

2024:BHC-AS:6439-DB



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 10108 OF 2023

1. XYZ
2. ABC

... Petitioners

Versus

1. The Union of India
through its Ministry of Health & Family
Welfare, Department of Health Research
2. The State of Maharashtra
through the Public Health Department
3. National Assisted Reproductive Technology
and Surrogacy Board, through the Department of
Health Research.
4. State Assisted Reproductive Technology
and Surrogacy Board, through Public Health Dept.
5. The Appropriate Authority
through the Assistant Health Officer,
Health Department of Pune.

... Respondents

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION (L) NO. 22674 OF 2023

1. XYZ
2. ABC

... Petitioners

Versus

- 1 The Union of India
through its Ministry of Health & Family
Welfare, Department of Health Research
- 2 The State of Maharashtra
through the Public Health Department.
- 3 National Assisted Reproductive Technology

and Surrogacy Board, through the Department of Health Research.

4 State Assisted Reproductive Technology and Surrogacy Board, through Public Health Dept.

5 The Appropriate Authority through the Assistant Health Officer, Health Department of Pune.

...Respondents

Mr. Tejesh Dande with Mr. Vishal Navale, Mr. Bharat Gadhavi, Ms. Trusha Shah, Mr. Vikrant Khare, Mr. Pratik Sabrad, Mr. Chinmay Deshpande, Mr. Sarvesh Deshpande & Ms. Janaki Patil i/b. Tejesh Dande & Associates, for the Petitioners.

Mr. Y. R. Mishra with Ms. Anusha P. Amin, for Respondent No.1 -UOI.

Mrs. Jyoti Chavan a/w. Mr. Sachin H. Kankal. AGP for Respondent No.2 in WP/10108/2023.

Mrs. Jyoti Chavan, Addl. G. P. for State in WPL/22674/2023

Mr. Rishikesh M. Pethe for Respondents in WPL/22674/2023.

CORAM: G. S. KULKARNI &
FIRDOSH P. POONIWALLA, JJ.
DATED: 9 February, 2024

Judgment : (Per G. S. Kulkarni):-

Writ Petition No. 10108 OF 2023

1. Rule. Returnable forthwith. Respondents waives service. By consent of the parties, heard finally.

2. The Petitioners, who are husband and wife got married on 29th April 2013. The Petitioners contend that they could not achieve parenthood due to serious medical issues suffered by the wife. Between the period of 2011 to 2023, the wife underwent surgeries. Confronted with several ailments arising from genetic abnormalities, the petitioners were advised that it would not be

possible for the wife to bear a child in the natural course and the only option for them, was to have a child by surrogacy.

3. When the Petitioners intended to take recourse to the procedure of surrogacy under the provisions of the Surrogacy (Regulation) Act, 2021 (for short “**the Surrogacy Act**”) and under the Rules framed thereunder, they were confronted with what was prescribed by the impugned notification dated 14th March 2023, issued by the Government of India, Ministry & Family Welfare. By such notification issued in exercise of powers conferred under Section 50 of the Surrogacy Act, the Central Government framed the following Rules to amend the Surrogacy (Regulation) Rules 2022 as contained in Form-2 under Rule 7, whereby amending existing para 1(d) (I), a new stipulation as contained in Rule 1(d)(I) & (II) came to be prescribed. The said notification prescribing the amending Rules reads thus:

“G.S.R. 179(E). - In exercise of the powers conferred by section 50 of the Surrogacy (Regulation) Act, 2021 (47 of 2021), the Central Government hereby makes the following rules, further to amend the Surrogacy (Regulation) Rules, 2022, namely :-

1. (1) These rules may be called the Surrogacy (Regulation) Amendment Rules, 2023.

(2) They shall come into force on the date of their publication in Official Gazette.

2. In Form 2 under rule 7 of the Surrogacy (Regulation) Rules, 2022, the existing Para 1(d) stands omitted and shall be substituted as under:

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

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

(emphasis supplied)

The impugned rules in paragraph 1(d)(I) hence prohibit donor gametes. The petitioners are aggrieved by such condition as imposed by the impugned rules.

