

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

WRIT PETITION (CIVIL) NO(S).756/2022

ARUN MUTHUVEL

Petitioner(s)

VERSUS

UNION OF INDIA & ORS.

Respondent(s)

(IA No. 197034/2022 - APPROPRIATE ORDERS/DIRECTIONS
IA No. 50195/2023 - APPROPRIATE ORDERS/DIRECTIONS
IA No. 181650/2022 - APPROPRIATE ORDERS/DIRECTIONS
IA No. 19266/2023 - APPROPRIATE ORDERS/DIRECTIONS
IA No. 181569/2022 - APPROPRIATE ORDERS/DIRECTIONS
IA No. 179193/2022 - APPROPRIATE ORDERS/DIRECTIONS
IA No. 4734/2023 - APPROPRIATE ORDERS/DIRECTIONS
IA No. 78519/2023 - APPROPRIATE ORDERS/DIRECTIONS
IA No. 179058/2022 - APPROPRIATE ORDERS/DIRECTIONS
IA No. 205942/2022 - APPROPRIATE ORDERS/DIRECTIONS
IA No. 50391/2023 - CLARIFICATION/DIRECTION
IA No. 173949/2022 - INTERVENTION/IMPLEADMENT
IA No. 205941/2022 - INTERVENTION/IMPLEADMENT
IA No. 169226/2022 - INTERVENTION/IMPLEADMENT
IA No. 50390/2023 - INTERVENTION/IMPLEADMENT
IA No. 150600/2022 - INTERVENTION/IMPLEADMENT
IA No. 196980/2022 - INTERVENTION/IMPLEADMENT
IA No. 181719/2022 - INTERVENTION/IMPLEADMENT
IA No. 50188/2023 - INTERVENTION/IMPLEADMENT
IA No. 19264/2023 - INTERVENTION/IMPLEADMENT
IA No. 78516/2023 - INTERVENTION/IMPLEADMENT)

WITH

W.P.(C) No. 931/2022 (X)
(FOR)

W.P.(C) No. 1129/2022 (X)
(FOR ADMISSION)

W.P.(C) No. 42/2023 (X)
(FOR APPLICATION FOR FILING THE PETITION WITHOUT DISCLOSING THE
IDENTITY OF THE PETITIONER/RESPONDENT ON IA 8968/2023
FOR APPROPRIATE ORDERS/DIRECTIONS ON IA 14205/2023)

W.P.(C) No. 164/2023 (X)
(FOR ADMISSION)

W.P.(C) No. 522/2023 (X)
(FOR ADMISSION)

W.P.(C) No. 487/2023 (X)
(FOR ADMISSION
IA No. 90140/2023 - GRANT OF INTERIM RELIEF
IA No. 116569/2023 - INTERVENTION/IMPLEADMENT
IA No. 115323/2023 - INTERVENTION/IMPLEADMENT
IA No. 190740/2023 - INTERVENTION/IMPLEADMENT
IA No. 164088/2023 - INTERVENTION/IMPLEADMENT
IA No. 162623/2023 - INTERVENTION/IMPLEADMENT
IA No. 154907/2023 - INTERVENTION/IMPLEADMENT)

W.P.(C) No. 830/2023 (X)
(IA No.161812/2023-STAY APPLICATION)

Date : 18-10-2023 These matters were called on for hearing today.

CORAM :

HON'BLE MRS. JUSTICE B.V. NAGARATHNA
HON'BLE MR. JUSTICE UJJAL BHUYAN

For Petitioner(s) Mr. Sanjay Jain, Sr. Adv.
Mr. Nalin Tripathi, Adv.
Mr. Yuvraj Sharma, Adv.
Mr. Nishant Tripathi, Adv.
Mr. Padmesh Mishra, Adv.
Ms. Harshita Sukhija, Adv.
Mr. Mrinmai Sagar, Adv.
Ms. Neelam Singh, AOR

Mr. Akshat Srivastava, AOR

Ms. Mohini Priya, AOR

Ms. Arundhati Katju, Adv.
Ms. Neha Nagpal, Adv.
Mr. Malak Bhatt, Adv.
Ms. Supriya Julka, Adv.
Ms. Samridhi, Adv.
Ms. Ritika Singh, Adv.
Mr. Himanshu, Adv.
Mr. Malak Manish Bhatt, AOR

Mr. Mayank Pandey, AOR
Mr. Rudra Pratap Singh Solanki, Adv.
Mr. Ashish Kumar Pandey, Adv.

For Respondent(s) Ms. Aishwarya Bhati, A.S.G.
Mr. Gurmeet Singh Makker, AOR
Mr. Rajat Nair, Adv.
Mr. Ketan Paul, Adv.
Mr. Mayank Pandey, Adv.
Ms. Chitrangda Rashtravara, Adv.

Ms. Shivika Mehra, Adv.
Mr. Rustam Chauhan, Adv.
Mr. Abhijeet Singh, Adv.
Mr. Pratham Sagar, Adv.
Ms. Shivani, Adv.

