

THESE WRIT PETITIONS HAVING BEEN HEARD AND RESERVED FOR ORDERS ON 08.11.2023, COMING ON FOR PRONOUNCEMENT THIS DAY, THE COURT MADE THE FOLLOWING:-

ORDER

“All love begins and ends with motherhood, by which a woman plays the God. Glorious it is as the gift of nature, being both sacrosanct and sacrificial, though; now again, science has forced us to alter our perspective of motherhood”.

- ***ROBERT BROWN.***

Science or scientific development never ceases to surprise us; it always outmaneuvers us. We humans, therefore, should either change or become immaterial. Law is no exception. It is now the turn of law to appreciate, the variance in the concept of the divine duty, of motherhood metamorphosing, into split motherhood, *albeit*, in certain circumstances. The turn to appreciate this dichotomy forms the *fulcrum* of the issue in the *lis* and becomes the *kernel* of the *conundrum*.

2. Conglomeration of these cases raise a common challenge. The petitioners, in all these cases, seek to challenge the amendment brought about to the Surrogacy (Regulation) Rules, 2022, in terms of the notification dated 14-03-2023 issued by the Union of India, with particular challenge to the amendment to clause (1)(d) of Form No.2 of the Surrogacy Regulations. Therefore, they are considered together by this common order. I deem it appropriate to notice the facts petition by petition.

3. **Shorn** of unnecessary details, facts in brief, germane, are as follows:

W.P.No.15824 of 2023:

The petitioners are again husband and wife who get married in the year 2007. Being desirous of expanding their family, tired to conceive naturally, but have been unsuccessful for the last 16 years since the 1st petitioner is having bulky uterus with thick endometrium which hindered conceiving naturally. Therefore, are left with the only option surrogacy. Since, the notification prohibits it, they call in question the notification, as in the companion petitions.

W.P.No.22462 of 2023:

This petition is taken up as the lead petition. The petitioners get married on 26-05-2014. The 1st petitioner desirous of motherhood tries to conceive a child naturally and has been unsuccessful for the last 9 years. It is the averment in the petition that several unsuccessful procedures between the years 2019 and 2021 using her own eggs and her husband's sperm resulted in successful pregnancy, but suffered from early miscarriage and had to undergo 3 laparoscopic surgeries to her uterus. It is averred that despite considerable efforts, her uterus still harbors multiple uterine fibroids that intrude upon the uterine cavity. All efforts have been in vain, the risk of miscarriage looms large on every ensuing pregnancy is the medical opinion. Therefore, it is a case where the 1st petitioner cannot naturally conceive. Left with no choice the viable option left was surrogacy, but the impugned notification comes in the way of the intending couple, in as much as it prohibits using of a donor egg during surrogacy.

W.P.No.20476 of 2023:

The petitioners get married on 16-11-2016. Efforts of 7 years have led the couple nowhere for expansion of the family due to the 1st petitioner being a patient of "CKD" – Chronic Kidney Disease. Therefore, the grave medical condition has left the couple with no choice, but to opt for surrogacy. The option is taken away by the impugned notification.

W.P.No.20492 of 2023:

The petitioners are husband and wife having got married in the year 2018 and all the efforts of expansion of family have been in vain due to poor heart condition of the 1st petitioner. Therefore, the only method of becoming a mother was through surrogacy, which also is now rendered impossible due to the impugned notification. The impossibility is what has driven the petitioners to this Court.

W.P.No.22468 of 2023:

The petitioners are a couple who have got married on 12-10-2017 and have been unsuccessful for the last 6 years to

expand the family on account of poor ovarian reserve and low quality of eggs. All methods medically available except surrogacy have been exhausted by the couple and therefore, they attempt at surrogacy. The attempt is blocked by the notification. The blocking of which is called in question.

W.P.No.22470 of 2023:

The petitioners are husband and wife having married on 14-05-2007. Several attempts to conceive naturally have all been in vain. Surrogacy was the only way to bear a child, as the ART method which the petitioner underwent for 8 cycles also resulted in a failure. The medical advice is also to go in for surrogacy. The notification has come in the way. Therefore, the challenge.

W.P.No.22511 of 2023:

The petitioners get married on 22-04-2205. They are doctors themselves and have been unsuccessful in expanding the family close to 18 years now. Every method available have been exhausted by the 1st petitioner in pursuit of the desire to become a

mother. Surrogacy being the only option has also become a dream due to the impugned notification. Therefore, the challenge.

W.P.No.22515 of 2023:

The petitioners are husband and wife having married on 11-05-2014. Conceiving a child naturally has become a dream to the 1st petitioner due to her medical condition and therefore, the desire to become a mother by surrogacy appears to have been destroyed by the impugned notification. Therefore, the challenge is to the said destruction, like in the companion petitions.

W.P.No.22530 of 2023:

The petitioners are again husband and wife having married in the year 2011 and are unsuccessful in expanding their family for the reason that the wife cannot conceive. The only option left is by way of surrogacy, as every other method to bear a child have been unsuccessful and to opt for surrogacy the impugned notification is an impediment. Therefore, the challenge to the impugned impediment, as in the companion petitions.

W.P.No.22533 of 2023:

The petitioners are a couple having got married in the year 2012 and have been unsuccessful on several occasions due to medical conditions for the last 11 years to expand the family. Surrogacy being the only method and the impugned notification coming in the way, having challenged the said notification like in the companion petitions.

W.P.No.22536 of 2023:

The petitioners are a couple having married on 10-01-2021. All attempts of conceiving naturally becoming impossible for the last 3 years, have sought to have a child by way of surrogacy and the impugned notification comes in the way and therefore, the challenge, as is in the companion petitions.

W.P.No.22624 of 2023:

The petitioners in the subject petition are also husband and wife. The two get married on 10-09-2009 and the 1st petitioner has been unsuccessful for the last 12 years to conceive a child

naturally. The only option left to them was surrogacy and the impugned notification comes in the way, therefore, the challenge.

W.P.No.22631 of 2023:

The petitioners are husband and wife who get married in the year 2007 and the 1st petitioner has been unsuccessful for the last 16 years. They are keen on having a biological child and undergo In Vitro Fertilization on several attempts, but have all been unsuccessful, it is therefore, the only option left to them is surrogacy and the notification prohibits surrogacy and therefore, the petitioners call in question the notification, as it is called in question in the companion petitions.

4. Succinctly stated are the facts obtaining in each of the cases as afore-narrated. One stream that runs through all the petitions is the challenge to the impugned notification dated 14-03-2023 whereby clause (1)(d) of Form No.2 of Surrogacy Regulations are amended. The challenge is to the amendment.

5. Heard Sri Gautam S. Bharadwaj, learned counsel appearing for petitioners; Sri H Shanti Bhushan, learned Deputy Solicitor General of India; Smt Irfana Nazeer; Sri M.N. Kumar, learned Central Government Counsels for respondent No.1/Union of India and Smt Navya Shekhar, learned Additional Government Advocate, for respondent No.2/State in all these petitions.

CONTENTIONS:

PETITIONERS:

6. The learned counsel appearing for the petitioners Sri Gautam S. Bharadwaj, in all these cases, would vehemently contend that the notification which amends the table is contrary to the Act. The Act permits sourcing of eggs, but the table or the form denies it. He would take this Court through the documents appended to every one of the petitions. In his effort highlights medical condition of every one of the intending mothers to demonstrate that they are in such medical condition that it is impossible for them to conceive in a natural way through IVF, or through any other method and are left with no choice, but to bear a child through surrogacy.

7. The learned counsel would lay emphasis on several provisions of the **Surrogacy (Regulation) Act, 2021 (hereinafter referred to as the "Act" for short) and the Assisted Reproductive Technology (Regulation) Act, 2021 (hereinafter referred to as the "ART" for short)**, contending that the Act itself permits surrogacy on medical conditions, the notification takes it away. He has, therefore, challenged the said notification in all the cases insofar as the amendment to Form 2 as aforesaid.

