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(2024) 9 Supreme Court Cases 586

(*Record of Proceedings*)

2J

(BEFORE B.V. NAGARATHNA AND UJJAL BHUYAN, JJ.)

ABC .. Petitioner;

Versus

UNION OF INDIA AND OTHERS .. Respondents.

Writ Petitions (C) No. 756 of 2022† with Nos. 931 and 1129 of 2022, 42, 164, 487, 522 and 830 of 2023, decided on October 18, 2023

A. **Family and Personal Laws — Marriage, Divorce, Other Unions and Children — Surrogacy — Surrogacy (Regulation) Rules, 2022 — R. 14 — Meaning and requirements of — Clarified — Gestational surrogacy — Provision is woman-centric, relates to her inability to conceive and give birth to a child owing to medical or congenial condition, necessitating gestational surrogacy**

— Surrogacy (Regulation) Act, 2021 — Ss. 2(r), 2(zd), 2(zg), 4(ii)(a) and 4(iii)(a)(I) — Surrogacy (Regulation) Amendment Rules, 2023

B. **Family and Personal Laws — Marriage, Divorce, Other Unions and Children — Surrogacy — Surrogacy (Regulation) Rules, 2022 — R. 14, Form 2 Para 1(d)(I) (as substituted on 14-3-2023) — Prospective operation — Clarified**

— Process of surrogacy initiated by petitioner and her husband on 7-12-2022 i.e. long before substitution of Para (1)(d) — Amendment dt. 14-3-2023 preventing intending couple from achieving parenthood through surrogacy, which is prima facie contrary to intendment of the main provisions of the Surrogacy Act both in form and substance — Hence amendment i.e. Para 1(d) in Form 2 stayed insofar as petitioner is concerned — Surrogacy (Regulation) Act, 2021 — Ss. 2(r), 2(zd), 2(zg), 4(ii)(a) and 4(iii)(a)(I) — Surrogacy (Regulation) Amendment Rules, 2023

Held :

The justification for necessitating gestational surrogacy in Rule 14 of the Surrogacy (Regulation) Rules, 2022 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. (Paras 12 and 13)

A reading of Para 1 of Form 2 of the Surrogacy (Regulation) Rules, 2022 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 Para 1(*d*) is in the nature of a mandate prohibiting or permitting the use of gametes

† Under Article 32 of the Constitution of India

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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 is contrary to what is contemplated under Rule 14(*a*) of the Surrogacy Rules. Moreover, form as well as the substance of the amendment of Para 1(*d*) is not in tune with the form and substance of the pre-existing Paras 1(*a*)-1(*f*) of 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*). (Paras 14 and 15)

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. (Para 16)

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 Para (*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. (Para 17)

Secondly, the petitioner herein had commenced the procedure for achieving parenthood through surrogacy much prior to the amendment which has come into effect from 14-3-2023. Therefore, the amendment which is now coming in the way of the intending couple and preventing them from achieving parenthood through surrogacy, is, prima facie contrary to what is intended under the main provisions of the Surrogacy Act both in form as well as in substance. (Para 18)

In the said circumstances, the amendment i.e. Para 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 is concerned. (Para 19)

ABC v. *Union of India*, (2024) 9 SCC 593, *referred to*

R-D/71595/CV

Advocates who appeared in this case :

Sanjay Jain, Senior Advocate [Nalin Tripathi, Yuvraj Sharma, Nishant Tripathi, Padmesh Mishra, Ms Harshita Sukhija, Mrinmai Sagar, Ms Neelam Singh (Advocate-on-Record), Akshat Srivastava (Advocate-on-Record), Ms Mohini Priya (Advocate-on-Record), Ms Arundhati Katju, Ms Neha Nagpal, Malak Bhatt, Ms Supriya Julka, Ms Samridhi, Ms Ritika Singh, Himanshu, Malak Manish Bhatt (Advocate-on-Record), Mayank Pandey (Advocate-on-Record), Rudra Pratap Singh Solanki and Ashish Kr. Pandey, Advocates], for the Petitioner;