4. The petitioners contend that prescribing of such condition in the Rules is illegal inasmuch as such condition would be violative of and/or in-congruent to the provisions of the Surrogacy Act. According to the Petitioners, imposing of such condition would in fact defeat the entire purpose, for which, the petitioners would intend parenthood by surrogacy. They contend that it cannot be the intention of the legislation to achieve surrogacy *inter alia* by using genetically defective gametes or for other several medical reasons, when it is not possible for the couple to use their gametes and in such circumstances, it is impossible nay improbable that such conditions be imposed on the petitioners, when to have a child by surrogacy is the only option available to the couple. The petitioners have set out various grounds of assail to the rules, as stipulated by the impugned notification, to contend that such conditions, as incorporated by the impugned notification, apart from being contrary to the provisions of the Surrogacy Act are arbitrary, illogical as also violative of Articles 14 and 21 of the Constitution of India.

5. Mr. Dande, learned Counsel for the Petitioner has taken us through the memo of the Petition to show the bona fides of the petitioner to the effect that

the medical condition of the wife, has been declared by the experts, to be such that there is no alternative for the Petitioners but to have a child, by the procedure of surrogacy. It is submitted that the challenge to the impugned rules stipulated by the notification dated 14 March 2023 are subject matter of assail and consideration before the Supreme Court in the proceedings of Writ Petition(Civil) No. 756 of 2022 (*Arun Muthuvel Vs. Union of India*) and other proceedings. Our attention is drawn to a detailed interim order dated 18th October 2023 passed by the Supreme Court whereby considering the scheme of the Surrogacy Act and the impugned rules, the Supreme Court has observed that *prima facie* the amendment which was brought into force by the impugned notification dated 14 March 2023, was contrary to what was intended by the provisions of the Surrogacy Act both in form as well as in substance. It was observed that such amendment was impeding the intending couples and preventing them to have a child through surrogacy. The Supreme Court accordingly stayed para 1(d) in Form 2 being the Consent of the Surrogate Mother and Agreement for surrogacy read with Rule 7 of the Surrogacy Rules made under the Surrogacy Act, in so far as the Petitioners before the Supreme Court were concerned, and subject to the Petitioners fulfilling all other conditions as prescribed under the Surrogacy Act, they were permitted to proceed with the process of surrogacy.

6. On behalf of the petitioner, it is submitted that the case of the Petitioners in the present proceedings is not different, considering the clear mandate of what has been observed by the Supreme Court, the petitioners also need to be granted such protection, so that they can proceed to undertake surrogacy procedure by not being impeded, with the condition as prescribed in para 1(d) in Form-2, as set out in the impugned rules dated 14th March 2023.

7. Our attention has also been drawn to a decision of the learned Single Judge of the Karnataka High Court in the case of *Smt. XXX Vs. Union of India & Anr.* deciding a batch of petitions, to contend that in similar circumstances noting the facts in each of the cases and considering the Orders passed by the Supreme Court as also the impugned rules dated 14 March 2023, the learned Single Judge had partly allowed the Writ Petitions holding that the Petitioners were entitled to opt for surrogacy in similar terms as directed by the Supreme Court in its orders in *Arun Muthuvel* case (supra).

8. It is thus submitted that considering the wife's medical condition as seen from the Medical Reports placed on the record of the present proceedings, it would amount to denial of the Petitioners of their legal right to achieve parenthood, if the conditions as contained in the impugned notification are made applicable. It is thus submitted that the reliefs be granted to the petitioners keeping open the challenge to the impugned rules dated 14 March

2023 which the petitioner would not press at this stage, being subject matter of consideration before the Supreme Court.

