



WEB COPY

W.A. No.3767



IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 03-02-2025

PRONOUNCED ON : 25-04-2025

CORAM

THE HONOURABLE MR.JUSTICE S.M. SUBRAMANIAM

And

THE HONOURABLE MR. JUSTICE K.RAJASEKAR

W.A. No.3767 of 2024

and

C.M.P.Nos.29654 and 29655 of 2024

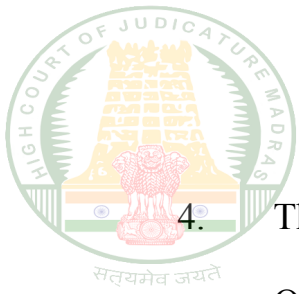
1. Subbulakshmi

2. S. Seenivasan

... Appellants / Petitioners

-VS-

1. The Union of India,
Rep. By Secretary, Ministry of Health
& Family Welfare, Sasthri Bhavan,
New Delhi - 110001.
2. State of Tamil Nadu,
Rep. by its,
Principal Secretary to Government,
Health and Family Welfare Department,
Secretariat, Chennai.
3. The Director/ Appropriate Authority,
The Directorate of Medical and Rural Health Service,
No.359, DMS Complex, 361, Anna Salai,
Chennai - 600006.



4.

The Joint Director of Health Service/
District Medical Board,
Office: 166, North Beach Road,
Fisheries Campus, Thoothukudi - 628 001.

... Respondents/ Respondents

Prayer: Writ Appeal as against the order dated 21.08.2024 passed in W.P. No. 23771 of 2024.

For Appellants : Mr. K.V. Sajeev Kumar

For RR 2 to 4 : M/s. M. Sneha

ORDER

[Order made by K. RAJASEKAR, J.]

This Writ Appeal has been filed challenging the order dated 21.08.2024 passed in W.P. No. 23771 of 2024, wherein the learned Single Judge of this Court has dismissed the Writ Petition filed by the appellants herein, rejecting the relief of quashing the proceedings of Respondent No.3 dated 04.03.2024 on the ground that the letter impugned is not ultra vires to the Surrogacy Regulation Act, 2021 and Surrogacy (Regulation) Rules, 2022.

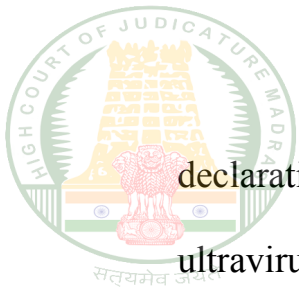
2. The brief facts leading to the filing of this appeal are brief as



follows:

WEB COPY

3. The petitioners herein are intending couple possessing certificate of essentiality for the purpose of surrogacy, issued as per the Surrogacy Regulation Act, 2021 (Surrogacy Act, hereinafter). They have able to secure a Surrogate mother for the purpose of surrogacy and approached the concerned authorities for issuance of eligibility certificate for the Surrogate mother to undergo Surrogacy procedure. According to the petitioners, the Surrogate mother fulfills the conditions and there is no legal impediment for issuing the eligibility certificate to her. They approached the appropriate Authority and issuance of the certificate was refused on the ground that the Surrogate mother was not hailing from the district in which they have made application for issuance of the eligibility certificate. The reasons stated by the Authorized Officer is that the guidelines issued by the State Authority, prescribes a condition that the eligibility certificate for a Surrogate mother shall be issued only from the district, where the Surrogate mother is hailing/ residing. This guideline issued by the State Authority/ third respondent herein is against the rules prescribed under the Surrogacy Act and it had caused prejudice to the intending couple and their right to have a child. Thereby, the petitioners have come forward with a writ of certiorari, seeking



declaration to declare that the guidelines issued by the State Authority is ultravirous to the rules of the Surrogacy Act and to quash the guidelines of the State Authority dated 04.03.2024.

4. On the side of the respondents, it was reported that the eligibility certificate has to be issued by the District Medical Board and for the purpose of guiding the Officials and for the purpose of protecting the interest of the persons, who are involved in the surrogacy procedures, including the intending couple and Surrogate mother, impugned letter in the form of clarification issued. There is no violation of any rules or rights of the petitioners.

