



MAJESTY LEGAL
Advocates & Solicitors

NEW ERA IN SURROGACY LAW
ARUN MUTHUVEL VERSUS UNION OF INDIA & ORS.

A very propitious initiative has been taken towards providing essential support to couples facing infertility challenges due to severe medical conditions, who choose surrogacy with donor eggs to have a child. As per Notification dated 14-03-2023¹, issued by the Ministry of Health and Family Welfare ('Impugned Notification'), by which the use of donor gametes in surrogacy procedures was disallowed by amending Paragraph 1(d) of Form 2 under Rule 7 of the Surrogacy (Regulation) Rules, 2022 ('Surrogacy Rules') the egg and the sperm of an intending couple can only be used for gestational surrogacy. As a result, many couples with underlying medical conditions and unable to produce gametes were barred from accepting parenthood through this means. This amendment has given rise to a spate of petitions before various High Courts resulting in the Supreme Court stepping in. The petitioners had challenged the impugned notification by which the use of donor gametes has been disallowed by an amendment brought in the Surrogacy Rules, 2022. The Court is already considering this challenge to the Surrogacy Act in a bunch of public interest litigations (PIL)².

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¹ No. 179(E) dated 14/03/2023

² Writ Petition(s)(Civil) No(s). 756/2022

³ Majesty legal is a LAW FIRM established in 2013 by Ms. Mahi Yadav. Objective of this legal update is to provide insights on law, statutes and is personal in nature, not to be deemed as legal advice.

MINISTRY OF HEALTH AND FAMILY WELFARE

(Department of Health Research)

NOTIFICATION

New Delhi, the 14th March, 2023

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.

[F. No. U.11019/15/2022-HR]

GEETA NARAYAN, Jt. Secy.

Note : The Surrogacy (Regulation) Rules, 2022 were published in the Gazette of India, Extraordinary, Part II, Section 3, sub-section (i) vide G.S.R. 460 (E) dated 21st June, 2022 and the Surrogacy (Regulation) Amendment Rules, 2022 were published in the Gazette of India, Extraordinary, Part II, Section 3, sub-section (i) vide G.S.R. 772 (E) dated 10th October, 2022.

ITEM NOS.55 + 54

COURT NO.13

SECTION PIL-W

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

Writ Petition(s) (Civil) No(s). 756/2022

ARUN MUTHUVEL

Petitioner(s)

VERSUS

UNION OF INDIA & ORS.

Respondent(s)

(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. 197034/2022 - APPROPRIATE ORDERS/DIRECTIONS
IA No. 50391/2023 - CLARIFICATION/DIRECTION
IA No. 235190/2023 - INTERVENTION APPLICATION
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
IA No. 173949/2022 - INTERVENTION/IMPLEADMENT
IA No. 205941/2022 - INTERVENTION/IMPLEADMENT
IA No. 169226/2022 - INTERVENTION/IMPLEADMENT
IA No. 50390/2023 - 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)

IA No. 8968/2023 - APPLICATION FOR FILING THE PETITION WITHOUT
DISCLOSING THE IDENTITY OF THE PETITIONER/RESPONDENT

IA No. 14205/2023 - APPROPRIATE ORDERS/DIRECTIONS)

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. 190740/2023 - INTERVENTION/IMPLEADMENT



IA No. 164088/2023 - INTERVENTION/IMPLEADMENT
IA No. 162623/2023 - INTERVENTION/IMPLEADMENT
IA No. 154907/2023 - INTERVENTION/IMPLEADMENT
IA No. 116569/2023 - INTERVENTION/IMPLEADMENT
IA No. 115323/2023 - INTERVENTION/IMPLEADMENT)

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

(IA No.161812/2023-STAY APPLICATION)

WITH

W.P. (s) (C) No. 1316/2023 (X)

(FOR ADMISSION)

Date : 05-12-2023 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) Ms. Mohini Priya, AOR
Mr. Rajan Raj, Adv.
Ms. Eka Kumari Singh, Adv.
Ms. Aishwarya Sinha, Adv.

Mr. Saurabh Kirpal, Sr. Adv.
Ms. Neha Nagpal, Adv.
Mr. Malak M. Bhatt, Adv.
Ms. Supriya Julka, Adv.
Ms. Samridhi Nain, Adv.
Ms. Aditi Shrivastava, Adv.
Mr. Malak Manish Bhatt, AOR

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

Mr. Sanjay Jain, Sr. Adv.
Mr. Nalin Tripathi, Adv.
Mr. Yuvraj Sharma, Adv.
Mr. Nishank Tripathi, Adv.
Ms. Harshita Sukhija, Adv.
Mr. Mrinmai Sagar, Adv.
Ms. Neelam Singh, AOR

Mr. Akshat Srivastava, AOR
Mr. Abhay Pratap Singh, Adv.
Mr. Gaurav Singh, Adv.

