



\$~36, 38

\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P.(C) 6020/2023, CM APPL. 23600/2023**

DR RAVIKANT CHAUHAN & ANR. .... Petitioners

Through: Mr. Naveen R. Nath, Senior Advocate  
with Ms. Saumya Tandon,  
Mr. Siddarth Agarwal, Mr. Anirudh  
Agarwal, Mr. Arjun Basra,  
Ms. Kavita Nailwal and Ms. Disha  
Gupta, Advocates.

versus

UNION OF INDIA & ORS. .... Respondents

Through: Mr. Chetan Sharma, ASG with  
Mr. Apoorv Kurup, CGSC with  
Ms. Gauri Goburdhun, Mr. Akhil  
Hasija, Ms. Archana Surve,  
Ms. Avshreya Pratap Singh Rudy and  
Mr. Amit Gupta, Advocates for UOI.  
Mr. Santosh Kr. Tripathi, SC (Civil)  
GNCTD with Ms. Prashansa Sharma  
and Mr. Rishabh Srivastava,  
Advocates for R-2.  
Mr. Shiven Varma, Advocate for R-2.

+ **W.P.(C) 7033/2023, CM APPLs. 27369-27370/2023**

SACHIN ALANG & ANR. .... Petitioners

Through: Dr. S.K. Khatri and Mr. Sachin  
Kumar, Advocates.

versus

UNION OF INDIA THROUGH THE SECRETARY DEPARTMENT  
OF HEALTH RESEARCH .... Respondent



Through: Mr. Chetan Sharma, ASG with  
Mr. Apoorv Kurup, CGSC with  
Ms. Gauri Goburdhun, Mr. Akhil  
Hasija, Ms. Archana Surve,  
Ms. Avshreya Pratap Singh Rudy and  
Mr. Amit Gupta, Advocates for UOI.  
Ms. Arunima Dwivedi, CGSC with  
Ms. Avshreya Pratap, GP with  
Ms. Pinky Pawar and Mr. Aakash  
Pathak, Advocates for UOI.

**CORAM:**  
**HON'BLE THE CHIEF JUSTICE**  
**HON'BLE MR. JUSTICE SANJEEV NARULA**

**ORDER**  
**09.10.2023**

%

1. The Petitioners before this Court are intending couples availing surrogacy services under the Surrogacy (Regulation) Act, 2021 (“**Surrogacy Act**”), whose long-anticipated surrogacy procedures have been abruptly halted on account of the Notification No. 179(E) dated 14<sup>th</sup> March, 2023, issued by the Ministry of Health and Family Welfare (“**Impugned Notification**”). The Impugned Notification disallows the use of donor gametes in surrogacy procedures, by amending Paragraph 1(d) of Form 2 under Rule 7 of the Surrogacy (Regulation) Rules, 2022 (“**Surrogacy Rules**”). The Petitioners contend that this arbitrarily and unreasonably curtails access to legally regulated surrogacy services for infertile couples wherein either/both partner(s) are unable to generate viable gametes.

**The Factual Background**

2. Considering the substantial overlap in facts and grounds urged in the



two petitions, it is considered prudent to pass a consolidated order. To streamline proceedings and ensure clarity, our primary point of reference shall be W.P.(C) 6020/2023. Any distinct variations in factual circumstances or contentions will be explicitly addressed as we proceed with this order.

3. In W.P.(C) 6020/2023, Petitioner No. 2, the wife, faces challenging medical conditions marked by several health issues. Accordingly, the statutorily constituted Board has assessed her to be infertile, as she is unable to produce viable oocytes (eggs) and is at high risk for carrying gestational pregnancy. As a result, a Certification of Medical Indication (“**Certificate**”) dated 9<sup>th</sup> December, 2022 has been issued in favour of the Petitioners for availing surrogacy procedure as an advanced treatment for infertility. Based on the Certificate, the Petitioners pursued the In Vitro Fertilization (IVF) procedure using donor gametes (in the present case, donor eggs were used with the sperms of Petitioner No. 1), and an embryo was fertilised, which is currently cryogenically preserved under custody of Respondent No. 3. While the Petitioners were carrying out their search for a surrogate to carry the pregnancy to term, the Central Government issued the Impugned Notification which restrained surrogacy using donor eggs, and consequently, the Petitioners’ surrogacy process was halted.

