves, if the provision that is called in question 2(1)(zg) is considered qua altruistic surrogacy, it would become an object of contradiction, as 2(1)(zg) mandates that the surrogate mother should be genetically related to the intending couple. If that be so, altruism is illusory if everything happens within the family. In the considered view of this Court, Altruistic

surrogacy should mean, surrogacy by an outsider. Therefore, the provision runs counter to the philosophy or principle behind the enactment. The words "genetically related" appearing in Section 2(1)(zg) can only mean that the child to be born through surrogacy should be genetically related to the intending couple, failing which, the words genetically related would not have any meaning if it were to be said that the surrogate mother should be genetically related to the intending couple. That defeats both altruism and logic.

19. Though the petitioners have called in question the provisions as afore-quoted in the prayer. It is brought to the notice of this Court that the entire gamut of challenge to the provisions of the Act is pending consideration before the Apex Court where the National Board of Surrogacy has been asked to submit their reply to all the contentions advanced before the Apex Court. Therefore, striking down the provisions as sought by the petitioner, at this juncture, is unavailable. They would all remain subject to, further orders to be passed by the Hon'ble Apex Court.

20. The Government of India in terms of a notification dated 04.05.2022 has constituted National Assisted Reproductive Technology and Surrogacy Board (The National Board) and subsequently, on 04.08.2022 and 16.12.2022, has composed the Board with expert members. Likewise, the State Surrogacy Board is also said to be in place. The Appropriate Authorities are also appointed both in the Center and the State for consideration of the applications submitted by the intending couple. Therefore, the State Surrogacy Board / Appropriate Authority / Prescribed Authority shall consider the application by the petitioners for grant of an eligibility certificate as is necessary in law for the petitioners to become parents by way of surrogacy, on the triple tests as indicated hereinabove – genetic; physical and economical. For the purpose of these tests, the petitioner shall file an affidavit which would contain the following:

- (i) The 1<sup>st</sup> petitioner/father shall undertake to undergo the genetic test for determination of the strength of the gamete/sperm and its quality.
- (ii) The Economic capacity of the intending couple for the growth of the child and to place the measures taken to

secure the life by creation of property or any fixed deposit in the name of the child.

- (iii) Measures to be taken for the upbringing of the child as the father or the mother, if are not physically able to bring up the child, this would not mean the petitioners would abandon the child or leave it at the mercy of anybody else.

The affidavit with the aforesaid details shall be filed before the Appropriate Authority or the Board as the case would be along with the application seeking eligibility. The application shall contain all the details including the details of the intending surrogate mother. If such an affidavit is filed before the Board, the Board shall consider the same bearing in mind the observations made in the course of this order and draw up appropriate proceedings, in accordance with law. Since the 1<sup>st</sup> petitioner is already growing old, as he is now 57 years, it would be imperative to fix a timeline for consideration by the State Board / Authority.

21. For the aforesaid reasons, the following:

ORDER

- (i) Writ Petition is allowed in part.
- (ii) The challenge to the provisions - Section 2(1)(zg) and Section 4(iii)(c)(I) of the Surrogacy (Regulation) Act, 2021, at present, is not considered, as they would be subject to the pendency proceedings before the Apex Court.
- (iii) The petitioners are directed to approach the State Surrogacy Board / Appropriate Authority/ Prescribed Authority with the appropriate application seeking redressal of their grievance.
- (iv) In the event petitioners would approach the Board/Appropriate Authority within 4 weeks from the date of receipt of the copy of this order, the State Surrogacy Board / Appropriate Authority / Prescribed Authority shall consider the application and pass appropriate orders for issuance of eligibility certificate within 4 weeks thereafter. While doing so,

the Board/Authority shall bear in mind the observations made in the course of the order.

Accordingly, I.A.No.1 of 2023 also stand disposed.

**Sd/-  
JUDGE**

bkp  
CT:MJ