Ms Aishwarya Bhati, Additional Solicitor General [Gurmeet Singh Makker (Advocate-on-Record), Rajat Nair, Ketan Paul, Mayank Pandey, Ms Chitrangda Rashtravara, Ms Shivika Mehra, Rustam Chauhan, Abhijeet Singh, Pratham Sagar, Ms Shivani, Ms Ameyavikrama Thanvi (Advocate-on-Record) and Ivan (Advocate-on-Record), Advocates], for the Respondents.

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Chronological list of cases cited ***on page(s)***
1. (2024) 9 SCC 593, *ABC* v. *Union of India* 588*a-b*, 588*b-c*

ORDER

WP (C) No. 830 of 2023

1. Pursuant to our order and direction dated 9-10-2023[1], the Office of the District Medical and Health Officer (Chairperson, District Medical Board), Medchal-Malkajgiri-District has submitted its report dated 11-10-2023 after examining the petitioner herein.

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

> "Pursuant to order dated 9-10-2023[1], 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 20-2-2023 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."

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

4. During the course of submissions, our attention was drawn to Sections 2(*r*), 2(*zd*), 2(*zg*) and Sections 4(*ii*)(*a*) and 4(*iii*)(*a*)(I) of the Surrogacy (Regulation) Act, 2021 (for short "the 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 Para 1(*d*) thereof of the Surrogacy (Regulation) Rules, 2022 (for short "the Surrogacy Rules"). For the sake of immediate reference the same are extracted as under:

> "**2.** ***Definitions***.—(1) In this Act, unless the context otherwise requires—
>
> * * *
>
> (*r*) "**intending couple**" means a couple who have a medical indication necessitating gestational surrogacy and who intend to become parents through surrogacy;
>
> * * *

1 *ABC* v. *Union of India*, (2024) 9 SCC 593

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(*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;

* * *

(*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;

* * *

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

* * *

(*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.

* * *

(*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.

* * *"

Surrogacy Rules

"**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;

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(*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 gynaecological cancer;

(*b*) intended parent or woman who has repeatedly failed to conceive after multiple in vitro fertilisation 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.

* * *

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*)-(*c*) * * *

(*d*) the fertilisation of a donor oocytes by the sperm of the husband."

5. However, by the impugned Notification dated 14-3-2023*, the aforesaid Para 1(*d*) has been substituted as under:

"**1.** (*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."

6. The learned Senior Counsel appearing for the petitioner in WP No. 830 of 2023 submitted that the substitution of Para 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.

7. It was submitted that the said paragraph has been substituted with effect from 14-3-2023, 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 14-3-2023 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 fulfil her hope of achieving motherhood.

8. 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, Para 1(*d*) of Form 2 may not be applied to the petitioner herein.

* **Ed.**: The Surrogacy (Regulation) Amendment Rules, 2023

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9. Per contra, the learned ASG appearing for the respondents contended that the definition of "intending couple" read with the definition of "surrogate mother" read with Section 4(*ii*)(*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.

10. 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.

11. By way of reply, the 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.

12. 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.

13. 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.

14. We have closely perused the original Para 1(*d*) in Form 2 and the substituted Para 1(*d*). A reading of Para 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 Para 1(*d*) is in the nature of a mandate prohibiting or permitting the use of gametes of the

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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.

15. 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 Para 1(*d*) is not in tune with the form and substance of the pre-existing Paras 1(*a*)-(*f*) of 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*).

16. 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.

17. 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 Para (*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.

18. Secondly, the petitioner herein had commenced the procedure for achieving parenthood through surrogacy much prior to the amendment which has come into effect from 14-3-2023. 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.

19. In the said circumstances, the amendment i.e. Para 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.

20. 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.

21. Since the report in respect of other petitioners-applicants has not yet been received, list the matters on 21-11-2023.

Court Masters