4. Learned counsel for Petitioners in W.P.(C) 7033/2023, Dr. S.K. Khatri, submits that the Petitioners therein are similarly placed. After five years of unsuccessful attempts at conceiving a child, both naturally as well as through IVF, a Certificate was issued in favour of Petitioners dated 9<sup>th</sup> February, 2023. It was found that the wife had a case of severe PCOS



(Polycystic Ovarian Syndrome)/PCOD (Polycystic Ovarian Disease), rendering her unable to produce oocytes of a suitable quality for embryo formation. Dr. S.K. Khatri submits that the intending couple possess a fertilized embryo, being frozen since 25<sup>th</sup> January, 2022, however, during their search for an altruistic surrogate, the process was impeded due to issuance of the Impugned Notification.

### **Contentions and Analysis**

5. In the above circumstances, Petitioners challenge the Impugned Notification on several grounds. They contend that the Impugned Notification is a colourable exercise of power since it seeks to subversively amend the Surrogacy Act through an amendment of the Consent Form appended to Rule 7 of the Surrogacy Rules. It is also argued that the Impugned Notification gives effect to an invidious discrimination between similarly situated infertile couples incapable of carrying gestational pregnancy, by differentiating those couples where both partners are able to produce gametes from those where either/both cannot, without disclosing any intelligible basis for such differential treatment. Further, an amendment of this nature is stated to be in conflict with the stated object of the Assisted Reproductive Technology (Regulation) Act, 2021 (“**ART Act**”). Petitioners also argue that the Impugned Notification violates the Petitioners’ right to life and privacy, as it contravenes the right to reproductive autonomy and parenthood by punishing the Petitioners, and those similarly placed, for inability of either partner to produce their own gametes, which is otherwise a medically indicated basis for infertility.



6. On the other hand, it is submitted by the Respondent by way of affidavit that the decision was taken to disallow the use of donor gametes after due consideration by experts of the National Assisted Reproductive Technology and Surrogacy Board (“**National Board**”). The reasons for the same are two-fold: *firstly*, the Act itself prescribes that the child must be genetically related to both parents; and *secondly*, a child which is not biologically related to the couple would risk being rejected and abandoned by their parents. The first submission attempts to draw its strength from Section 2(1)(zg) of the Act<sup>1</sup>, whereby the phrase ‘genetically related to the intending couple’ has been interpreted to mean that the child must be related to both partners.

7. We have conducted comprehensive hearings, wherein we had the privilege of hearing arguments presented by Mr. Naveen R. Nath, Senior Counsel for Petitioners, and Mr. Chetan Sharma, Additional Solicitor General. We have also heard subject experts, Dr. Neena Malhotra and Dr. Neeta Singh from the All India Institute of Medical Sciences, as well as Dr. R.G. Patel, a distinguished member of the National Board, who are present in Court as per our direction. We express our gratitude for their assistance and expertise, which have contributed to our understanding of the problem at hand. Before we proceed to articulate our opinion, it is imperative to analyze the implications of the Impugned Notification, which has effectively

---

<sup>1</sup> (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;



substituted Paragraph 1(d) of Form 2<sup>2</sup>, an integral component appended to Rule 7 of the Surrogacy Rules. The amended paragraph now reads as follows:

*“1. That I understand that the methods of treatment may include:*

*....*

*“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.”*

For reference, the original clause previously read as follows:

*“1. That I understand that the methods of treatment may include:*

*....*

*(d) the fertilization of a donor oocyte by the sperm of the Husband”*

8. The original clause allowed for fertilization of a donor oocyte (egg) by the sperm of the husband. Thus, couples facing infertility issues, where the wife is unable to produce viable oocytes, could use donor eggs to fuse with the sperm of the husband, and the gestational pregnancy would be carried to term by the surrogate mother assisted by medical technologies recognized under the ART Act. The Impugned Notification introduces a significant change in the regulatory regime for surrogacy by expressly prohibiting the use of donor gametes in surrogacy procedures for couples as well as single women.<sup>3</sup> Thus, it is now mandatory for both the egg and sperm to originate from the intending couple undergoing surrogacy, and a similarly placed infertile couple would be disentitled from availing surrogacy services.

9. The interpretation of the expression “genetically related to the

---

<sup>2</sup> Form for Consent of the Surrogate Mother and Agreement for Surrogacy.