THE UNION OF INDIA:

8. Per-contra, the Union of India led by a battery of counsels and the DSGI spearheading the submissions on behalf of the Union of India seeks to refute the submissions contending that if any interference would be made, it would tinker the object of the Act itself. There is a reason for the Union of India to bring in the Act due to rampant commercialization of surrogacy, which had become popular as "rent a womb". It is his submission that the Court should not interfere with the impugned notification. It is his further submission that the Apex Court is also seized of the issue and has

stayed the notification. He would submit that this Court should not pass any orders and leave it to the challenge before the Apex Court. All other counsels would toe the lines of the learned DSGI.

9. Learned counsel Sri. Gautam S. Bharadwaj joining issue to clarify would submit that the Apex Court has not stayed the notification in its entirety. It is only concerning one petitioner who had approached the Apex Court wherein the Apex Court permitted that petitioner to undergo surrogacy and insofar as the said petitioner has stayed the notification. He would contend that there would be no impediment for this Court to consider the issue raised and answer it. He would out of anguish submit that awaiting a decision at the hands of the State or this Court, one of the intending mother has already passed away. He would submit that all the petitioners have such medical conditions and their dream of becoming an intending mother through surrogacy should not be destroyed by procrastination.

10. I have given my anxious consideration to the submissions made by the respective learned counsel and have perused all the

available material on record. In furtherance whereof, what falls for consideration is, ***the tenability or sustainability of the impugned amendment qua clause (1) (d) of Form 2 of Surrogacy Regulations.***

JUDICIAL RECOGNITION OF SURROGACY:

11. Before embarking upon the consideration of the issue in the *lis*, I deem it appropriate, to notice two judgments rendered by the Apex Court, one in the case of ***BABY MANJI YAMADA V. UNION OF INDIA***¹ wherein the Apex Court considered what is surrogacy and elucidated on different kinds of surrogacy observing as follows:

"8. Surrogacy is a well-known method of reproduction whereby a woman agrees to become pregnant for the purpose of gestating and giving birth to a child she will not raise but hand over to a contracted party. She may be the child's genetic mother (the more traditional form for surrogacy) or she may be, as a gestational carrier, carry the pregnancy to delivery after having been implanted with an embryo. In some cases surrogacy is the only available option for parents who wish to have a child that is biologically related to them.

¹ (2008)13 SCC 518

9. The word "surrogate", from Latin "subrogare", means "appointed to act in the place of". The intended parent(s) is the individual or couple who intends to rear the child after its birth.

10. In traditional surrogacy (also known as the Straight method) the surrogate is pregnant with her own biological child, but this child was conceived with the intention of relinquishing the child to be raised by others; by the biological father and possibly his spouse or partner, either male or female. The child may be conceived via home artificial insemination using fresh or frozen sperm or impregnated via IUI (intrauterine insemination), or ICI (intracervical insemination) which is performed at a fertility clinic.

11. In gestational surrogacy (also known as the Host method) the surrogate becomes pregnant via embryo transfer with a child of which she is not the biological mother. She may have made an arrangement to relinquish it to the biological mother or father to raise, or to a parent who is themselves unrelated to the child (e.g. because the child was conceived using egg donation, germ donation or is the result of a donated embryo). The surrogate mother may be called the gestational carrier.

12. Altruistic surrogacy is a situation where the surrogate receives no financial reward for her pregnancy or the relinquishment of the child (although usually all expenses related to the pregnancy and birth are paid by the intended parents such as medical expenses, maternity clothing, and other related expenses).

13. *Commercial surrogacy is a form of surrogacy in which a gestational carrier is paid to carry a child to maturity in her womb and is usually resorted to by well-off infertile couples who can afford the cost involved or people who save and borrow in order to complete their dream of being parents. This medical procedure is legal in several countries including in India where due to excellent medical infrastructure, high international demand and ready availability of poor surrogates it is reaching industry proportions. Commercial surrogacy is sometimes referred to by the emotionally charged and potentially offensive terms "wombs for rent", "outsourced pregnancies" or "baby farms".*

14. *Intended parents may arrange a surrogate pregnancy because a woman who intends to parent is infertile in such a way that she cannot carry a pregnancy to term. **Examples include a woman who has had a hysterectomy, has a uterine malformation, has had recurrent pregnancy loss or has a health condition that makes it dangerous for her to be pregnant. A female intending parent may also be fertile and healthy, but unwilling to undergo pregnancy.***

(Emphasis supplied)

The Apex Court quotes illustrations where a woman has no choice but to become a mother through surrogacy. Medical condition was the foundation for the direction.

JUDICIAL INTERPRETATION OF RIGHT TO REPRODUCTIVE HEALTH:

The Apex Court, in a later judgment, in the case of **DEVIKA BISWAS V. UNION OF INDIA**² has held as follows:

" (ii) Right to reproductive health

110. Over time, there has been recognition of the need to respect and protect the reproductive rights and reproductive health of a person. Reproductive health has been defined as "the capability to reproduce and the freedom to make informed, free and responsible decisions. It also includes access to a range of reproductive health information, goods, facilities and services to enable individuals to make informed, free and responsible decisions about their reproductive behaviour". The Committee on Economic, Social and Cultural Rights in General Comment No. 22 on the Right to Sexual and Reproductive Health under Article 12 of the International Covenant on Economic, Social and Cultural Rights observed that "The right to sexual and reproductive health is an integral part of the right of everyone to the highest attainable physical and mental health."

111. This Court recognised reproductive rights as an aspect of personal liberty under Article 21 of the Constitution in Suchita Srivastava v. Chandigarh Admn. The freedom to exercise these reproductive rights would include the right to make a choice regarding sterilisation on the basis of informed consent and free from any form of coercion. The issue of informed consent in respect of sterilisation programmes was considered by Committee on the Elimination of Discrimination Against Women in A.S. v. Hungary, where the Committee found Hungary to have violated Articles 10(h), 12 and 16 para 1(e) of the Convention on the Elimination of All Forms of

² (2016)10 SCC 726

Discrimination Against Women by performing a sterilisation operation on A.S. while she was brought in for a Caesarean by making her sign a consent form that she did not fully understand. The Committee found that it was not plausible to hold that, in the brief period of 17 minutes commencing from her admission in the hospital to the completion of the surgical procedures, that the hospital personnel provided her with sufficient counselling and information about sterilisation, as well as alternatives, risks and benefits, to ensure that she could make a well-considered and voluntary decision to be sterilised. The Committee held:

"Compulsory sterilisation ... adversely affects women's physical and mental health, and infringes the right of women to decide on the number and spacing of their children. The sterilisation surgery was performed on the author without her full and informed consent and must be considered to have permanently deprived her of her natural reproductive capacity."

(Emphasis supplied)

The Apex Court holds that right to reproductive health is a facet of personal liberty under Article 21 of the Constitution. Reproductive health is the capacity to reproduce and the freedom to make informed, free and responsible decisions. Though the judgment of the Apex Court was rendered in a different circumstance, I deem it appropriate to reword it to the case at hand, only to emphasize on the fact, that right to reproductive health is held to be a facet of fundamental right. The concept of Surrogacy is not alien to judicial interpretation, as it did form elucidation by the Apex Court in **BABY MANJI YAMADA** *supra*.

CONCEPT OF SURROGACY:

12. In the light of what is considered by the Apex Court, a little elaboration on the concept of Surrogacy and its types would become necessary. Surrogacy is an arrangement in which a woman (surrogate) agrees to carry and give birth to a child on behalf of another person or couple (the intended, intending or commissioning parents). Surrogacy involves a process known as In Vitro Fertilization (IVF), a procedure by which, embryos are created in a lab and implanted into the surrogate. There are 2 types of surrogacy medically evolved, now known:

(i) **Gestational surrogacy:**

In gestational surrogacy, the surrogate's egg is not used in conception, therefore the surrogate (the gestational carrier) has no genetic link to the baby and is not a biological mother. The embryo transferred into the surrogate would be created using the intended parents' sperm and egg or at times, donor embryos also would be used.

(ii) **Traditional surrogacy:**

Traditional surrogacy involves an egg from the surrogate. Fertility treatment, either artificial insemination or even IVF is used with the intending father's sperm. In traditional surrogacy the surrogate carries the pregnancy and gives birth to a child that they are genetically related to.

The difference between the two is that, in gestational surrogacy, the baby born, has no genetic link to the surrogate; in traditional surrogacy, the baby has a genetic link to the surrogate.