9. On the other hand Ms. Chavan, learned Assistant Government Pleader would not dispute as to what is clearly the consequence of the observations of the Supreme Court in the case of **Arun Muthuvel** (supra), as also as to what has been held by the Karnataka High Court. She submits that under the provisions of Section 12 of the Surrogacy Act, the State of Maharashtra has constituted a board by notification dated 14 March 2023 to look into such issues. She submits that it would have been appropriate for the petitioners to approach the said board whose function would be to assist surrogacy in terms of the Assisted Reproductive Technology Regulation Act, 2021 and the provisions of the Surrogacy Act. The notification to that effect which is dated 5th October 2023 is placed on record.

10. A reply affidavit is filed by Respondent No. 1 justifying the legality of the impugned rules, however, the contents of the affidavit are completely contrary to what has been observed by the Supreme Court in **Arun Muthuvel's** case (supra).

11. We have heard learned counsel for the parties. We have also perused the record. At the outset, we may observe that petitioner no. 1-wife has been diagnosed to be a known case of Von Hippel-Lindau Syndrome (VHL). Learned counsel for the petitioner has contended that her medical record

indicates that there is a “genetic disorder”, as the mother and younger brother of the wife have lost vision in the Left Eye. She was operated on the complications which have arisen from the illness on more than one occasion. The medical condition of the wife has also been described in paragraph 9 and 10 of the Petition. The medical documents are annexed at Exhibit-C of the Petition. The wife’s medical condition is described to be a rare medical condition which is a genetic abnormality having a high possibility of passing on the rare medical condition to the fetus, if the wife is to carry pregnancy. It is stated in the Petition that the several family members of the wife are having similar genetic issues. The details of which are set out in paragraph 11 of the Petition and for such reason, the Petitioners were advised to go for surrogacy to achieve parent hood. The IVF experts also opined that the oocytes of the wife would lead to the genetics defects to be passed on the child. It was also advised that even in normal cases, if a woman crosses the age of 35, the doctors do not prefer the mother’s oocytes for fertilization. It is in these circumstances, the petitioners had no alternative but to opt for surrogacy.

12. In the above circumstances, in our opinion, it is imperative for the petitioners to proceed to achieve parenthood by surrogacy, however, in doing so, the petitioners cannot be foisted with the compliance of the impugned rules, namely, Rule 1(d)(I), as set out in the notification dated 14 March, 2023, the reasons we would discuss hereafter. Also, the petitioners case would fall

within the parameters of what fell for consideration before the Supreme Court in **Arun Muthuvel** (supra), and the circumstances in which the Supreme Court directed that the rules as stipulated in the notification dated 14 March 2023, insofar as they prescribe the impugned conditions in Form 2, be not made applicable.

13. It is well settled that the reproductive health is a facet of personal liberty under Article 21 of the Constitution of India. However, when such right is required to be exercised by taking recourse to the procedure of Surrogacy, the Parliament has regulated the same by enactment of the Surrogacy Act. The Surrogacy Act makes provisions to regulate surrogacy clinics *inter alia* by prescribing strict conditions in regard to surrogacy clinics and the surrogacy procedures. It also makes provisions for prohibition of conducting surrogacy, as also makes a provision for “written informed consent of surrogate mother”; provision for prohibition to abandon child born through surrogacy, rights of surrogate child, number of oocytes or human embryos to be implanted, prohibition of abortion and several other aspects in relation to surrogacy. There are rules which are framed under the Act being “The Surrogacy (Regulation) Rules, 2022” under which Rule 7 provides for ‘consent of a surrogate mother’ and ordains that the consent of a surrogate mother shall be as specified in Form 2. It is under Rule 7, Form 2 has been amended under the impugned notification dated 14 March 2023, prescribing the conditions as noted above.

Rule 14 provides for medical indications necessitating gestational surrogacy.

Rule 7 and Rule 14 of 2022 Rules reads thus:

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

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 unicornuate uterus, T-shaped uterus) or if the uterus is surgically removed due to any medical conditions such as gynaecological 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.”