<sup>3</sup> It is noted that the issue pertaining to single women is not under consideration in the present case.



intending couple”, as used in the definition of ‘surrogate mother’ under Section 2(1)(zg) of the Surrogacy Act, is contingent upon a nuanced understanding of the term ‘intending couple’. Section 2(r) of the Surrogacy Act defines ‘intending couple’ as “a couple who have a medical indication necessitating gestational surrogacy and who intend to become parents through surrogacy”. Additionally, the objective of the ART Act is to provide assistance to *inter alia* infertile couples. Section 2(j) of the ART Act, defines ‘infertility’ to mean “the inability to conceive after one year of unprotected coitus or other proven medical condition preventing a couple from conception”. This definition, critically, confines the determination of infertility solely to medical parameters and precludes any arbitrary basis for its assessment. It is thus essential to harmonize both legislations in a manner that mitigates any potential conflicts between the law and established medical science. Such interpretation is guided by constitutional standards. Consequently, *prima facie*, the amendment to Form 2 is contradictory to the core principles of the two acts and their specific provisions.

10. The sole basis for denying surrogacy services to the Petitioners is the inability of one of them to produce gametes, which is on account of a medical condition recognized for infertility among couples. This amendment effectively renders the ART Act otiose, and engenders a fundamental conflict with the Act's stated objectives. It is paramount to note that the ART Act deliberately renounces the concept of ‘genetic purity’ by providing that a child born out of assisted reproductive technology procedures would be deemed as a biological child and entitled to all rights available to a ‘natural’



child.<sup>4</sup> Moreover, a consent form executed by the surrogate mother cannot surreptitiously alter the rights to parenthood of an intending couple as granted under the Surrogacy Act to parenthood. Furthermore, the amendment has the effect of exposing couples who have commenced surrogacy procedures under the old regime to criminal prosecution by virtue of Section 43 of the Surrogacy Act, raising significant legal and ethical concerns.

11. The crux of the matter lies in the apparent discrimination faced by infertile couples, where disparate treatment is meted out between infertile couples based on their ability to produce viable oocytes. In cases where a wife is able to produce viable oocytes, however is unable to carry a gestational pregnancy, the intending couple would be able to avail surrogacy procedures in accordance with law. However, should the wife not be able to produce viable oocytes, they would not be permitted to become parents through surrogacy. In light of the aforesaid submissions made by the learned counsel, *prima facie*, the Impugned Notification violates the basic rights of a married infertile couple to parenthood by denying them access to legally and medically regulated procedures and services. Further, the Impugned Notification does not disclose any rational justification, basis or intelligible criteria for discriminating between citizens based on their ability to produce gametes for the purpose of availing Surrogacy services.

### **Interim Directions**

---

<sup>4</sup> Section 31 of the ART Act.





12. While we have expressed our *prima facie* views on the matter, it is crucial to acknowledge a compelling reason, which is, in our opinion, sufficient for granting interim relief to the Petitioners. The Impugned Notification must logically be held to be prospective in its application. This conclusion is bolstered by the fact that the Petitioners had already secured the requisite Certificate of Medical Indication, as mandated under Section 4(iii)(a)(I) of the Surrogacy Act, from the Delhi State Level Medical Board, Department of Family Welfare, Government of NCT of Delhi, prior to the amendment taking effect. Furthermore, the process of embryo generation was initiated prior to the Impugned Notification being issued as well. The Petitioners have a cryogenically preserved fertilized embryo earmarked for surrogacy use, predating the amendment. As such, the Petitioners possess a vested and constitutionally protected right to parenthood. The amendment cannot be allowed to retroactively render their legally fertilized embryo unviable. On the legal front, it is worth noting that Mr. Chetan Sharma, learned Additional Solicitor General, does not contest the general principle of law that notifications are typically applied prospectively. Hence, this compelling argument reinforces the need for interim relief in favour of the Petitioners.

13. Regardless of the fate of the Impugned Notification with regards to the challenge to its *vires*, it is essential to recognize that the Petitioners have secured a right to access surrogacy services which stood crystallised with the issuance of the Certificate of Medical Indication issued under Section 4(iii)(a)(I) of the Surrogacy Act. Moreover, given the fact that the embryo was generated prior to the issuance of the Impugned Notification, the



Petitioners possess a legally enforceable entitlement to surrogacy. This right aligns with their basic civil, human and right to reproductive autonomy and parenthood.

14. For the foregoing reasons, Petitioners in both petitions are permitted to resume the process for gestational surrogacy using their respective preserved embryos, which were generated using donor oocytes fertilized by the husbands' sperms prior to the issuance of the Impugned Notification. The Respondents are directed to facilitate the same in accordance with the previously existing regime, and it is made clear that the conditions stipulated in the amended Form 2 shall not be insisted upon from the surrogate mother.

15. In light of the aforesaid, the present interim applications are disposed of.

16. List on 15<sup>th</sup> December, 2023.

**SATISH CHANDRA SHARMA, CJ**

**SANJEEV NARULA, J**

**OCTOBER 9, 2023**

*nk*