13. Surrogacy became popularly known as a 'womb on rent', all over the globe. India had become a hub of commercial surrogacy, as rent a womb practice mushroomed in all parts of India, whereby, plenty of women impoverished, were being exploited by the affluent for taking the womb on rent. When such cases of exploitation became rampant, the Parliament thought it fit to regulate surrogacy in India. Therefore, a Bill came to be introduced which prohibits commercial surrogacy, but permits altruistic surrogacy. The altruistic surrogacy involves no monetary

compensation, to the surrogate mother other than medical expenses and insurance coverage during the said pregnancy. Commercial surrogacy, in contrast, was undertaken for monetary benefit or reward either in cash or kind exceeding the basic medical expenses and insurance coverage. The misuse of surrogacy and exploitation of woman became a heated debate in the Parliament which initially led to a Bill being introduced in the Parliament called the Surrogacy (Regulation) Bill, 2016. The Bill was debated in the Parliament. Certain corrections were suggested to the Bill. One such correction was that the baby need not be genetically related to the intending couple. This was accepted and finally the Act was promulgated on 25-12-2021. Therefore, Surrogacy is now regulated under the Act. Two enactments emerge more or less in the same time. The Act on 25-12-2021 and the ART on 18-12-2021. I deem it appropriate to consider certain provisions of the ART at the outset and then spring into the provisions of the Act.

THE ASSISTED REPRODUCTIVE TECHNOLOGY (REGULATION) ACT, 2021:

14. The Assisted Reproductive Technology (Regulation) Act, 2021 was promulgated for regulation and supervision of the assisted reproductive technology clinics, banks, prevention of misuse and for the purposes of generating safe and ethical practice of the technology services. The ART came into force on 18-12-2021. Certain provisions of the ART are germane to be noticed and they read as follows:

Section 2 deals with definition, Section 2(1)(a) deals with Assisted Reproductive Technology and it reads as follows:

"2. Definitions

(1) In this Act, unless the context otherwise requires,—

(a) "assisted reproductive technology" with its grammatical variations and Cognate expressions, means all techniques that attempt to obtain a pregnancy by handling the sperm or the oocyte outside the human body and transferring the gamete or the embryo into the reproductive system of a woman;"

In terms of Section 2(1)(a) Assisted Reproductive Technology would mean, all grammatical variations and cognate expressions, which would include all techniques that would attempt to obtain a

pregnancy, by handling the sperm or the oocyte outside the human body and transferring the gamete or the embryo into the reproductive system of a woman.

Section 2(1)(h) defines a gamete donor, it reads as follows:

"(h) "gamete donor" means a person who provides sperm or oocyte with the objective of enabling an infertile couple or woman to have a child;"

(Emphasis supplied)

Gamete donor as defined under Section 2(1)(h) would mean a person who provides sperm or oocyte with the object of enabling an infertile couple or woman to have a child.

2(1)(j) defines infertility and it reads as follows:

"(j) "infertility" means the inability to conceive after one year of unprotected coitus or other proven medical condition preventing a couple from conception;"

(Emphasis supplied)

Section 2(1)(j) depicting infertility would mean inability to conceive or other **proven medical condition preventing a couple from conception.**

Section 2(1)(t) defines Surrogacy Act and reads as follows:.

"(t) "Surrogacy Act" means the Surrogacy (Regulation) Act, 2021;"

Section 27 permits sourcing of gametes by ART banks and it reads as follows:

"27. Sourcing of gametes by assisted reproductive technology banks

(1) The screening of gamete donors, the collection, screening and storage of semen; and provision of oocyte donor, shall be done only by a bank registered as an independent entity under the provisions of this Act.

(2) The banks shall-

- a) obtain semen from males between twenty-one years of age and fifty-five years of age, both inclusive;*
- b) obtain oocytes from females between twenty-three years of age and thirty-five years of age; and*
- c) examine the donors for such diseases, as may be prescribed.*

(3) A bank shall not supply the sperm or oocyte of a single donor to more than one commissioning couple.

(4) An oocyte donor shall donate oocytes only once in her life and not more than seven oocyte shall be retrieved from the oocyte donor.

(5) All unused oocytes shall be preserved by the banks for use on the same recipient. or given for research to an organisation registered under this Act after seeking written consent from the commissioning couple.

(6) A bank shall obtain all necessary information in respect of a sperm or oocyte donor, including the name, Aadhaar number as defined in clause (a) of section 2 of the Aadhaar (Targeted Delivery of Financial and other Subsidies, Benefits and Services) Act, 2016 (18 of 2016), address and any other details of such donor, in such manner as may be prescribed, and shall undertake in writing from such donor about the confidentiality of such information.

Explanation: For the purposes of this section, the expressions-

- (i) "retrieval" means a procedure of removing oocytes from the ovaries of a woman;*
- (ii) "screening" means the genetic test performed on embryos produced through in-vitro fertilisation."*

Section 42 deals with power to make Rules and reads as follows:

"42. Power to make rules

(1) The Central Government may by notification make rules for carrying out the provisions of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for-

- a) the other powers and functions of the National Board under clause (g) of section 5;*

- b) *the other powers and functions of the State Board under clause (b) of sub-section (2) of section 8;*
- c) *the terms of office and other conditions of service scientific, technical and other employees of the National Registry under section 10;*
- d) *the other functions of the National Registry under clause (d) of section 11;*
- e) *the other functions of the appropriate authority under clause (h) of section 13;*
- f) *the other powers to be exercised by the appropriate authority under clause (d) of sub-section (1) of section 14;*
- g) *the format for granting of licences to the clinic or bank by the appropriate authority under sub-section (2) of section 14;*
- h) *the form and manner in which an application shall be made for registration and fee payable thereof under sub-section (2) of section 15;*
- i) *the facilities and equipments to be provided and maintained by the clinics and banks under sub-section (4) of section 15;*
- j) *the conditions, form and fee for application of renewal of the registration of clinic or bank under section 17;*
- k) *the manner in which an appeal may be preferred to the State Government or the Central Government under section 19;*
- l) *the criteria for availing the assisted reproductive technology procedures under clause (a) of section 21;*

- m) the medical examination of the diseases with respect to which the donor shall be tested under clause (b) of section 21;*
- n) the manner of making a complaint before a grievance cell and the mechanism adopted by the clinic under clause (f) of section 21;*
- o) the manner of providing information by the clinics and banks to the National Registry under clause (j) of section 21:*
- p) the amount of insurance coverage for oocyte donor under clause (b) of sub-section (1) of section 22;*
- q) the manner of maintaining the records by the clinics and banks under clause (a) of section 23;*
- r) the manner of collection of gametes posthumously under clause (f) of section 24;*
- s) the other duties of clinics under clause (h) of section 24:*
- t) the examination of the donors by the assisted reproductive technology banks for diseases under clause (c) of sub-section (2) of section 27;*
- u) the manner of obtaining information in respect of a sperm or oocyte donor by a bank under sub-section (6) of section 27;*
- v) the standards for the storage and handling of gametes, human embryos in respect of their security, recording and identification under sub-section (1) of section 28;*
- w) the manner of obtaining the consent of the commissioning couple or individual for perishing or donating the gametes of a donor or embryo under sub-section (2) of section 28;*

- x) *the manner of performing research on human gametes or embryo within India under sub-section (2) of section 30;*
- y) *the manner of entry and search by the National Board, the National Registry or the State Board or any officer authorised by it under sub-section (1) of section 40;*
- z) *any other matter which is to be, or may be prescribed, or in respect of which provision is to be made by rules."*

(Emphasis supplied)

In exercise of power conferred under Section 42, Rules have been promulgated, and those Rules have brought in certain forms. Form 13, as existing in terms of Rule 13(f)(viii) reads as follows:

"FORM 13

[Refer rule 13(f)(viii)]

CONSENT FORM FOR THE DONOR OF OOCYTES

1, Ms.....Address.....Mobile number.....AADHAAR card number,.....Willingly consent to donate my oocyte to couple/individual who are unable to have a child by other means. At this stage and to the best of my knowledge I am free of any infectious diseases or genetic disorders

I have had a full discussion with Dr.....(name and address of the clinician) on..... I have been counselled by.....(name and address of independent counsellor) on,.....

