CHAPTER FOUR

SURROGACY AND ASSISTED REPRODUCTIVE TECHNOLOGIES

India does not have statutory laws on surrogacy. Guidelines issued by the Indian Council of Medical Research were generally followed by artificial reproductive technologies[1] clinics[2]. It is only recently that the Government of India, through an executive order, prohibited transnational surrogacy.[3] Consequently, the implication is that only Indian nationals can enter into surrogacy contracts within the country. In this chapter, we discuss cases on three issues:

- Legality of Surrogacy Contracts
- Maternity Benefits for "Commissioning Mothers"
- Right to Avail of Assisted Reproductive Technologies (ART)

Legality of Surrogacy Contracts

The first case before the Supreme Court on surrogacy was ***Baby Manji Yamada v. Union of India***.[4] A non-governmental organization (NGO) filed a petition before the Rajasthan High Court, against granting custody of Baby Manji (who had been born through a surrogacy arrangement) to the baby's grandmother.[5] The NGO's petition argued that the contract was unenforceable as surrogacy is not regulated under any law in India and as there are concerns about illegal activity being undertaken within the industry. The allegation made was that since there was no law governing surrogacy in India, various illegalities were occurring and the surrogacy contract was essentially a money-making racket and illegal. The High Court directed that the baby be produced before it in four weeks. This order of the High Court was challenged by the petitioner before the Supreme Court. The primary question in this case was who would be entitled to the custody of the baby born through a surrogacy contract. The Supreme Court, however, did not finally decide on the issue. This appears to be primarily because of questions regarding the *locus standi* of the NGO that had approached the Rajasthan High Court to challenge the custody of the child being given to the paternal grandmother of the child. The Court held that commissions for protection of child rights, constituted under the Commissions for Protection of Child Rights Act, 2005, would be the competent authority before whom complaints regarding custody should be made. In the judgment, the Court discussed the process of surrogacy and the various medical/legal terms associated with it.

Maternity Benefits for "Commissioning Mothers"[6]

Whether the "commissioning mother" is entitled to maternity leave under the Central Civil Services (Leave) Rules, 1972 was the question before the Delhi High Court in ***Rama Pandey v. Union of India***.[7] The Court answered the question in the affirmative. It discussed the rationale behind granting maternity and paternity leave, and concluded that there is no difference between biological, adoptive, and commissioning mothers. It thus held that a commissioning mother is entitled to the same amount of leave that a biological mother is. In arriving at this conclusion, the court also ruled that the interpretation of statutes and rules should be updated in light of current technology and social norms.

Right to Avail of ART Services

In ***Major Anamdeep Singh Dhingra v. Union of India***,[8] the Delhi High Court was approached by an Army officer who needed to avail of ART services in order to conceive. The medical facility was not available at the station he was being transferred to by the Army. The Court quashed his transfer on the grounds that the hardship faced by the petitioner and his wife trumps that of the Army.

Related Human Rights Standards and Jurisprudence

Below is a selection of international and regional human rights standards and jurisprudence that explains states' obligations to ensure reproductive rights as they apply to assisted reproduction, including surrogacy. In the context of surrogacy and ART, states are at a minimum required to ensure that the human rights of all parties involved in ART are respected throughout the process, with regard to the real environment in which these interactions occur. This chapter focuses on human rights standards concerning the regulation of surrogacy and ART, including maternity benefit for women who act as surrogates; issues pertaining to legal parentage and the rights of children following birth are beyond the scope of this discussion.