Ms. Ameyavikrama Thanvi , AOR

Mr. Ivan, AOR

UPON hearing the counsel the Court made the following
O R D E R

W.P.(C) No. 830/2023:

Pursuant to our order and direction dated 09.10.2023, the Office of the District Medical & Health Officer (Chairperson District Medical Board), Medchal-Malkajgiri-District has submitted its report dated 11.10.2023 after examining the petitioner herein.

On perusal of the said report, it would be useful to extract the following portions of the Report:

“Pursuant to order dt 09.10.2023, a request was received in our office seeking medical opinion, hence District Medical Board has examined the available medical records of Mrs. ABC and it is seen that she is a case of Type 2 -“Mayer Rokitansky Kuster Howser(MRKH) Syndrome”

We have perused the Pelvic ultrasound report from Lucid Medical Diagnostics dated 29/4/2022 which states that both uterus as well as Ovaries are not visualised. We have also relied on the 3T-MRI whole Abdomen report of Mrs. ABC dated 20/2/23 which states that “uterus is not visualised”, “Both Ovaries are not visualised.”

We have also examined the documents submitted by Mrs. ABC in the process of applying and obtaining various permissions for ART and Surrogacy and after careful examination of all documents it has lead us to opine that since Mrs. ABC has absent Ovaries and absent

Uterus, hence she cannot produce her own Eggs/Oocytes.”

In the above backdrop, we have heard learned Senior Counsel Mr. Sanjay Jain for the petitioner Mrs. ABC and learned A.S.G. Ms. Aishwarya Bhati for the respondents.

During the course of submissions, our attention was drawn to Section 2(r), 2(zd), (zg) and Sections 4(ii)(a) and 4(iii)(a)(I) of the Surrogacy (Regulation) Act, 2021 (for short, “Surrogacy Act”) as well as Rule 14(a) read with Rule 7 as well as the portion of Form 2, namely Consent of the Surrogate Mother and Agreement for Surrogacy and Paragraph 1(d) thereof of the Surrogacy (Regulation) Rules, 2022 (for short, “Surrogacy Rules”). For the sake of immediate reference the same are extracted as under:

“2.(1) In this Act, unless the context otherwise requires, -

X X X

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

X X X

(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;

X X X

(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;

X X X

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

X X X

(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.

X X X

(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.

X X X

Surrogacy Rules:

7. Consent of a surrogate mother.- The consent of a surrogate mother shall be as specified in Form 2.

X X X

14. Medical indications necessitating gestational surrogacy.- A woman may opt for surrogacy if; -

- (a) She has no uterus or missing uterus or abnormal uterus (like hypoplastic uterus or intrauterine adhesions or thin endometrium or small uni-cornuate uterus, T-shaped uterus) or if the uterus is surgically removed due to any medical

condition such as gynecological cancer;"

- (b) intended parent or woman who has repeatedly failed to conceive after multiple In vitro fertilization or intracytoplasmic sperm injection attempts. (Recurrent implantation failure);
- (c) multiple pregnancy losses resulting from an unexplained medical reason. unexplained graft rejection due to exaggerated immune response;
- (d) any illness that makes it impossible for woman to carry a pregnancy to viability or pregnancy that is life threatening.

X X X

FORM 2

[See rule 7]

Consent of the Surrogate Mother and
Agreement for Surrogacy

1. That I understand that the methods of treatment may include:
- a).....
 - b).....
 - c).....
 - d) the fertilisation of a donor oocytes by the sperm of the husband."

However, by the impugned notification dated 14.03.2023, the aforesaid Paragraph 1(d) has been substituted as under:

(d) (I) Couple undergoing Surrogacy must have both gamete from the intending couple and donor gametes is not allowed.

(II) Single woman (widow/divorcee) undergoing Surrogacy must use self eggs and donor sperms to avail surrogacy procedure."

Learned senior counsel appearing for the petitioner in W.P. No. 830 of 2023 submitted that the substitution of Paragraph 1(d) (i) in Form 2 has impeded the process of surrogacy that has been initiated by the petitioner and her husband inasmuch as it is

impossible for the petitioner and her husband (intending couple) to continue with the process of surrogacy in order to achieve parenthood.

It was submitted that the said Paragraph has been substituted with effect from 14.03.2023, whereas the process of surrogacy commenced long prior to the said date by the petitioner and her husband (intending couple) that is on 7.12.2022 and whereas the amendment is with effect from 14.03.2023 and therefore the same cannot have a retrospective effect by taking away the right of the petitioner herein to undergo the process of surrogacy and to fulfill her hope of achieving motherhood.

It was further pointed out that having regard to the medical exigencies, the potential surrogate mother will have to undergo the pregnancy by way of surrogacy at the earliest and there are only two options presently available. Therefore, the Paragraph 1(d) of Form 2 may not be applied to the petitioner herein.

Per contra, learned A.S.G. appearing for the respondents contended that the definition of "intending couple" read with the definition of "surrogate mother" read with Section 4(2)(a) which regulates surrogacy and surrogacy procedure would clearly indicate that unless the child is genetically related to the intending couple, the process of surrogacy cannot be availed of by the intending couple.