(I understand that there will be no direct or indirect contact between me and the recipient, and my personal identity will not be disclosed to the recipient or to the child born through the use of my gamete.: If applicable)

I understand that I shall have no rights whatsoever on the resulting offspring and vice versa.

I understand that the method of treatment may include:

- 1. Stimulating my ovaries for multifollicular development.*
- 2. The recovery of one or more of my eggs under ultrasound-guidance or by laparoscopy under sedation or general anesthesia.*
- 3. The fertilization of my oocytes with recipient's husband's or donor sperm and transferring the resulting embryo into the recipient.*

I understand and accept that the drugs that are used to stimulate the ovaries to raise oocytes have temporary side-effects like nausea, headaches and abdominal bloating. Only in a small proportion of cases, a condition called ovarian hyperstimulation occurs where there is an exaggerated ovarian response. Such cases can be identified ahead of time but only to a limited extent. Further, at times the ovarian response is poor or absent in spite of using a high dose of drugs. Under these circumstances, the treatment cycle will be cancelled.

Name, address and signature of woman

Endorsement by the ART clinic

I/we have personally explained to.....the details and implications of her signing this consent/approval form, and made sure to the extent humanly possible that she understands these details and implications.

Name, address and signature of the Witness from the clinic

Name and signature of the Doctor

Name and address of the ART clinic

Name and address of the ART Bank that recruited and screened the donor

Date:.....

(This form will be filled by the ART clinic but a copy of the same has to be maintained by the ART bank in case the donor was recruited and screened by the bank)"

The afore-quoted are the provisions of the ART that requires consideration in the case at hand.

SURROGACY (REGULATION) ACT, 2021:

15. Now, I deem it appropriate to dive into the provisions of the Act. Section 2 deals with definitions. Section 2(b), (g), (h), (i), (n), (r), (s), (zf), (zg) are necessary to be considered and they run as follows:

"2. Definitions

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

....

(b) "altruistic surrogacy" means the surrogacy in which no charges, expenses, fees, remuneration or monetary incentive of whatever nature, except the medical expenses and such other prescribed expenses incurred on surrogate mother and the insurance coverage for the surrogate mother, are given to

the surrogate mother or her dependents or her representative;

.....

(g) *"commercial surrogacy" means commercialisation of surrogacy services or procedures or its component services or component procedures including selling or buying of human embryo or trading in the sale or purchase of human embryo or gametes or selling or buying or trading the services of surrogate motherhood by way of giving payment, reward, benefit, fees, remuneration or monetary incentive in cash or kind, to the surrogate mother or her dependents or her representative, except the medical expenses and such other prescribed expenses incurred on the surrogate mother and the insurance coverage for the surrogate mother;*

(h) *"couple" means the legally married Indian man and woman above the age of 21 years and 18 years respectively;*

(i) "egg" includes the female gamete;

.....

(n) "gamete" means sperm and oocyte;

.....

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

(s) "intending woman" means an Indian woman who is a widow or divorcee between the age of 35 to 45 years and who intends to avail the surrogacy;

.....

(zf)) *"surrogacy procedures" means all gynaecological, obstetrical or medical procedures, techniques, tests,*

practices or services involving handling of human gametes and human embryo in surrogacy;

(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:"

(Emphasis supplied)

Section 2(b) defines altruistic surrogacy. A method of surrogacy which does not involve any commercial aspect except medical expenses. Commercial surrogacy as defined under Section 2(1)(g) deals with a human embryo put to trade. 2(h) defines a couple to be an Indian man and woman married. **2(i) defines an egg to be a female gamete. 2(n) defines a gamete, to mean sperm and oocyte. 2(r) defines intending couple to mean, a couple who have a medical condition necessitating gestational surrogacy.** 2(s) defines an intending woman to be an Indian woman including a widow or a divorcee between the age of 35 to 45. 2(zf) which deals with surrogacy procedures, means gynecological, obstetrical or medical procedures, involving handling of human gametes and human embryo in surrogacy. 2(zg) defines

a surrogate mother which would mean a woman who agrees to bear a child.

Chapter-III deals with Regulation of surrogacy and surrogacy procedures.

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

- I. *no place including a surrogacy clinic shall be used or cause to be used by any person for conducting surrogacy or surrogacy procedures, except for the purposes specified in clause (ii) and after satisfying all the conditions specified in clause (iii);*
- 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.

Explanation.—For the purposes of this sub-clause and item (I) of sub-clause (a) of clause (iii) the expression "gestational surrogacy" means a practice whereby a surrogate mother carries a child for the intending couple through implantation of embryo in her womb and the child is not genetically related to the surrogate mother;

- b) when it is only for altruistic surrogacy purposes;**
- c) when it is not for commercial purposes or for commercialisation of surrogacy or surrogacy procedures;**
- d) when it is not for producing children for sale, prostitution or any other form of exploitation; and**
- e) any other condition or disease as may be specified by regulations made by the Board;**

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 women necessitating gestational surrogacy from a District Medical Board. Explanation: For the purposes of this item, the expression "District Medical Board" means a medical board under the Chairpersonship of Chief Medical Officer or Chief Civil Surgeon or Joint Director of Health Services of the district and comprising of at least two other specialists, namely, the chief gynaecologist or obstetrician and chief paediatrician of the district;*
- II. *an order concerning the parentage and custody of the child to be born through*

surrogacy, has been passed by a court of the Magistrate of the first class or above on an application made by the intending couple or the intending woman and the surrogate mother, which shall be the birth affidavit after the surrogate child is born; and

- III. an insurance coverage of such amount and in such manner as may be prescribed in favour of the surrogate mother for a period of thirty-six months covering postpartum delivery complications from an insurance company or an agent recognised by the Insurance Regulatory and Development Authority established under the Insurance Regulatory and Development Authority Act, 1999 (41 of 1999);*

(b) the surrogate mother is in possession of an eligibility certificate issued by the appropriate authority on fulfilment of the following conditions, namely:-

- I. no woman, other than an ever married woman having a child of her own and between the age of 25 to 35 years on the day of implantation, shall be a surrogate mother or help in surrogacy by donating her egg or oocyte or otherwise;***
- II. a willing woman shall act as a surrogate mother and be permitted to undergo surrogacy procedures as per the provisions of this Act: PROVIDED that the intending couple or the intending woman shall approach the appropriate authority with a willing woman who agrees to act a surrogate mother;***
- III. no woman shall act as a surrogate mother by providing her own gametes;***

IV. no woman shall act as a surrogate mother more than once in her lifetime:

PROVIDED that the number of attempts for surrogacy procedures on the surrogate mother shall be such as may be prescribed; and

V. a certificate of medical and psychological fitness for surrogacy and surrogacy procedures from a registered medical practitioner;

(c) an eligibility certificate for intending couple is issued separately by the appropriate authority on fulfilment of the following conditions, namely:-

(I) the intending couple are married and between the age of 23 to 50 years in case of female and between 26 to 55 years in case of male on the day of certification;

(II) the intending couple have not had any surviving child biologically or through adoption or through surrogacy earlier: PROVIDED that nothing contained in this item shall affect the intending couple who have a child and who is mentally or physically challenged or suffers from life threatening disorder or fatal illness with no permanent cure and approved by the appropriate authority with due medical certificate from a District Medical Board; and

(III) such other conditions as may be specified by the regulations."

(Emphasis supplied)

Section 4(iii)(b) mandates the manner in which the mother has to secure the eligibility certificate from the hands of the appropriate

authority on fulfilling various conditions. Sub clause (V) of Section 4(iii)(b) directs that a certificate of medical and psychological fitness for surrogacy and surrogacy procedures be obtained by a registered medical practitioner. Therefore, medical and psychological fitness is a mandate for issuance of a certificate.

Section 6 deals with written informed consent of surrogate mother and reads as follows:

"6. Written informed consent of surrogate mother

1. No person shall seek or conduct surrogacy procedures unless he has-

- i. Explained all known side effects and after effects of such procedures to the surrogate mother concerned; and*
- ii. Obtained in the prescribed form, the written informed consent of the surrogate mother to undergo such procedures in the language she understands.*

2. Notwithstanding anything contained in subsection (1), the surrogate mother shall have an option to withdraw her consent for surrogacy before the implantation of human embryo in her womb."