For Respondent(s) Ms. Aishwarya Bhati, A.S.G.
Mr. Gurmeet Singh Makker, AOR
Mr. Rajat Nair, Adv.
Mr. Ketan Paul, Adv.
Ms./Mr. Shivika Mehra, Adv.
Mr. Rustom Chauhan, Adv.
Mr. Mayank Pandey, Adv.



Ms. Chitragda Rashtravara, Adv.

Mr. Ivan , AOR

Mr. Trideep Pais, Sr. Adv.

Ms. Shreya Munoth, AOR

Mr. Gautam Bhatia, Adv.

Ms. Sitamsini Cherukumalli, Adv.

Ms. Ameyavikrama Thanvi , AOR

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

Writ Petition (Civil) No. 1316 of 2023

Since notice has been issued in the matter being, W.P.(C) No. 42 of 2023, in the interest of consistency, we are issuing notice in this matter also to the respondents.

Learned counsel for the petitioner(s) to serve respondent- Union of India.

I.A. No. 138689 of 2023 in W.P.(C) No. 487 of 2023

Pursuant to our initial order dated 09.10.2023 and subsequent orders passed thereafter, the Director and Professor, IOG and Government Hospital for Women and Children at Egmore, Chennai- 600 008, representing the Members of the Medical Board, has submitted the medical report in a sealed cover, which has been opened. We have perused the report.

Learned counsel appearing for the applicant has also pointed out to the Diagnostics Laproscopy Report dated 08.01.2018 stating that the applicant suffers from MRKH syndrome owing to the absence of uterus. In the report dated 30.10.2023, it is also noted that the applicant has hypo plastic uterus and streak ovaries and that her uterus is not producing the embryo plantation and development of foetus.



In view of the above, the applicant's counsel submitted that the interim order dated 18.10.2023 in W.P.(C) No.830 of 2023 may also be granted in the case of this applicant also. In the earlier order dated 18.10.2023, we have stated as under: -

"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."

Following the said order, the amendment, i.e., Paragraph 1(d) (i) in Form '2', which is the consent of the surrogate mother and agreement for surrogacy read with Rule 7 of the Surrogacy (Regulation) Act, 2021 under the surrogacy Act is insofar as this applicant is concerned stayed. It is needless to observe that if the applicant otherwise fulfills all other conditions mentioned under the Act, she is entitled to proceed with the process of surrogacy.

The Interlocutory Application (I.A. No. 138689 of 2023) is, accordingly, allowed on the above terms.

I.A. No. 191808 of 2023 in W.P.(C) No. 487 of 2023

Ms. Mohini Priya, learned counsel appearing for the applicant submitted that the applicant is presently residing at Meerut in her paternal home and her treatment has also taken place in Meerut, Uttar Pradesh. Therefore, directions may be issued to the Chief



Medical Officer/District Medical Officer, Meerut, to conduct the medical examination of the applicant and to submit a report in a sealed cover to this Court on or before 30.12.2023.

Accepting the submission, direction as sought is issued. The applicant shall appear before the concerned Medical Board on 15.12.2023. Report to be submitted in a sealed cover by 30.12.2023. On receipt of the said report from the concerned Medical Board, the Registry is directed to put up this matter along with the report on 09.01.2024.

W.P. (C) No. 487 of 2023

This writ petition has been filed by four women seeking permission to proceed with surrogacy using donor eggs in light of their exceptional medical condition and at the same time, assailing notification dated 14.03.2023. They have also sought for reading down of Sections 2(1)(zg) of the Surrogacy (Regulation) Act, 2021, so as to permit them to use donor eggs/gametes as intending couple in order to attain parenthood through surrogacy.

We have heard Ms. Mohini Priya, learned counsel for the petitioners and Mr. Ketan Paul, learned counsel appearing for the respondents-Union of India and perused the material placed on record, particularly, the medical certificates which they have produced as annexures to the writ petitions.

Petitioners' counsel submitted that order dated 09.10.2023 passed by this Court in the case of "*Arun Muthuvel vs. Union of India and Others*" in Writ Petition (Civil) No. 765 of 2022 may be replicated in the case of these petitioners also and they may be referred to the concerned Medical Board so that on receipt of the



requisite medical opinion, interim orders may be made in the case of these petitioners also.

By a detailed order dated 09.10.2023, we had referred one of the applicants in Writ Petition(Civil) No(s). 487 of 2023 to the Medical Board and on seeking report from the Medical Board and on considering the same, the impugned notification was stayed insofar as that petitioner was concerned. Following the same, we direct that the writ petitioners herein may present themselves before the concerned District Medical Boards on or before 15.12.2023. The concerned District Medical Boards are directed to examine the respective petitioners-herein and to submit their report in a sealed cover to this Court so as to maintain the right of privacy of the petitioners and confidentiality in the matter. The said report shall be submitted to this Court on or before 30.12.2023.