The Government of India has committed itself to comply with the obligations under various international human rights treaties to protect sexual and reproductive health and rights. These include the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child (CRC), the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW), and the International Covenant on Civil and Political Rights (ICCPR).[9] Under international law, all government organs and authorities, including the judiciary, are obligated to uphold the laws and standards outlined in these treaties.[10] The Supreme Court has held that in light of the obligation to "foster respect for international law" in Article 51 (c) of the Indian Constitution "[a]ny International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into [fundamental rights] to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee."[11]

INTERNATIONAL TREATY STANDARDS

TREATIES

- **ICCPR, Articles 2, 3, 17, 23, 24, 26** (protecting the rights to equality, non-discrimination, privacy, and found a family).
- **CEDAW, Articles 1, 2, 5(1), 10(h), 11(3), 12(1), 14(2)–(b), 16(e)** (outlining women's right to non-discrimination and freedom from sex stereotyping, health, and to "decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights"; and requiring states to establish, review, and revise "protective legislation" guaranteeing the right to equality at work, including on paid leave and maternity protections, "periodically in the light of scientific and technological knowledge").
- **CRC, Articles 2(1), 7(1), 8(1), 24(2)(d), 24(2)(f), 24(4)** (outlining that, in order to ensure the right of the child to the highest attainable standard of health, states should ensure appropriate prenatal and post-natal health care for mothers, develop family planning education and services, and cooperate internationally between countries in order to realize these goals).
- **ICESCR, Artciles 10, 12, 15** (protecting the rights to health and to "special protection" for women before and after childbirth; and to guarantee the right to "enjoy the benefits of scientific progress and its applications," including by ensuring "the development and the diffusion of science").
- **Convention on the Rights of Persons with Disabilities, Articles 23(1)(b), 25(d)** (obligating states to "require health professionals to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent" and to ensure the rights of persons with disabilities to decide freely and responsibly on the number and spacing of their children and to provide access to the information and means necessary to enable them to exercise these rights).

SELECTED GENERAL COMMENTS

- **CEDAW Committee, *General Recommendation No. 24 on Article 12 of the Convention (women and health)***, U.N. Doc. A/54/38/Rev.1 (1999), para. 22 (in health care, guaranteeing women the right to fully informed consent, respect for their dignity, confidentiality, and sensitivity to their needs and perspectives).
- **Committee for Economic, Social and Cultural Rights (CESCR), *General Comment No. 22 (2016) on the right to sexual and reproductive health***, U.N. Doc. E/C.12/GC/22 (2016), paras. 18, 39, 45 (with regard to the state's obligation to ensure the right to reproductive health, explaining that "[t]he failure or refusal to incorporate

technological advances and innovations in the provision of sexual and reproductive health services, such as […] assisted reproductive technologies […] jeopardizes the quality of care"; calling for states to provide information and health care without discrimination on treatments for infertility and fertility options).

- **CESCR, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)***, U.N. Doc. E/C.12/2000/4 (2000), para. 8 (recognizing the right to health includes the right to sexual and reproductive freedom; calling on states to provide access to the full range of high quality and affordable health care, including sexual and reproductive health services; defining reproductive health to mean that women and men have the freedom to decide if and when to reproduce).

UNITED NATIONS HUMAN RIGHTS EXPERT AND WORKING GROUP REPORTS

- **Special Rapporteur on the sale of children, child prostitution and child pornography (SR Sale of Children), *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material***, U.N. Doc. A/HRC/37/60 (2018), paras. 10-11, 77-78 (calling for strict regulation of all intermediaries involved in surrogacy arrangements and protections for the rights, medical health, and safety of gestational mothers and children born through surrogacy; and urging that all steps of the process conform with the best interest of the child).
- **SR Sale of Children, *Report of the Special Rapporteur on the sale of children, child prostitution and child pornography,*** U.N. Doc. A/HRC/34/55 (2016), para. 52 ("The international regulatory vacuum that persists in relation to international commercial surrogacy arrangements leaves children born through this method vulnerable to breaches of their rights.").