14. Thus, the statutory scheme under the Surrogacy Act read with the Rules prescribe a complete code on all matters governing surrogacy. It is clear that the intention of the legislation is to regulate surrogacy as also seen from the Statement of object and reasons leading to the enactment of the Surrogacy Act, which is to weed out incidents of unethical practices, exploitation of surrogate mother, abandonment of children born out of surrogacy and import of human embryos and gametes, which had led to widespread condemnation of commercial surrogacy in India.

15. It may however observed that in the present proceedings what falls for consideration is something which lies within the domain of the Surrogacy Act,

namely, as to whether the petitioners could be foisted with condition in paragraph 1(d)(I) as contained in the impugned rules dated 14 March, 2023. This more particularly, considering the observations of the Supreme Court in **Arun Muthuvel** (supra), when the medical condition of the wife does not support parenthood to be achieved by the couple by surrogacy by utilizing the wife's gamete.

16. In **Arun Muthuvel** (supra) considering the contentions of the petitioners that the substitution of para 1(d)(I) in Form 2 would impede the process of surrogacy intended by the Petitioners, the Supreme Court observed that the justification for necessitating gestational surrogacy in Rule 14 was all related to the intending women or the wife, which does not refer to the man/husband at all. It was observed that such provision was woman-centric and related to the medical or congenital condition of women which impedes her from become a mother. It was observed that the whole scheme of the Surrogacy Act revolved around the inability of the women to conceive and to give birth to a child and the medical intention necessitating gestational surrogacy in Rule 14, explained the various circumstances, which incapacitate or disable women from having a normal pregnancy and having child. The Supreme Court in these circumstances illustratively referring to Rule 14(a) observed that 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), [which defines “intending couple” means ‘*a couple who have a medical indication necessitating gestational surrogacy and who intend to become parents through surrogacy*’], cannot be given effect at all, even having regard to the scheme of the Surrogacy Act, which permits surrogacy subject to certain conditions being complied. It was further observed that when an intending woman avails of surrogacy, naturally she would have to use her own oocytes or eggs and donor’s sperm and conversely, when the woman in the intending couple is unable to produce oocytes or eggs, then donor oocytes or eggs are necessarily required to be made use of. It is in such context, the Court permitted that the impugned conditions as set out in the Notification dated 14 March, 2023 were required to be stayed, insofar as the petitioners before the Court were concerned. The relevant observations as made in this behalf in such context are required to be noted which read thus:-

“ 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."

17. It would also be necessary to refer to the observations of the learned Single Judge of the Karnataka High Court and more particularly on the perception of the Ministry of Health and Family Welfare, Government of India in the context of the impugned notification dated 14th March 2023. The relevant observations in that regard are in the paragraph 19 of the said decision, which reads thus:-

“19. If the medical conditions quoted of all the 1st petitioners in these cases are considered on the bedrock of the provisions quoted hereinabove, it would clearly indicate that they are entitled to opt for gestational surrogacy. The Act permits; the Rules permit; the Form appended to the Rules takes away the right of intending couple. In the light of the impugned amendment generating certain obfuscation, clarifications in the nature of instructions regarding non-genetic relation to the surrogate mother was sought for and a communication from the Ministry of Health and Family Welfare to all the States and Union Territories steered clear such obfuscation. After considering the issues that were necessary to be resolved the communication insofar as the present petition is concerned reads as follows:

“Accordingly, it is reiterated that any willing woman can act as surrogate mother on fulfillment of above conditions and hence it is not mandatory that the surrogate mother is genetically related to the Intending Couple or Intending Woman (as defined in the Surrogay (Regulation) Act, 2021).”

Thus, even according to the Ministry of Health and Family Welfare of the Government of India, it is not mandatory for the surrogate mother to be related to the intending couple. It stands to reason as, if, the intending couple have a medical condition that becomes impossible for the woman to conceive for a child, opting for surrogacy by a gamete which is not of the woman naturally would not be genetically related to the intending couple. To a pointed query to the battery of counsels representing the Union of India lead by the Deputy Solicitor General as to the rationale behind the amendment, no convincing answer has come about, nor is in print in the statement of objections. Therefore, in the considered view of the Court, though this Court finds the amendment blatantly contrary to law, is not answering the challenge, as the challenge is pending before the Apex Court. Therefore, I deem it appropriate not to annihilate the same.”