5. The learned Single Judge, after hearing the parties has accepted the case of the respondents and held that the guidelines/ impugned letter issued are not violating the Surrogacy Act or Rules or the rights of the parties and dismissed the writ petition.

6. Aggrieved over the same, this writ appeal is filed.

The Submissions on behalf of the Appellants:



7. The learned counsel for the appellants/ petitioners submitted that the Form-17 B have been prescribed as per the rules under the Surrogacy Act, which reads that the Surrogate mother shall get the certificate from the appropriate authority. It has not prescribed the condition that this certificate shall be issued only by the appropriate authority from the district where the Surrogate mother is hailing/ residing. He further submitted that there is no provisions regarding the persons, who have to issue the eligibility certificate to the Surrogate mother, prescribed under the rules of surrogacy, hence the guideline stating that the Surrogate mother should get the eligibility certificate from the appropriate authority of the district from where the Surrogate mother is hailing is not valid and it has caused prejudice to the intending couple and Surrogate mother, thereby prays this Court to quash the impugned proceedings.

The Submissions on behalf of the Respondents 2 to 4:

8. Per contra, the learned counsel appearing for the respondents submitted that the prescribed guidelines are not new guidelines and not offending from any of the rules or regulations. These guidelines are only explanation issued



for the authorities or Stake holders for better understanding of the Surrogacy Act,
hence prays to dismiss the appeal.

WEB COPY

Discussions and Conclusion:

9. We have considered the submissions made on both sides and also perused the materials available on record.

10. For better understanding of the issues involved in this case, it is appropriate to incorporate the relevant provisions of the Surrogacy Act.

"The definitions given under Section 2 are as follows:

Section 2(h) - "couple" means the legally married Indian man and woman above the age of 21 years and 18 years respectively.

Section 2(r) - "intending couple" means a couple who have a medical indications necessitating gestational surrogacy and who intend to become parents through surrogacy.

Section 2(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.

Section 2(zd) - "surrogacy" means a practice whereby one woman bears and gives birth to a child for an intending couple with the intention of handing over such child to the intending couple after the



birth.

Section 2(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."

11. Section 4 of the Surrogacy Act relates to Surrogacy and its procedures and it reads as follows:

"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 7 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 woman 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 as 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."

12. Section 4(ii)(a) provides that except for the purposes stated therein, no surrogacy procedures shall be conducted and before availing surrogacy, the



intending couple shall obtain a certificate for recommendation from the Board, on an application made by such persons in such form or manner as may be prescribed. Similarly, Section 4(iii)(a) lays down that the intending couple shall possess "certificate for essentiality" issued by the appropriate authority for the purpose of surrogacy after satisfying itself the conditions stipulated in Sections 4(iii)(a)(i), (ii) and (iii).

13. Section 4(iii)(b) prescribes that the Surrogate mother, shall be in possession of an eligibility certificate issued by appropriate authority, after satisfying conditions prescribed in 4(iii)(b) (I) to (V). The conditions prescribed are relating to age of the women, willingness of women, etc. More importantly, Section 4(iii)(b)(iv) prescribes no women shall act as a Surrogate mother more than once in her lifetime to undergo surrogacy. Similarly, conditions for issuance of eligibility certificate for intending couple prescribed under Section 4(iii)(c) (I) to (III).

14. Section 6 of the Act titled as "Written informed consent of the Surrogate mother" and it reads as follows:

"6. Written informed consent of Surrogate mother.—(1) No person shall seek or conduct surrogacy procedures unless he has—



WEB COPY

(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 sub-section (1), the Surrogate mother shall have an option to withdraw her consent for surrogacy before the implantation of human embryo in her womb."*

15. Section 8 of the Act deals about the rights of Surrogate child and it 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."