Section 8 deals with rights of surrogate child and reads as follows:

"8. Rights of surrogate child

A child born out of surrogacy procedure, shall be deemed to be a biological child of the intending couple or intending woman and the said child shall be entitled to all the rights and privileges available to a natural child under any law for time being in force."

Section 8 gives a right to the child born out of surrogacy to be deemed to be a biological child of the intending couple or the intending woman and such child would be entitled to all rights and privileges as is available to a natural child.

Section 50 deals with power to make Rules. In exercise of power conferred under Section 50 of the Act, **Surrogacy (Regulation) Rules, 2022** are promulgated by the Central Government on 21-06-2022. **Rule 14 thereof forms the marrow of the *lis***. It reads as follows:

"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 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 a woman to carry a pregnancy to viability or pregnancy that is life threatening.”***

(Emphasis supplied)

Rule 14 deals with medical indications necessitating gestational surrogacy. Rule 14(a) permits gestational surrogacy to a woman who has no uterus or missing uterus or abnormal uterus or other medical conditions such as gynaecological cancer; clause (b) permits an intended parent or a woman who has repeatedly failed to conceive after multiple In vitro Fertilization or Intracytoplasmic sperm injection attempts; clause (c) permits gestational surrogacy on multiple pregnancy losses resulting in an unexplained medical reason; clause (d) permits such illness that makes it impossible for a woman to carry pregnancy or pregnancy would become life threatening. Rule 14 is not nebulous, it does contain all the conditions – medical conditions that would permit a woman to opt

for gestational surrogacy. Therefore, the Act recognizes who is an intending couple to mean, any medical indication necessitating gestational surrogacy. Though medical condition is not defined under the Act, Rule 14 makes it clear *qua* the conditions that would inure to the benefit of a woman who wants to opt for surrogacy.

THE CHALLENGE:

16. It now becomes germane to notice the challenge. The stream of challenge in all these cases, is Form 2 as is appended to Rule 7. In the light of the challenge being to the Form, I deem it appropriate to juxtapose the Form hitherto subsisting, and the amendment to the Form that is under challenge, now notified. The Form earlier is as follows:

**"FORM 2
[See rule 7]
Consent of the Surrogate Mother and
Agreement for Surrogacy**

*I, (the woman), agedYears
(address) (Aadhar Number), having
..... (Number of children) child/children(age in
years) of my own have agreed to act as a surrogate mother
for Intending couple/intending woman Name
Husband Name Wife/ Intending woman Age
..... Husband Age Wife/Intending womanhad a
full discussion with Dr. of the Surrogacy clinic on
..... in regard to the matter of my acting as a
surrogate mother for the child/children of the above couple.*

1. *That I understand that the methods of treatment may include:*
 - a) *stimulation of the genetic mother for follicular recruitment;*
 - b) *the recovery of one or more oocytes from the genetic mother by ultrasound-guided oocyte recovery or by laparoscopy;*
 - c) *the fertilization of the oocytes from the genetic mother with the sperm of her husband;*
 - d) ***the fertilization of a donor oocyte by the sperm of the husband;***
(now substituted by the impugned notification)
 - e) *the maintenance and storage by cryopreservation of the embryo resulting from such fertilization until, in the view of the medical and scientific staff, it is ready for transfer;*
 - f) *implantation of the embryo obtained through any of the above possibilities into my uterus, after the necessary treatment if any.*
.....”

(Emphasis supplied)

IMPUGNED NOTIFICATION:

The gazette notification dated 14-03-2023 which is the *fly in the ointment* reads as follows:

"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."

(Emphasis supplied)

The amendment is that the couple undergoing surgery must have both gamete from the intending couple and donor gametes is not allowed. It specifically, pins at an intending couple, but not to any others. The purport of the amendment is that both the husband and the wife must have their own gamete and not donor gamete. In the considered view of the Court, this throws Rule 14 (*supra*) to

the winds. An amendment to a Form, is trite, that it cannot run counter to the Act or the Rules. Rule 14 permits gestational surrogacy to be availed by a women who have medical conditions. Medical conditions are also defined under Rule 14. The situation now that has emerged is, what the Act recognizes, Rule permits, a Form appended to the Rule washes it away, in effect, the Form appended to the Rule – the consent Form, takes away the right or liberty granted to opt for surrogacy in terms of Rule 14, particularly to the intending couple. Rule 14 is framed in exercise of power conferred under Section 50 of the Act. Rule 14 permits an intending couple to opt for surrogacy on medical conditions. Medical conditions are also depicted under Rule 14. The Rule that permits surrogacy is taken away by the impugned notification which is an amendment to the consent Form of surrogacy.

17. It is trite law that a Form cannot control the Act or the Rules and if permitted to remain, would be akin to permitting the *tail to wag the dog*. In the circumstances, reference being made to the judgment of the Apex Court in the case of **KERALA STATE**

ELECTRICITY BOARD v. THOMAS JOSEPH³ would be apposite

and it reads as follows:

"66. *At this stage, it is apposite to state about the rule making powers of a delegating authority. If a rule goes beyond the rule making power conferred by the statute, the same has to be declared invalid. If a rule supplants any provision for which power has not been conferred, it becomes invalid. The basic test is to determine and consider the source of power, which is relatable to the rule. Similarly, a rule must be in accord with the parent statute, as it cannot travel beyond it.*

67. *Delegated legislation has come to stay as a necessary component of the modern administrative process. Therefore, the question today is not whether there ought to be delegated legislation or not, but that it should operate under proper controls so that it may be ensured that the power given to the Administration is exercised properly; the benefits of the institution may be utilised, but its disadvantages minimised. The doctrine of ultra vires envisages that a rule making body must function within the purview of the rule making authority conferred on it by the parent Act. As the body making rules or regulations has no inherent power of its own to make rules, but derives such power only from the statute, it has to necessarily function within the purview of the statute. Delegated legislation should not travel beyond the purview of the parent Act. If it does, it is ultra vires and cannot be given any effect. Ultra vires may arise in several ways; there may be simple excess of power over what is conferred by the parent Act; delegated legislation may be inconsistent with the provisions of the parent Act or statute law or the general law; there may be non-compliance with the procedural requirement as laid down in the parent Act. It is the function of the courts to keep all authorities within the confines of the law by supplying the doctrine of ultra vires.*

68. *In this context, we may refer with profit to the decision in General Officer Commanding-in-Chief v. Dr.*

³ 2022 scc online sc 1737

Subhash Chandra Yadav reported in (1988) 2 SCC 351, wherein it has been held as follows:—

"14.before a rule can have the effect of a statutory provision, two conditions must be fulfilled, namely, (1) it must conform to the provisions of the statute under which it is framed; and (2) it must also come within the scope and purview of the rule making power of the authority framing the rule. If either of these two conditions is not fulfilled, the rule so framed would be void....."

69. In Additional District Magistrate (Rev.) Delhi Admn. v. Siri Ram reported in (2000) 5 SCC 451, it has been ruled that it is a well recognised principle that the conferment of rule-making power by an Act does not enable the rule-making authority to make a rule which travels beyond the scope of the enabling Act or which is inconsistent therewith or repugnant thereto."

If the law as laid down by the Apex Court is brought into the facts of the case, it would undoubtedly take away the amendment from the Statute.

MEDICAL CONDITIONS OF THE PETITIONERS:

18. In the light of the preceding analysis, I now deem it appropriate to notice the medical condition of each of the petitioners on the touchstone of Rule 14. They are quoted petitioner by petitioner:

18.1. The **1st petitioner** in **W.P.No.15824 of 2023** has following medical condition:

“TO WHOM SO EVER IT MAY CONCERNED

Case summary of Mrs.XXXX, 41 years, married for 16 years.

History of molar pregnancy for 2 times 13 years back

History of AUB + anemia (Adenomyosis) - presently on Tab. Regesterone

Mrs. xxx-43 years. Semen analysis Normoz spermia and DFI-7.9%

Menstrual History: 15-20 days/2 months with heavy flow+, spasmodic dysmenorrhoea+

Marital History: Married for 17 years. Non Consanguinous marriage.