SELECTED REGIONAL CASE LAW

EUROPEAN COURT OF HUMAN RIGHTS

- ***Costa and Pavan v. Italy,* Application No. 54270/10 (2013)**, paras. 52–71 (finding that Italy violated applicants' right to private and family life by banning their use of ART and preimplantation genetic diagnosis to conceive a child unaffected by a genetic disease which they both carried).
- ***S.H. and Others v. Austria,* Application No. 57813/00 (2011)**, paras. 80–82, 85–118 (where the law prohibited certain kinds of ARTs that were necessary for the applicants to become parents: finding that access to ARTs is protected by the right to private and family life; ruling that, because the events occurred in the mid-1990s, when the science and related legislation were in an early stage of development, Austria was entitled to a wide margin of appreciation *at that time* and therefore finding no violation; but emphasizing the need to keep this area under review as it is "subject to a particularly dynamic development in science and law").
- ***Dickson v. United Kingdom,* Application No. 44362/04 (2007)**, paras. 65–66, 69–86 (where an imprisoned man and his wife were denied access to artificial insemination necessary for conception, finding a violation of the right to private and family life, as "the choice to become a genetic parent" constitutes "a particularly important facet of an individual's existence or identity").
- ***Evans v. United Kingdom,* Application No. 6339/05 (2007)**, paras. 56–75 (where the applicant and her former partner had created embryos with their respective eggs and sperm, then the partner withdrew his consent to the embryos' development, depriving the applicant of any way to become a genetic parent: finding no violation of the applicant's right to private and family life, on the basis that the applicant and her partner's rights to decide on or against becoming a genetic parent held equal weight).

INTER-AMERICAN COURT OF HUMAN RIGHTS

- ***Artavia Murillo ("In Vitro Fertilization") v. Costa Rica,* Preliminary objections, merits, reparations and costs, Ser. C, No. 257 (2012)**, paras. 136, 142–151, 185–264, 272–317 (where Costa Rica had outlawed all forms of in-vitro fertilization (IVF), finding a violation of the rights to integrity, liberty, and private and family life because "the right to have access to scientific progress in order to exercise reproductive autonomy and the possibility to found a family gives rise to the right to have access to the best health-care services in assisted reproduction techniques, and, consequently, the prohibition of disproportionate and unnecessary restrictions, de iure or de facto, to exercise the reproductive decisions that correspond to each individual"; recognizing that embryos cannot be understood to be persons and are not rights holders; and discussing in depth the discriminatory effects of prohibiting IVF and calling for regulation).

RELEVANT EXCERPTS FROM SELECT CASE LAW

(Arranged chronologically)

IN THE SUPREME COURT OF INDIA

Baby Manji Yamada v. Union of India & Anr.
(2008) 13 SCC 518
Arijit Pasayat and M.K. Sharma, JJ.

Emiko Yamada, a Japanese national, the paternal grandmother of a child born through a surrogacy arrangement filed a petition before the Supreme Court seeking custody of the child. The commissioning parents had separated during the pregnancy. The intending mother was no longer interested in taking custody of the child, and the intending father had to leave the country due to expiration of his visa. The Rajasthan High Court had ordered that the baby be produced before it, after a habeas corpus petition was filed by an NGO arguing that custody of the child could not be given to the grandmother, since surrogacy was not permitted by the law. The Supreme Court in this case elaborates on the meaning of various terms associated with surrogacy.

Pasayat, J.: "This petition under Article 32 of the Constitution of India (hereinafter for short "the Constitution") raises some important questions.

2. Essentially, challenge is to certain directions given by a Division Bench of the Rajasthan High Court relating to production/custody of a child, Manji Yamada. Emiko Yamada, claiming to be the grandmother of the child, has filed this petition. The writ petition before the Rajasthan High Court was filed by M/s Satya, stated to be an NGO, Opposite Party No. 3 in this petition.

…

4. There is no dispute about Baby Manji Yamada having been given birth to by a surrogate mother. It is stated that the biological parents Dr. Yuki Yamada and Dr. Ikufumi Yamada came to India in 2007 and had chosen a surrogate mother in Anand, Gujarat and a surrogacy agreement was entered into between the biological father and biological mother on one side and the surrogate mother on the other side. It appears from some of the statements made that there were matrimonial discords between the biological parents. The child was born on 25-7-2008. On 3-8-2008 the child was moved to Arya Hospital in Jaipur following a law and order situation in Gujarat and she was being provided with much needed care including being breastfed by a woman. It is stated by the petitioner that the genetic father Dr. Ikufumi Yamada had to return to Japan due to expiration of his visa. It is also stated that the municipality at Anand has issued a birth certificate indicating the name of the genetic father.