16. Section 14 of the Act provides remedies to challenge the rejection of applications, suspension or cancellation of registration passed by the appropriate authority under Section 13 and communications relating to rejection of certificates under Section 4 of the Act, which reads as follows:

"14. Appeal.— The surrogacy clinic or the intending couple or the intending woman may, within a period of thirty days from the date of



WEB COPY

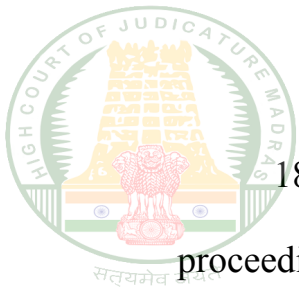
receipt of the communication relating to order of rejection of application, suspension or cancellation of registration passed by the appropriate authority under section 13 and communication relating to rejection of the certificates under section 4, prefer an appeal against such order to—

(a) the State Government, where the appeal is against the order of the appropriate authority of a State;

(b) the Central Government, where the appeal is against the order of the appropriate authority of a Union territory,

in such manner as may be prescribed."

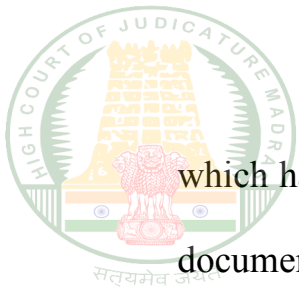
17. In this case, the intending couple raised a grievance that the Director/ Appropriate Authority/ third respondent herein has issued certain guidelines relating to issuance of eligibility certificate for intending couple and surrogate mother. According to the petitioners, these guidelines are not been issued by invoking any of the powers to issue regulations or guidelines. Similarly, the State has also taken the stand that they have not issued any guidelines or made any rules. The letter impugned prescribes general procedures, in the nature of clarifications for the purpose of better understanding of the rules and regulations framed under the Act and also for creating awareness among the Stake holders.



18. We have gone through the guidelines and in paragraph No. 5 of the proceedings, the Director has issued certain clarifications regarding the Form-17 i.e., the eligibility certificate for intending couple and stated that the certificate for intending couple shall be issued by the Medical Board from where the intending couple is hailing or residing. The paragraph No.6 states about the necessary documents to be attached along with Form-17 i.e., Application as follows:

- (i) *Aadhar Card Photo Copy of Intending Father*
- (ii) *Aadhar Card Photo Copy of Intending Mother*
- (iii) *Authorization letter from concerned Hospital*
- (iv) *Proof of Marriage*
- (v) *Medical History of Intending Mother*

19. Paragraph Nos.7 to 9 reads about what kind of test to be conducted and who are all should be consulted for the purpose of issuance of certificate. paragraph Nos.10 & 11 deals with the Form-17 B eligibility certificate for the Surrogate mother. In paragraph No.10, it is stated that the certificate of the Surrogate mother shall be issued by the District Medical Board from where she is hailing or residing. Similarly, paragraph No.11 states about the documents,



which have to be received from the Surrogate mother and also listed the required documents. It also reads that the eligibility certificate for the Surrogate mother shall be issued from the Medical Board from where she is hailing, since the surrogate mother's family/ eligible couple register data will be available only with the concerned district. The necessary documents to be attached along with Form-17 B to get eligibility certificate for Surrogate mother are as follows:

- (i) *Form-2 of the Surrogacy Act, 2021*
- (ii) *Aadhar Card Photo Copy of Surrogate Mother*
- (iii) *Fitness Certificate of Surrogate Mother from RMP/ Government Doctor*
- (iv) *Relationship Certificate of the Intending Couple and Surrogate Mother issued by Notary Public*
- (v) *Proof of Marriage and Child Birth Certificate of the Surrogate Mother and Age proof*
- (vi) *Surrogate Mother's Husband/ Guardian Concern Letter*
- (vii) *Fitness Certificate of Surrogate Mother from Registered Medical Practitioner*

20. For better understanding, the copy of the Form-17 B furnished by the writ petitioners in their typed set, is incorporated hereunder:



WEB COPY

W.A. No.3767



Surrogacy Rules

FORM 17 B
Certificate No.
The Appropriate Authority
Eligibility Certificate
(SURROGATE MOTHER)

This is to certify that Ms.....age.....
residing at under the provision of
The Surrogacy (Regulation) Act, 2021 & Rules there under. Under the said
certificate is eligible to act as "SURROGATE MOTHER" subject to the terms &
conditions*

Relationship with the intended couple/woman

The certificate is valid from to.....