Family History: Mother hypertensive

Past History: History of migraine

Past treatment History:

History of Diagnostic Hysteroscopy at BACC on 12/06/2008

Endometrial Biopsy (23/05/2008) - Cytoglandular hyperplasia

2010 – BACC - 1 cycle of IVF cancelled due to poor response

2015 – Nova - 1 cycle of IUI - Failed to conceive

2015 – Nova - 1 cycle of IVF - cancelled at Nova due to poor response

2017 – Gunasheela - Underwent Donor egg IVF programme (with own sister as Donor + Anonymous Donor). 3 cycles FET (1 cycle with Euploid embryo) - Failed to conceive

Came to Milann in June 2021, advised IVF/ICSI with donor egg in view of poor ovarian reserve

19/08/2021 - Stimulation started for IVF cycle for Donor"

(Emphasis added)

The opinion is, motherhood can happen only with a donor egg in view of the poor ovarian reserve, as several attempts even through IVF have been of no avail.

18.2. The **1st petitioner** in **W.P.No.22462 of 2023** is said to be having the following medical condition:

"26th Aug 2023

To,

Whom so ever it may concern

Re: XXXX (DOB:17th May 1986)

Medical History:

The above said patient of mine has undergone multiple IVF procedures using her own Oocytes (eggs) and husband's sperms which did not yield a baby. She also suffered an early miscarriage in one of her IVF procedures.

She has also undergone 3 laparoscopic surgical procedures in her uterus. She still had multiple uterine fibroids encroaching into the uterine cavity reducing possibilities of pregnancies implanting as well as increasing chances of a miscarriage.

She has had a Donor Oocyte IVF (and embryos made) prior to the change in law. Surrogacy has been delayed due to new legal challenges.

Advice:

Considering all the surgical and IVF procedures she has undergone I would consider it unsafe for her to proceed with further Ovarian stimulation and IVF. Therefore I recommend her towards Oocyte Donor and Surrogacy as this will help her start her family."

(Emphasis added)

The petitioner as she has undergone 3 laparoscopic surgical procedures in her uterus is declared impossible to conceive and recommendation for an oocyte donor and surrogacy is the remedy.

18.3. The **1st Petitioner** in **W.P.No.20476 of 2023** has the following medical condition:

"TO WHOMSOEVER IT MAY CONCERN

*This is to certify that Mrs XXXX, 32 year old, wife of Mr xxx, 38 year old with Hospital Registration number JYN 2022-11-055, has been visiting Milan Hospital, JP Nagar for fertility treatment. **She is a known case of IgA Nephropathy with chronic kidney disease and has been consulting Dr Prashanth C Dheerendra (Reports enclosed) for the same and is currently undergoing peritoneal dialysis. Due to her medical condition, embarking on fertility treatment such as ovarian stimulation and embryo transfer would result in supraphysiological levels of various hormones like estrogen and progesterone, which will be detrimental to her health and would cause worsening of her kidney disease.** Hence it has been advised that they go for donor egg stimulation with ICSI of husband sperm, followed by surrogacy."*

(Emphasis added)

She is a patient of chronic kidney disease, which is worsening. Therefore, only a donor egg stimulation with the husband's sperm followed by surrogacy, is the answer.

18.4. The **1st petitioner** in **W.P.20492 of 2023** dies during the pendency of the petition dreaming of motherhood.

18.5. The **1st Petitioner** in **W.P.22468 of 2023** has the following medical condition:

"TO WHOMSOEVER IT MAY CONCERN

This is to certify that Mrs. xxxx aged 42 years w/o Mr.xxxx aged 45 years (MR NO: BLR-SIV-2018-11-175/176) are married since 2017. They have attempted multiple cycles of ovulation induction and timed intercourse since July 2017 which failed. Four cycles of intrauterine insemination with husband sperms done in 2018 failed. She took Ayurveda medication to conceive for about 6 months in 2019. Couple underwent IVF/ICSI with self eggs and husband sperms in 2020 with Mathrutva Fertility Centre, Bangalore which failed.

Couple underwent IVF/ICSI with donor eggs and husband sperms in 2022 which failed. Donor eggs IVF was recommended as the patient was 41 years of age with poor ovarian reserve. Couple have 6 (4AA) blast embryos frozen on 14-04-2022. Frozen embryo transfer was done on 20-05-222 which failed.

Because of advanced age of the husband (45 years) the quality of semen / sperms is expected to be on the lower side now. As patient is a case of recurrent implantation failure and is of advanced age we recommend the remaining frozen embryos (donor

egg and husband sperm) to be transferred to a surrogate for conception.

Please do the needful.

Thanking you,"

(Emphasis added)

Again it is a case of poor ovarian reserve. The couple have also tried with frozen embryo which has failed. Therefore, it is only surrogate conception that can help.

18.6. The **1st Petitioner** in **W.P.No.22470 of 2023** has the following medical condition:

"TO WHOMSOEVER IT MAY CONCERN

This is to certify that Mrs. xxx (UHID: 100029560), 43 years w/o Mr.xxxx, 46 years are my patients since 21st July 2021. Before being referred to me, the couple have been undergoing treatment elsewhere. Synopsis of the treatment undergone as below –

- 1. The couple have been married for 16 years and have been trying to conceive for 13 years since 2010 with h/o secondary infertility.**
- 2. 7 cycles of IUI and 1 cycle of own oocyte IVF which failed and did not result in pregnancy.**
- 3. Follicular study results have shown that the quantity and quality of the follicles are low, hence the patient was advised for donor oocytes IVF.*

4. Post which the patient underwent a Donor IVF cycle with one fresh ET with 2 embryos which did not result in pregnancy.

5. The patient has also undergone one cycle of donor IVF with one frozen embryo transfer at our center, which also did not result in pregnancy.

The aforesaid treatment history shows very low ovarian reserve requiring donor oocytes for embryos, coupled with thin endometrium, h/o several failed IUI and IVF Cycles and considering the age of the patient, couple is advised to go for surrogacy."

(Emphasis added)

16 years of trial and error of every medical method has failed due to the aforesaid condition and surrogacy is the only advice.

18.7. The **1st Petitioner** in **W.P.No.22511 of 2023** has the following medical condition:

"TO WHOM SO EVER IT MAY CONCERN

I have been seeing Dr.xxxx aged 48 years W/O Dr. xxxx aged 52 years for the last five years. They are a couple who is married for 18 years. They have tried several cycles of timed intercourse and IUI which failed to give a pregnancy. Following this she was counselled for IVF.

She has had four attempts of IVF in which she conceived 4 times but unfortunately she had one ectopic pregnancy, two first trimester missed abortion and one biochemical pregnancy. Further which we did PGT of her embryo revealed aneuploidy. Thus, she was counselled for IVF - ET with egg donor and husband sperms. Following

embryo transfer with egg donor and husband sperm Dr. Hemalatha conceived, but she had severe PIH and was admitted severe PIH and was admitted at Apollo Cradle for management of hypertension from the 19th week of pregnancy. Around the 20th week there was A wave reversal on fetal Doppler with growth lag. Despite all efforts she landed up with IUD and impending eclampsia at 24th week and the pregnancy was terminated. Following this the physician has not given her fitness for another pregnancy on account of her medical condition. Her urine albumin levels are yet to settle. She is also found to be ANA positive with NK cell deficiency.

Currently we have another six embryos of theirs which was done prior to the new rules and regulations of 2021 act with egg donor and husband sperm. As she is not able to carry on account of health grounds. I recommend her to undergo the embryo transfer to gestational surrogate.

Sd/-
Dr.Mekhala Dwarakanath B
Consultant'
Reproductive Medicine"

(Emphasis added)

Every time there has been a miscarriage for several years.

