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Supreme Court allows surrogacy, strikes down rule banning use of donor gametes

Two-judge Bench comes to the rescue of a woman suffering from the rare medical condition of Mayer Rokitansky Kuster Hauser syndrome by staying the operation of a law which threatened to wreck her hopes of becoming a mother

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The Supreme Court has protected the right of parenthood of a woman, suffering from a rare medical condition, by staying the operation of a law which threatened to wreck her hopes to become a mother through surrogacy.



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The woman, known only as ‘Mrs. ABC’ for anonymity sake, has the Mayer Rokitansky Kuster Hauser (MRKH) syndrome. Medical board records showed she has “absent ovaries and absent uterus, hence she cannot produce her own eggs/oocytes”. The couple had begun the process of gestational surrogacy, through a donor, on December 7 last year.

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However, a government notification on March 14 this year amended the law, banning the use of donor gametes. It said “intending couples” must use their own gametes for surrogacy. The petition was filed in the Supreme Court challenging the amendment as a violation of a woman’s right to parenthood.

“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,” a Bench of Justices B.V. Nagarathna and Ujjal Bhuyan held in a recent order.

Senior advocate Sanjay Jain, the petitioner’s lawyer, argued that the amended Paragraph 1(d) of the Surrogacy (Regulation) Rules, 2022, by ruling out the use of donor eggs had made it impossible for his client and her husband to continue with the process of surrogacy in order to achieve parenthood.

He argued that the 2023 amendment contradicted the Sections 2(r) and 4 of the Surrogacy Act, 2021 which recognised the situation when a medical condition would require a couple

to opt for gestational surrogacy in order to become parents.

Mr. Jain referred to Rule 14(a) of the Surrogacy Rules which listed the medical or congenital conditions owing to which a woman could choose to become a mother through gestational surrogacy. They included “having no uterus or missing uterus or abnormal uterus (like hypoplastic uterus or intrauterine adhesions or thin endometrium or small unicornuate uterus, T-shaped uterus) or if the uterus is surgically removed due to any medical condition such as gynecological cancer”.

‘Woman’s choice’

The lawyer said the Rule made it clear that the choice was solely that of the woman. He said his client had begun the surrogacy process months before the amendment, which cannot be implemented retrospectively.

The government, through Additional Solicitor General Aishwarya Bhati, countered that the process of surrogacy cannot be availed under the law unless the child was “genetically related” to the intending couple. This exempted the use of donor eggs.

In a 11-page order, the court agreed with Mr. Jain’s argument that the law permitting gestational surrogacy was “woman-centric”. The decision to have a surrogate child was entirely based on the woman’s inability to become a mother owing to her medical or congenital condition. Such a condition included the “absence of a uterus or repeatedly failed pregnancies, multiple pregnancies or an illness which makes it impossible for her to carry a pregnancy to term or would make the pregnancy life-threatening”.

The amendment cannot contradict Rule 14(a) which specifically recognises the absence of a uterus or any allied condition as a medical indication necessitating gestational surrogacy, the court held.

Addressing the government’s contention that the surrogate child should be “genetically related” to the couple, the court pointed out that the child would be related to the husband. “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,” the court interpreted.