Date:

Place:

Sign & Seal
Appropriate Authority

Terms & Conditions

1. Surrogate mother shall be an ever-Married women having a child of her own and between the age of 25 to 35 years on the day of implantation.
2. Husband consent required.
3. The surrogate mother shall not help in surrogacy by donating her egg.
4. No woman shall act as a surrogate mother more than once in her lifetime.
5. Not more than 3 time for the same couple when the first embryo transfer has failed in a surrogate mother, at most two more successful embryo transfers for the same couple.

21. The Form-17 B prescribes that the relationship between the intending couple and the surrogate mother shall also be stated and this condition also to be verified by the authorities concerned.

22. We have gone through the entire instructions impugned herein. After some background check by this Court, we have noted that, Form-17, 17(B) are prescribed in the Draft rules framed by the Ministry of Health and Family Welfare (Department of Health Research), in exercise of power confined by



Section 50 of Surrogacy Act. However, the ministry has notified only few rules found in Draft rules, as per notification in G.S.R. 460(E), dated 21.06.2022 titled as "The Surrogacy (Regulation) Rules 2022", which contains 14 rules, i.e., Rule 1 to 14, scheduled Part I and Part II, and Form I to Form V. Until today, Form 17, 17(b) are not notified and not in force. On reading of the impugned proceeding, it shows that the State appropriate authority issued guidelines dated 04.03.2024, wherein he refers that, already, District Medical Board is appointed under Section 4(iii)a(i) of the Surrogacy Act and they advised to follow the above guidelines, more particularly, he suggests issuance of eligibility certificate of intending couple, surrogate mother and essentiality certificate for intending couple, as per Form 17, 17(b) and Form 11 respectively. He also suggests that the documents required for issuance of such documents. These guidelines referring Forms prescribed in Draft rules. Admittedly, the above forms have not been notified by the concerned Ministries, hence direction to the Stake Holders to utilize these forms, is not having any legal sanctity.

23. It is also brought to our knowledge that, in exercise of power under Section 35(3)(9) and 35(3)(b), appropriate authorities are notified by the State Government for the purpose of Surrogacy Act. As argued by the learned counsel



for the petitioners, the Respondent No.3 is not empowered to issue any guidelines, since he was not empowered to do so. However, it is contended that the same were issued by way of clarification for the provisions already incorporated under the Surrogacy Act and Rules.

24. In ***Sant Ram Sharma Vs. State of Rajasthan and Anr. [AIR 1967 SC 1910]***, the Apex Court in paragraph No.7 has held that the Government cannot amend or supercede the Statutory Rules by Administrative circulars but if the Rules are silent in any particular point, the Government can fill up the gaps and issue instructions, which are inconsistent with the Rules already framed. In ***Union of India vs. Amrik Singh [1994 (1) SCC 269]***, the Apex Court has reiterated that the Administrative Authority can issue executive instructions, which are not inconsistent with the Statutory Rules. In ***Joint Action Committee of Airlines Pilots Associations of India and Ors. vs. The Director General of Civil Aviation and Ors. [2011 (5) SCC 435]*** in paragraph no.22, the Apex Court has again considered the legal precedents relating to validity of administrative instructions, and held as follows:

"It is evident from the above that executive instructions which are issued for guidance and to implement the scheme of the Act and do not have the force of law, can be issued by the competent authority and altered, replaced and substituted at any time. The law merely



prohibits the issuance of a direction, which is not in consonance with the Act or the statutory rules applicable therein."

WEB COPY

25. The Respondent No.3 herein is appropriate authority, to implement the provisions of the Surrogacy Act and he has issued clarifications to the District Level Authority, who have been notified to issue certificates, prescribed under Section 4 of the Surrogacy Act, concerning with all stake holders under the act.