5. Stand of Respondent 3 was that there is no law governing surrogation (sic) in India and in the name of surrogation (sic) a lot of irregularities are being committed. According to it, in the name of surrogacy a money-making racket is being perpetuated. It is also the stand of the said respondent that the Union of India should enforce stringent laws relating to surrogacy.

…

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.

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.

15. Alternatively, the intended parent may be a single male or a male homosexual couple.

16. Surrogates may be relatives, friends, or previous strangers. Many surrogate arrangements are made through agencies that help match up intended parents with women who want to be surrogates for a fee. The agencies often help manage the complex medical and legal aspects involved. Surrogacy arrangements can also be made independently. In compensated surrogacies the amount a surrogate receives varies widely from almost nothing above expenses to over $30,000. Careful screening is needed to assure their health as the gestational carrier incurs potential obstetrical risks.

17. In the present case, if any action is to be taken that has to be taken by the Commission. It has a right to inquire into complaints and even to take suo motu notice of matters relating to: (*i*) deprivation and violation of child rights, (*ii*) non-implementation of laws providing for protection and development of children, and (*iii*) non-compliance with policy decisions, guidelines or instructions aimed at mitigating hardships to and ensuring welfare of the children and to provide relief to such children, or take up the issues arising out of such matters with the appropriate authorities.

18. It appears that till now no complaint has been made by anybody relating to the child, the petitioner in this Court. We, therefore, dispose of this writ petition with a direction that if any person has any grievance, the same can be ventilated before the Commission constituted under the Act. It needs no emphasis that the Commission has to take into account various aspects necessary to be taken note of.

19. Another grievance of the petitioner is that the permission to travel so far as the child is concerned including issuance of a passport is under consideration of the Central Government; but no orders have been passed in that regard…

20. The learned Solicitor General, on instructions, stated that if a comprehensive application, as required under law, is filed within a week, the same shall be disposed of expeditiously and not later than four weeks from the date of receipt of such application. If the petitioner has any grievance in relation to the order to be passed by the Central Government, such remedy, as is available in law may be availed.

…”

IN THE HIGH COURT OF DELHI

Rama Pandey v. Union of India & Ors.
(2015) 221 DLT 756
Rajiv Shakdher, J.

A commissioning mother, whose application for maternity leave had been rejected by the central government on the ground that she was not a biological mother, invoked the Delhi High Court's writ jurisdiction for relief. The Court was to adjudicate on the issue of whether a commissioning mother is eligible for maternity leave under the Central Civil Services (Leave) Rules, 1972. In its decision, the Court also examined the impact of the principle of "best interests of the child" in determining the entitlement to maternity leave for a commissioning mother.

Shakdher, J.:

FACTS

1. A synthesis of science and divinity (at least for those who believe in it), led to the culmination of the petitioner's desire for a child. Married, on 18.01.1998, to one Sh. Atul Pandey, the petitioner's wish to have a child was fulfilled on 09.02.2013, albeit via the surrogacy route. Her bundle of joy comprised of twins, who were born on the aforementioned date, at a city hospital.

…

2. …This far, the petitioner was happy; her unhappiness, however, commenced with rejection of her application dated 06.06.2013, for grant of maternity and Child Care Leave (CCL). By this application, the petitioner sought 180 days maternity leave and 3 months CCL. This application was addressed to respondent no. 3, with a copy to respondent no. 2.

2.1 Respondent no. 3 vide a covering letter of even date, i.e., 06.06.2013, forwarded the petitioner's application to respondent no. 2, along with the requisite documents i.e. the surrogacy agreement and the birth certificate of the children. Respondent no. 3, sought clarification with regard to the request made by the petitioner for sanctioning the maternity leave. A perusal of the covering letter would show that the leave sought for the purposes of child care was not being objected to. A doubt, was raised only qua maternity leave.