In this regard, it was pointed out that although the medical indication necessitating gestational surrogacy is a justification for the intending couple to avail of the process of gestational surrogacy and therefore, achieve parenthood, the basic or essential

condition that the child be genetically related to both the intending couple would not be achieved in the instant case. This is because of the categorical medical report which states that the petitioner, in the absence of having any uterus and ovaries is not in a position to produce oocytes and therefore, there would have to be a donor. Therefore, the donor's oocytes have to be utilised in the instant case to successfully undergo surrogacy, which is prohibited under the provisions of the Act. Therefore, the petitioner herein cannot be aggrieved by the amendment as such.

By way of reply, learned senior counsel, Mr. Jain, pointed out that the expression "intending couple" must be read to indicate that the same would not refer to both persons of an intending couple having a medical indication necessitating gestational surrogacy. If either of them has a medical indication necessitating gestational surrogacy, it would serve the purpose of achieving parenthood through surrogacy. This is because Rule 14 only refers to a woman and not the man.

We find substance in the arguments of the learned counsel for the petitioner inasmuch as Rule 14 which is extracted above clearly refers to the wife as not being able to achieve parenthood owing to the "disability" on account of the absence of a uterus or repeatedly failed pregnancies, multiple pregnancies or an illness which makes it impossible for a woman to carry a pregnancy to term or would make the pregnancy life-threatening. The justification for necessitating gestational surrogacy in Rule 14 is all related to the intending woman or the wife and does not refer to the man/husband at all. The said provision is woman-centric and relates

to the medical or congenital condition of a woman, which impedes her from becoming a mother.

Therefore, the whole scheme of the Act revolves around the "inability" of the woman to conceive and to give birth to a child and the medical indication necessitating gestational surrogacy in Rule 14 explains the various circumstances which incapacitate or disable women from having a normal pregnancy and having a child.

We have closely perused the original Paragraph 1 (d) in Form 2 and the substituted Paragraph 1(d). A reading of Paragraph 1 of Form 2 clearly indicates several procedures contemplated prior to the implantation of the embryo obtained through any of the procedures or possibilities into the uterus, after the necessary treatment if any of the surrogate mother. However, the substituted Paragraph 1(d) is in the nature of a mandate prohibiting or permitting the use of gametes of the intending couple or the single woman, as the case may be, and does not relate to fertilisation or other procedures contemplated therein. In other words, the fertilisation of a donor oocyte by the sperm of the husband is deleted. This in our view is contrary to what is contemplated under Rule 14(a) of the Surrogacy Rules. Moreover, the form as well as the substance of the amendment of Paragraph 1 (d) is not in tune with the form and substance of the pre-existing Paragraph 1 (a)-(f) of the Form 2. When Rule 14(a) specifically recognises the absence of a uterus or any allied condition as a medical indication necessitating gestational surrogacy, the consent of the surrogate mother and the agreement for surrogacy in Form 2 appended to Rule 7 cannot mandate a condition contrary to Rule 14(a).

In circumstances stated in Rule 14(a) for instance, the intending couple would necessarily have to have a surrogate child through donor's oocytes because in such a condition, it is not possible for the woman to produce oocytes. Otherwise Rule 14 which has to be read as part of Section 2(r) cannot be given effect at all, even having regard to the scheme of the Act which permits surrogacy subject to certain conditions being complied with.

In this regard, it may be noted that the expression "genetically" related to the intending couple has to be read as being related to the husband when Rule 14(a) applies. Similarly, the expression "genetically" related to the intending woman would refer only to the intending woman who is an Indian woman who is a widow or divorcee which is in consonance with Paragraph d(ii) of the amendment, between the age of 35 to 45 years and intending to avail surrogacy. When an intending woman avails of surrogacy naturally, she would have to use her own oocytes or eggs and donor's sperm. Conversely, when the woman in the intending couple is unable to produce oocytes or eggs, then donor oocytes or eggs have to be made use of.

Secondly, the petitioner herein had commenced the procedure for achieving parenthood through surrogacy much prior to the amendment which has come into effect from 14.03.2023. Therefore, the amendment which is now coming in the way of the intending couple and preventing them from achieving parenthood through surrogacy, we find, is, *prima facie* contrary to what is intended under the main provisions of the Surrogacy Act both in form as well as in substance.

In the said circumstances, the amendment i.e., Paragraph 1(d) in Form 2 which is the Consent of the Surrogate Mother and Agreement for Surrogacy read with Rule 7 of the Surrogacy Rules made under the Surrogacy Act is stayed insofar as the petitioner herein Mrs. ABC is concerned.

It is needless to observe that if the petitioner Mrs. ABC otherwise fulfils all other conditions mentioned under the Act, she is entitled to proceed with the process of surrogacy.

Since the report in respect of other petitioners/applicants has not yet been received, list the matters on 21.11.2023.

(RADHA SHARMA)
COURT MASTER (SH)

(MALEKAR NAGARAJ)
COURT MASTER (NSH)