18.8. The **1st petitioner** in **W.P.No.22515 of 2023** has the following medical condition:

"To Whom so ever it may concern

- *Mrs xxxx and Mr. xxxx got married on 11th May 2014 (9- years)*
- *Trying to conceive naturally from 2018*

- **March 2020-consulted gynaecologist. Advice Ovulation Induction and natural X5 cycles**
- **September 2020, then consulted Infertility Specialist advice for AMH for wife And resulted low AMH of 0.13 and got advice for IVF with donor oocytes But not followed.**
- **underwent 1 cycle of IUI procedure in February 2021 and failed.**
- **planned oocyte pooling X 3 ivf cycle and embryo transfer done using 2 embryos and unsuccessful.**
- **June 2022 consulted another infertility specialist and got advised for ICSI with donor oocyte and frozen 10 embryos.**
- *July 2022 1st cycle embryo transfer done using 1 Embryo and failed.*
- *September 2022 2nd embryo transfer done using 2 embryos. Had a miscarriage at 6th week and D&C done due blood loss and haemorrhaging, with haemoglobin dropping by 50% from 13.6 to 8.2 in just a span of 3 hours.*
- *After the unfortunate miscarriage got advised for PGTA testing on the remaining embryos to rule out any embryo abnormalities. We went ahead with that in December 2022 and out of 7 embryos only 3 embryos were transferable.*
- *January 2023, 3rd embryo transfer done using 1 embryo and failed.*
- *February 2023 consulted Us at Cloudfine Fertility, advised try 4th embryo transfer with 2 embryos and Failed.*
- **She underwent several assisted procedures to conceive- few cycles of ovulation induction-timed intercourse -OI+TI 5 cycles, OI+IUI 1 cycle Intra uterine insemination followed by 3 cycles of self IVF-in-vitro fertilization in between 2021 to 2022 may, only 2 embryos formed and implantation failure, Due**

to maternal age, low AMH, poor ovarian reserve and low antral follicle count, more oocytes cannot be retrieved from the patient. She was advised for oocyte donor program. 1 cycle of IVF done using with donor oocyte with husband gametes were She was able to generate 10 embryos were frozen These were transferred in 2 cycles of Hormone Replacement Treatment-Frozen Embryo transfer-HRT- FET (July, September 2022) after 2 cycle of implantation failure pt advised for PGS for remaining 7 embryos but 3 embryos were transferable. These were transferred in 2 cycles of Hormone Replacement Treatment-Frozen Embryo transfer-HRT-FET (January, February 2023) due to thin endometrium.

- Advised 5th cycles of IVF with donor oocyte and husband gametes and embryos are frozen.

Due to maternal age, low AMH, poor ovarian reserve and low antral follicle count, more oocytes cannot be retrieved from the patient. In the view of long term infertility, 1 cycle of embryo transfers (with self-embryos) and 4 cycles of embryo transfers (with donor oocyte and husband gametes) repeated implantation failure due to thin endometrium thickness, missed abortion patient advised for embryo transfer with Surrogate mother considering maternal health condition."

(Emphasis added)

The medical condition is, the moment she conceives haemoglobin drops to less than 50% and has had repeated miscarriages.

18.9. The **1st petitioner** in **W.P.No.22530 of 2023** has the following medical condition:

"To whomsoever it may concern

My patient xxxx, female, 39 years and her spouse xxxx, male, 39 years have been married since November 11, 2011. In the last 12 years of marriage Mrs. Anchal had two tubal (ectopic) pregnancies in the year 2014 and 2019, a type of pregnancy that can be fatal to the mother. She underwent 3 laparoscopic surgeries from 2014-2019 under GA. She also suffers from Ankylosing Spondylitis since 2008, an auto-immune disease caused due to HLA- B27 positive. She was also diagnosed with NK Cell Deficiency in 2019.

She underwent several assisted procedures to conceive- few cycles of ovulation induction-timed intercourse -OI+TI (2017), 2 cycles of intra-uterine insemination- UI (2018), followed by 2 cycles of IVF-in-vitro fertilization (March and August 2020). She was able to generate 5 8-cell-embryos. These were transferred in 2 cycles of Hormone Replacement Treatment - Frozen Embryo transfer- HRT-FET (Jan 2021 and June 2022) both leading to biochemical pregnancies due to poor embryo quality, thin endometrium, and underlying auto-immune conditions.

- 1. Due to maternal age, low AMH, poor ovarian reserve and low antral follicle count, more oocytes cannot be retrieved from the patient. She was advised for oocyte donor program. The Donor gametes were fertilized with spouse gametes and 5 blastocysts were developed.*
- 2. These were cryopreserved in December 2022, with the intent to go for surrogacy as there was no ban on conducting surrogacy through the use- of donor gametes. The new notification of this ban came into effect in March 2023 by that time the embryos with spouse gametes and donor oocytes were already cryopreserved.*

The patient underwent one more cycle of embryo transfer with the donor blastocyst in December 2022 that led to implantation failure and no pregnancy,

3. *All previous assisted reproductive treatments OI+TI, IUI, IVF with 3 cycles of Frozen Embryo transfer HRT-FET have been unsuccessful with the patient in conception. Considering the maternal health condition of the patient in the view of recurring ectopic pregnancy, biochemical pregnancy and implantation failures, persistent thin endometrium and poor ovarian reserve, the patient is advised to go ahead with Surrogacy with donor eggs under my care. The increasing maternal age of the patient and the risks above are not congenial for the patient to try conceiving on her own/or with own oocytes."*

(Emphasis added)

All medical methods have failed including frozen embryo. Therefore, surrogacy is the only option.

18.10. The **1st petitioner** in **W.P.No.22533 of 2023** has the following medical condition:

*"To
BS Dattatreya
Advocate
Jayanagar, Bangalore..*

Mrs. xxxx, 40 yrs wife of Mr. xxxx 43 yrs MRN-BLR-IND-2020-02-087/088. a case of secondary infertility (A2), married since 11 yrs.

She has undergone 3 cycle of IUI but she failed to conceive.

Patient had 3 cycle of IVF (Self Egg + Husband Sperms) done in 2015, 2016 & 2018 and had Frozen embryo transfer conception in 2017 but it was

missed abortion and Dilatation & Evacuation was done.

She failed to conceive in other embryo transfer cycles.

In 2019 she had 1 cycle of Donor egg IVF and Frozen embryo transfer, in first donor egg IVF frozen embryo transfer she had biochemical pregnancy and in 2nd embryo transfer she failed to conceive.

Patient is a known case of endometriosis, adneomyosis and multiple fibroid uterus since last 8 yrs, Laparoscopic cystectomy and Left Salpingectomy was done 8 yrs back in view of endometriosis with left hydrosalpinx. She had open myomectomy done in 2017 and 16-17 fibroids were removed.

2nd Cycle of Donor egg IVF stimulation was done in 2020 as her AMH was 0.61 ng/ml (poor egg reserve) and FSH was 13.7 mIU/ml (poor egg quality) and embryo (donor egg+husband sperm) has been frozen.

Couple has been advised for surrogacy due to multiple failed IVF cycles with recurrent multiple uterine fibroids.

Kindly do the needful."

(Emphasis added)

She has failed multiple IVF cycles with recurrent multiple uterine fibroids.

18.11. The **1st petitioner** in **W.P.No.22536 of 2023** has the following medical condition:

"CASE SUMMARY

Mrs xxxx, 33 years, and Mr. xxxx, 35 years, presented up Milann on 28/01/2011 with married life -2years, third degree consanguineous marriage.

Menstrual History: regular cycles, 3-4/28-30 days

Obstetric history: Nulligravida

Sexual history: Non consummation marriage

Past history- She underwent cardiac surgery for Tetralogy of Fallot at the age of 5 years.

Personal history and family history: Father - Motor Neuron Disease.

Husband History: Nil significant

Treatment at Milann- As she has Tetralogy of Fallot, it was explained that self IVF stimulation would involve injection of gonadotrophins which may lead to supraphysiological levels of hormones like estrogen and progesterone which may impose risk to her preexisting cardiac condition as per cardiologist opinion

She was given DE +HS along with surrogacy option which the couple accepted.

Donor Ovum pick up has done on 18/10/2022. 7 oocytes obtained. ICSI done with husband sperm. Three 8-Cell Grade A, one- 4-AB and One 3- AB (5 Embryos) formed which were frozen.

The couple now wants to proceed with surrogacy."

(Emphasis added)

This petitioner has a grave problem. She has undergone cardiac surgery for tetralogy at the age of 5 years and she cannot consummate at all. She has married and wants to become a

mother and if by normal method she tries to become pregnant all the possibility of having a heart attack looms large. Therefore, surrogacy is the method.

18.12. The **1st petitioner** in **W.P.No.22624 of 2023** has the following medical condition:

"PAST TREATMENT HISTORY:

3 cycles of OI+ IUI done (3rd cycle IUI- left Ectopic pregnancy) 2018 – 1 cycle IVF at Radha Krishna Hospital - all aneuploidy embryos

(self) - FET done with DEM-FTC

Jan 2021 - Apollo Hospital eERA based FET blast transfer (144 +/- 2hours).