2.2 Evidently, vide communication dated 10.10.2013, petitioner's request was rejected by respondent no. 3, based on, inputs received from respondent no. 2 vide two communications dated 04.09.2013 and 19.09.2013. The first communication appears to have been sent by Kendriya Vidyalaya Sangathan (KVS), [Headquarters], while the second was, evidently, sent by KVS (D.R.). These communications, though, are not on record.

2.3 In sum, it was conveyed to the petitioner that there was no provision for grant of maternity leave in cases where the surrogacy route is adopted. The petitioner was, however, informed that the CCL could be sanctioned, in her favour, under Rule 43-A, which was applicable to "female government servants". It now transpires that reference ought to have been made to Rule 43 and not Rule 43-A; a fact which was confirmed by the counsel for respondent no. 2 and 3.

2.4 In the background of the aforesaid stand, the petitioner was requested to submit an application for CCL, in case she was desirous of availing leave on that account.

3. The petitioner being aggrieved, approached this court by way of the instant petition, filed, under Article 226 of the Constitution…[F]acts in the matter are not in dispute. The issue raised in the writ petition is, a pure question of law.

4. I may only note that on 10.02.2015, respondents placed before this court an office memorandum dated 09.02.2015, issued by the Ministry of Personnel, Public Grievances, Pensions, Department of Personnel and Training (DoPT), Govt. of India which, in turn, relied upon the office memorandum dated 09.01.2015, issued by the Ministry of Human Resources and Development.

4.1 The stand taken, based on the said office memorandums, was that, there was no provision for grant of maternity leave to female employees, who took recourse to the surrogacy route for procreating a child. Furthermore, it was indicated that for grant of "adoption leave", a valid adoption had to be in place.

4.2 Having said so, the DoPT recommended grant of maternity/adoption leave to the petitioner keeping in mind the welfare of the child and, on consideration of the fact that the child was in her custody. The recommendation made was, that, not only should the petitioner be allowed 180 days of leave as was permissible in situations dealing with maternity

leave/adoption leave but that she, should also be allowed, CCL, in case, an application was made for the said purpose. It was further indicated that the said two sets of leave would not be adjusted from the petitioner's leave account. The said recommendation was, however, made without prejudice to the policy, rules and/or instructions that the government may frame in that behalf in due course.

4.3 In the light of the aforesaid development, the counsel for both parties indicated that since the answer to the issue of law remains unarticulated (though the grievance of the petitioner may have been redressed), this court ought to deliberate upon the same and pronounce its judgment in the matter.

4.4 It is based on the stand taken by the counsels for the parties, I proceed to decide the issues raised, in the matter.

…

REASONS

7. I have heard the learned counsels for the parties. According to me, what needs to be borne in mind, is this: there are two stages to pregnancy, the pre-natal and post-natal stage. Biologically pregnancy takes place upon union of an ovum with spermatozoon. This union results in development of an embryo or a foetus in the body of the female. A typical pregnancy has a duration of 266 days from conception to delivery. The pregnancy brings about physiological changes in the female body which, inter alia, includes, nausea (morning sickness), enlargement of the abdomen etc. [Dorland's Illustrated Medical Dictionary, 30th Edition, Saunders Publication]

7.1 Pregnancy brings about restriction in the movement of the female carrying the child as it progresses through the term. In case complications arise, during the term, movement of the pregnant female may get restricted even prior to the pregnancy reaching full term. It is for these reasons, that maternity leave of 180 days is accorded to pregnant female employees.

7.2 Those amongst pregnant female employees, who are constitutionally strong and do not face medical complications, more often than not, avail of a substantial part of their maternity leave in the period commencing after delivery. Rules and regulations framed in this regard by most organizations, including those applicable to respondent no. 3, do not provide for bifurcation of maternity leave, that is, division of leave between pre-natal and post-natal stages.

7.3 The reason, perhaps, why substantial part of the leave is availed of by the female employees (depending on their well-being), post delivery, is that, the challenging part, of bringing a new life into the world, begins thereafter, that is, in the post-natal period. There are other factors as well, which play a part in a pregnant women postponing a substantial part of her maternity leave till after delivery, such as, family circumstances (including the fact she is part of a nuclear family) or, the health of the child or, even the fact that she already has had successful deliveries; albeit without sufficient time lag between them.