On receipt of the said report from the concerned Medical Boards, the Registry is directed to put up this matter along with a report before this Court on 09.01.2024.

W.P. (C) No. 522 of 2023

In view of the interim order passed by this Court on 09.10.2023 in the case of "*Arun Muthuvel vs. Union of India and Ors.*" in Writ Petition(C) No. 756 of 2022 and the interim order passed today in Writ Petition(Civil) 487 of 2023, we have considered the submissions of the learned counsel appearing for the petitioners and learned counsel appearing for the respondents-Union of India and perused the material on record, particularly, Annexure P-3, which is the discharge summary issued by the Department of Health and Welfare, Government of West Bengal and noted the medical



condition of the first petitioner herein. In the facts and circumstances, order dated 09.10.2023 shall be replicated in this case also. In terms of the Surrogacy (Regulation) Act, 2021, the petitioner is directed to appear before the concerned Medical Board on 15.12.2023. The concerned Medical Board is directed to submit a report in a sealed cover to this Court so as to maintain the right of privacy of the petitioners herein and confidentiality in the matter. The said report shall be submitted to this Court on or before 30.12.2023.

On receipt of the said report from the concerned Medical Board, the Registry is directed to put up this matter along with a report before this Court on 09.01.2024.

I.A. No. 138444 of 2023 in W.P.(C) No. 487 of 2023

In view of the interim order passed by this Court on 09.10.2023 in the case of "*Arun Muthuvel vs. Union of India and Ors.*" in Writ Petition(C) No. 756 of 2022 and the interim order passed today in Writ Petition(Civil) 487 of 2023, we have considered the submissions of the learned counsel appearing for the petitioners and learned counsel appearing for the respondents-Union of India and perused the material on record, particularly, Annexure A-2 which is the certificate issued by the Bombay Hospital, Mumbai and noted the medical condition of the petitioner herein. In the facts and circumstances, order dated 09.10.2023 shall be replicated in this case also. In terms of the Surrogacy (Regulation) Act, 2021, the petitioner is directed to appear before the concerned Medical Board on 15.12.2023. The concerned Medical Board is directed to submit a report in a sealed cover to this Court so as



to maintain the right of privacy of the petitioners herein and confidentiality in the matter. The said report shall be submitted to this Court on or before 30.12.2023.

On receipt of the said report from the concerned Medical Board, the Registry is directed to put up this matter along with a report before this Court on 09.01.2024.

I.A. No. 208062 of 2023 in W.P.(C) No. 487 of 2023

In view of the interim order passed by this Court on 09.10.2023 in the case of "*Arun Muthuvel vs. Union of India and Ors.*" in Writ Petition(C) No. 756 of 2022 and the interim order passed today in Writ Petition(Civil) 487 of 2023, we have considered the submissions of the learned counsel appearing for the petitioners and learned counsel appearing for the respondents-Union of India and perused the material on record, particularly, Annexure A-2 which is the hysteroscopy report issued by the Fernandez Hospital, Hyderabad and noted the medical condition of the petitioner herein. In the facts and circumstances, the order dated 09.10.2023 shall be replicated in this case also. In terms of the Surrogacy (Regulation) Act, 2021, the petitioner is directed to appear before the concerned Medical Board on 15.12.2023. The concerned Medical Board is directed to submit a report in a sealed cover to this Court so as to maintain the right of privacy of the petitioners herein and confidentiality in the matter. The said report shall be submitted to this Court on or before 30.12.2023.



On receipt of the said report from the concerned Medical Board, the Registry is directed to put up this matter alongwith a report before this Court on 09.01.2024.

I.A. No. 191978 of 2023 in W.P.(C) No. 487 of 2023

In view of the interim order passed by this Court on 09.10.2023 in the case of "*Arun Muthuvel vs. Union of India and Ors.*" in Writ Petition(C) No. 756 of 2022 and the interim order passed today in Writ Petition(Civil) 487 of 2023, we have considered the submissions of the learned counsel appearing for the petitioners and learned counsel appearing for the respondents-Union of India and perused the material on record, particularly, Annexure A-1, which is the discharge summary issued by the Paras Cancer Centre, Gurgaon and noted the medical condition of the petitioner herein. In the facts and circumstances, the order dated 09.10.2023 shall be replicated in this case also. In terms of the Surrogacy (Regulation) Act, 2021, the petitioner is directed to appear before the concerned Medical Board on 15.12.2023. The concerned Medical Board is directed to submit a report in a sealed cover to this Court so as to maintain the right of privacy of the petitioners herein and confidentiality in the matter. The said report shall be submitted to this Court on or before 30.12.2023.

On receipt of the said report from the concerned Medical Board, the Registry is directed to put up this matter along with a report before this Court on 09.01.2024.



Rest of the matters/Interlocutory Applications

List on 09.01.2024.

(POOJA SHARMA)
COURT MASTER (SH)

(MALEKAR NAGARAJ)
COURT MASTER (NSH)

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