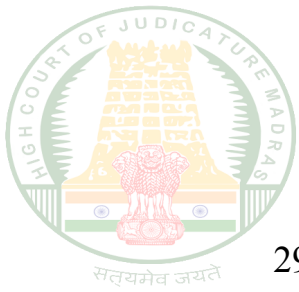
26. The intention behind the Surrogacy Act as well as the Rules is for proper practice and regulations of the process of surrogacy. This Act and Rules prescribe the stage by stage verifications and involvement of various authorities including the Medical Board at each and every stage of the process. Getting the certificates from the proper place and authority is mandated under the Act, more specifically Sections 4 and 6 of the Surrogacy Act, which in turn help the parties to rely on the informations given by the individuals regarding their consent, eligibility, qualifications, etc. Though, prescribed Form is not having any legal sanctity, but, the contents to be recorded in the certificates in substance not violates any right of parties, or same is ultra vires to the Act, rules or regulations.

27. In the case in hand, the petitioners herein are hailing from



Thoothukudi district and according to them, they were not able to get a Surrogate mother from their district or from the State of Tamil Nadu. They have not even disclosed any information about the Surrogate mother. According to the petitioners, they were not able to give the name of the Surrogate mother in this writ petition for the purpose of maintaining her privacy. Whereas in the Act, various types of tests have to be conducted by the Medical Board/ District Authorities and verification has to be done with regard to the family background of both intending couple as well as surrogate mother. The Act also provides guidance to the appropriate authorities for maintaining the records/ registers for the purpose of uniformity and for flawless implementation of the Act and also for protecting the interest of the intending couple and Surrogate mother, more particularly, for strict adherence of proceedings.

28. Admittedly, Surrogacy Act impose various duties to the competent authorities to verify qualifications and conditions of the intending couple and surrogate mother, more particularly, the number of times, the Surrogate mother is eligible to undergo surrogacy is prescribed. If the Surrogate mother is allowed to get certificate at any place, where she is not residing, it will lead to inefficient implementation of the Act.

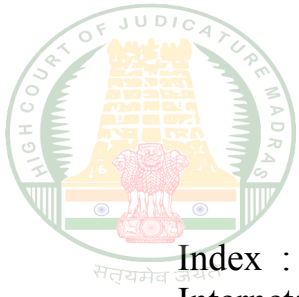


WEB COPY

29. We are of the view that the present executive instructions, which are issued for guidance and to implement the scheme of the Act, though do not have the force of law, it can be issued by the Competent Authority, without altering any rules or contemplates any new conditions. If the contention of the writ petitioners are accepted, then, it will lead to help the violators to bend the provisions in their favour, more particularly, when there are specific conditions imposed on the Surrogate mother. It is always better that the Surrogate mother shall be directed to receive certificate from the district, where she is hailing or residing. Hence, we find no reason to reject the guidelines issued. However, the Director/ Appropriate Authority, the Directorate of Medical and Rural Health Service/ Respondent No.3 herein is directed to issue fresh and proper instructions in this regard, in the background that the Draft rules were not notified.

30. With the above observations, the present writ appeal stands dismissed. Consequently, connected civil miscellaneous petition stands closed. However, there shall be no order as to costs.

(S.M.SUBRAMANIAM, J.) (K.RAJASEKAR, J.)



25-04-2025

Index : Yes/No
Internet: Yes/No
Speaking order/Non-Speaking order
Neutral Citation : Yes/No
stn

To

1. The Union of India,
Rep. By Secretary, Ministry of Health
& Family Welfare, Sasthri Bhavan,
New Delhi - 110001.
2. State of Tamil Nadu,
Rep. by its,
Principal Secretary to Government,
Health and Family Welfare Department,
Secretariat, Chennai.
3. The Director/ Appropriate Authority,
The Directorate of Medical and Rural Health Service,
No.359, DMS Complex, 361, Anna Salai,
Chennai - 600006.
4. The Joint Director of Health Service/
District Medical Board,
Office: 166, North Beach Road,
Fisheries Campus, Thoothukudi - 628 001.



WEB COPY

W.A. No.3767



S.M.SUBRAMANIAM, J.
AND
K.RAJASEKAR, J.

stn



WEB COPY

W.A. No.3767



Pre-delivery Judgment made in
W.A. No.3767 of 2024

25-04-2025