(emphasis supplied)

18. Our attention is also drawn to a subsequent Order dated 5.02.20254. passed by the Supreme Court in Arun Muthuvel (supra), wherein the Supreme Court has observed that persons like Petitioners would be at liberty to approach the jurisdictional High Courts seeking reliefs of the nature as prayed for in the present Petition and such Writ Petitions be considered having regard to the interim orders passed by the Supreme Court and in accordance with law. The Petitioners are thus justified in invoking the jurisdiction of the Court by filing the present Petition.

19. In the light of the above discussion, we are of the clear opinion that if the protection as prayed for is not granted to the Petitioners it would certainly prejudice their legal rights to achieve parenthood through surrogacy which they ought to be permitted without the insistence on the compliances of condition as stipulated under the impugned notification dated 14 March 2023.

20. Hence the following Order:-

a) It is ordered that the impugned notification dated 14 March 2023 shall not to be applied in the case of the Petitioners and the Petitioners would be entitled to opt for surrogacy, subject to the Petitioners fulfilling other conditions and requirement under the 2021 Act and Rules except the notification dated 14 March 2023.

- b) The challenge to the impugned notification dated 14 March 2023 is kept open as the same is subject matter of consideration before the Supreme Court.
- c) It is clarified that the present order is applicable only insofar as the petitioners are concerned.
- d) Rule is made absolute in the aforesaid terms.
- e) No costs.

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21. Rule. Returnable forthwith. Respondents waives service. By consent of the parties, heard finally.

22. The petitioners in this petition are similarly placed as in the aforesaid petition wherein we have permitted the petitioners to carry forward the surrogacy procedure without being foisted with the impugned rules as stipulated in the notification dated 14 March, 2023 (supra). The case of the petitioners is that the wife/petitioner no. 1 could not conceive due to various medical complications as set out in the writ petition. The petitioners approached various fertility clinics between the period 2015 to 2022 and experts in the field, for proper treatment, fertility study etc. with a hope of pregnancy. However, the petitioners failed to get any positive results out of the IUI as well as IVF procedures undergone. The petitioners have stated that there were two earlier pregnancies, out of which the first birth was a still birth

whereas the second birth was born alive and when sent to neonatal intensive care unit, the child did not survive. Because of persistent failures of the earlier procedures, the experts have opined the wife not to use her own eggs for having a child as the chances of having similar consequences, cannot be overruled out, which would be detrimental to the mental and emotional health of the petitioners. This also for the reason that the genetic changes would also occur in the mother's egg and which escalate by age. Hence, the petitioners contend that they were left with no option but to achieve parenthood by surrogacy.

23. In our opinion, considering such facts, the petitioners need to adopt the surrogacy procedure and in doing so, they cannot be foisted with the impugned rules (paragraph 1(d)(I) as contained in the notification dated 14 March, 2023. The petitioners would also be entitled to similar reliefs as granted in the aforesaid Writ Petition.

24. The petition is thus required to be allowed. It is, accordingly, allowed in terms of the following orders:-

- a) It is ordered that the impugned notification dated 14 March 2023 shall not to be applied in the case of the Petitioners and the Petitioners would be entitled to opt for surrogacy, subject to the Petitioners fulfilling other conditions and requirement under the 2021 Act and Rules except the notification dated 14 March 2023.

- b) The challenge to the impugned notification dated 14 March 2023 is kept open as the same is subject matter of consideration before the Supreme Court.
- c) It is clarified that the present order is applicable only insofar as the petitioners are concerned.
- d) Rule is made absolute in the aforesaid terms.
- e) No costs.

(FIRDOSH P. POONIWALLA, J.)

(G. S. KULKARNI, J.)