FET-1-4AA-FTC

FET-2-2 PAST Blasts (1-4AA,1-3AB)-conceived missed abortion at 8 weeks.

PAST MEDICAL HISTORY:H/o multi nodular goitre since 3 months PERSONAL/FAMILY HISTORY: Nil significant HUSBAND HISTORY-40 years k/c/o DM since 7 years on regular OHA,H/o Hypercholesterolemia on regular treatment. Family h/o both parents are diabetic on treatment.

OUTSIDE INVESTIGATIONS

Wife: 13/09/21 – USG thyroid – multi nodular goiter, TSH – 1.05, anti TPO- negative, anti-thyroglobulin-negative."

(Emphasis added)

The opinion is, petitioner is suffering from thyroid and multi nodular goiter. In view of repeated implantation failure and pregnancy loss donor egg and surrogacy is the option for better pregnancy outcome.

18.13. The **1st petitioner** in **W.P.No.22631 of 2023** has the following medical condition:

"Whom so ever it may concern,

Re: Mrs.xxxx (DOB: 02/06/1980) & Mr.xxxx (DOB: 25/04/1978)

Medical History:

The above said patient of mine has undergone multiple IVF procedures using her own as well as donor oocytes (eggs) and husband's sperms which did not yield a baby.

She has developed severe Adenomyosis & Endometriosis secondary to multiple IVF attempts, This condition has resulted in severe pain and heavy menstrual bleeds. With a view to managing her symptoms and improving her quality of life she is currently being treated with medications (and this is providing her with the relief of her symptoms).

She has also undergone 2 laparoscopic surgical procedures in her uterus for removing her Fibroids. She was also diagnosed with Infection of her fallopian tube. She still has multiple uterine fibroids encroaching into the uterine cavity reducing possibilities of pregnancies implanting as well as increasing chances of a miscarriage.

She had undergone an embryo transfer with a surrogate using donor eggs prior to the amendment in law. Even though it had yielded a pregnancy, unfortunately that had ended in a miscarriage increasing her mental agony.

Advice:

Considering all the operative and IVF procedures she has undergone I would consider it unsafe for her to proceed with further Ovarian stimulation and IVF n her own self as this would only lead to another unsuccessful procedure. Therefore, recommend her towards Oocyte Donor and Surrogacy.

Since she already has embryos frozen prior to the change in law, I would be grateful if she is permitted to undergo an embryo transfer with the embryos which are already available using a surrogate as this will help this couple start a family."

(Emphasis added)

As per the opinion of the doctor, petitioner has undergone many IVF procedures and it is unsafe for her to proceed with further ovarian stimulation. Hence, oocyte donor and surrogacy is the option.

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 Surrogacy (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. Wherefore, I deem it appropriate not to annihilate the same.

20. Insofar as the submission of the learned Deputy Solicitor General of India that the matter is pending before the Apex Court and there is an interim order of stay is concerned, the order of the Apex Court in Writ Petition (Civil) No(s).756/2022 dated 18-10-2023 in the case of **ARUN MUTHUVEL V. UNION OF INDIA** reads as follows:

"xxx

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."

(Emphasis supplied)

The Apex Court while permitting surrogacy to the petitioner therein stays Form 2 only insofar as the petitioner therein is concerned. While so permitting, the Apex Court has also observed that the fertilization of a donor oocyte by the sperm of the husband is

deleted. This, in the view of the Apex Court, runs contrary to what is contemplated under Rule 14(a) of the Rules (*supra*), *inter alia*. The stay of the Notification granted was only insofar as the petitioner therein was concerned. Therefore, there can be no impediment to consider the cases of the petitioners on a case to case basis, strictly in consonance with the Act, Rules and the concept of gestational surrogacy.

21. There are certain conditions stipulated under the Act, the Rules or even the Forms appended to the Rules. Sections 26 and 35 of the Act read as follows:

“26. Constitution of State Assisted Reproductive Technology and Surrogacy Board.—*Each State and Union territory having Legislature shall constitute a Board to be known as the State Assisted Reproductive Technology and Surrogacy Board or the Union territory Assisted Reproductive Technology and Surrogacy Board, as the case may be, which shall discharge the following functions, namely:—*

- i) to review the activities of the appropriate authorities functioning in the State or Union territory and recommend appropriate action against them;*
- ii) to monitor the implementation of the provisions of the Act, and the rules and regulations made thereunder and make suitable recommendations relating thereto, to the Board;*
- iii) to send such consolidated reports as may be prescribed, in respect of the various activities undertaken in the State under the Act, to the Board and the Central Government; and*

iv) such other functions as may be prescribed.

... ..

35. Appointment of appropriate authority.—

(1) The Central Government shall, within a period of ninety days from the date of commencement of this Act, by notification, appoint one or more appropriate authorities for each of the Union territories for the purposes of this Act and the Assisted Reproductive Technology Act.

(2) The State Government shall, within a period of ninety days from the date of commencement of this Act, by notification, appoint one or more appropriate authorities for the whole or any part of the State for the purposes of this Act and the Assisted Reproductive Technology Act.

(3) The appropriate authority, under sub-section (1) or sub-section (2), shall,—

(a) when appointed for the whole of the State or the Union territory, consist of—

- i) an officer of or above the rank of the Joint Secretary of the Health and Family Welfare Department—Chairperson, ex officio;
- ii) an officer of or above the rank of the Joint Director of the Health and Family Welfare Department—Vice Chairperson, ex officio;
- iii) an eminent woman representing women's organisation—member;
- iv) an officer of Law Department of the State or the Union territory concerned not below the rank of a Deputy Secretary—member; and
- v) an eminent registered medical practitioner—member:

Provided that any vacancy occurring therein shall be filled within one month of the occurrence of such vacancy;

(b) when appointed for any part of the State or the Union territory, be officers of such other rank as the State Government or the Central Government, as the case may be, may deem fit.”

Section 26 deals with Constitution of State Assisted Reproductive Technology and Surrogacy Board, as per the heading. Section 35 deals with appointment of appropriate authority for the purposes of the Act and the ART.

22. The Board has several functions with regard to issuance of certificate of recommendation; certificate of essentiality; certificate by the District Medical Board stating that there exists a medical condition necessitating gestational surrogacy and eligibility certificate to be issued by the appropriate authority. Therefore, the claims made to opt for surrogacy have to pass through the rigors of Sections 26, 35 and the District Medical Board. The conditions that every one of the petitioners are undergoing or as is depicted by the medical practitioners would clearly indicate necessity of surrogacy, which would mean that the petitioners are all entitled to opt for surrogacy under the Rule, Rule 14 in particular read with provisions of the Act and the ART, all of which are considered *supra*.

23. In the light of the peculiar quagmire and the impending urgency of every one of the petitioners *qua* their medical

conditions, they would become entitled to a mandamus to be issued in acceptance of the prayers that are sought in the respective writ petitions, but not for obliteration of the amendment, as the same is the subject matter of challenge before the Apex Court in the afore-quoted judgment in the case of **ARUN MUTHUVEL V. UNION OF INDIA**.

24. For the *praefatus* reasons, the following:

ORDER

- (i) Writ Petitions are allowed in part.
- (ii) The challenge to the notification dated 14-03-2023 is left unanswered, as the challenge to it is pending consideration before the Apex Court.
- (iii) For the reasons rendered in the course of the order, the notification dated 14-03-2023 is declared inapplicable to the case of the petitioners.
- (iv) The petitioners are entitled to opt for surrogacy for the reasons rendered in the course of the order.
- (iv) The petitioners would become entitled to opt for surrogacy, subject to them fulfilling all other conditions and requirements under the statute, except the one that is in the notification dated 14-03-2023.

- (v) In the light of the findings rendered in the course of the order, the Authorities cannot insist or direct the petitioners that the donor gamete cannot be made use of by the intending couple. The Authorities shall forthwith process the applications, if any and issue Eligibility Certificate/Essentiality Certificate, if the intending couple would fulfil all other conditions.

**Sd/-
JUDGE**

bkp
CT:SS