8. Thus, it is evident that except for the physiological changes and difficulties, all other challenges of child rearing are common to all female employees, irrespective of the manner, she chooses, to bring a child into this world.

9. But the law, as it stands today, and therefore, the rules and regulations as framed by most organisations do not envisage attainment of parenthood via the surrogacy route.

…

11. With the advent of New Reproductive Technologies (NRT) or what are also known as Assisted Reproductive Technologies (ART), (after the birth of the first test-tube baby Louise Joy Brown, in 1978), there has been a veritable explosion of possibilities for achieving and bringing to term a pregnancy. It appears that in future one would have three kinds of mothers:

(i) a genetic mother, who donates or sells her eggs;

(ii) a surrogate or natal mother, who carries the baby; and

(iii) a social mother, who raises the child.

[See: Feminist Perspectives on Law, Chapter 4: Facilitating Motherhood, pages 121-123]

11.1 India's first test-tube baby Kanupriya alias Durga, brought to fore the use of similar technology in India. The reproduction of children by NRTs or ARTs, raises several moral, legal and ethical issues. One such legal issue arises in the instant case.

11.2 Though the science proceeded in this direction in the late 1970, the practice of having children via surrogacy is a more recent phenomena. The relevant leave rules were first framed in 1972; to which amendments have been made from time to time. While notions have changed vis-a-vis parenthood (which is why provisions have been incorporated for paternity leave; an aspect which I will shortly advert to), there appears to be an inertia in recognising that motherhood can be attained even via surrogacy.

11.3 Rule 43 implicitly recognises that there are two principal reasons why maternity leave is accorded. First, that with pregnancy, biological changes occur. Second, post childbirth "multiple burdens" follow. (See: C-366/99 *Griesmar*, [2001] ECR 1-9383)

11.4 Therefore, if one were to recognise even the latter reason the commissioning mother, to my mind, ought to be entitled to maternity leave.

11.5 It is clearly foreseeable that a commissioning mother needs to bond with the child and at times take over the role of a breast-feeding mother, immediately after the delivery of the child.

11.6 In sum, the commissioning mother would become the principal care giver upon the birth of child; notwithstanding the fact that child in a given situation is bottle-fed.

11.7 It follows thus, to my mind, that the commissioning mother's entitlement to maternity leave cannot be denied only on the ground that she did not bear the child. This is dehors the fact that a commissioning mother may require to be at the bed side of the surrogate mother, in a given situation, even at the pre-natal stage; an aspect I have elaborated upon in the latter part of my judgment.

11.8 The circumstances obtaining in the present case, however, indicate that the genetic father made use of a donor egg, which then, was implanted in the surrogate mother.

11.9 The surrogate mother in this case had no genetic connection with the children she gave birth to. The surrogate mother however, carried the pregnancy to term.

12. Undoubtedly, the fact that the surrogate mother carried the pregnancy to full term, involved physiological changes to her body, which were not experienced by the commissioning mother but, from this, could one possibly conclude that her emotional involvement was any less if, not more, than the surrogate mother?

12.1 Therefore, while the submission advanced by Mr. Rajappa that maternity leave is given to a female employee who is pregnant, to deal with biological changes, which come about with pregnancy, and to ensure the health and safety, both of the mother and the child, while it is in her womb, is correct; it is, I am afraid, an uni-dimensional argument, offered to explain the meaning of the term "maternity", as found incorporated in the extant rules.

12.2 The rules as framed do not restrict the grant of leave to only those female employees, who are themselves pregnant as would be evident from the discussion and reasons set forth hereafter. For this purpose, in the first instance, I intend to examine the scope and effect of the Rules to the extent relevant for the purposes of issues raised in the writ petition.

12.3 The word 'maternity' has not been defined in the Central Civil Services (Leave) Rules, 1972 (in short the Leave Rules), which respondents say are applicable to the petitioner.

12.4 Rule 43, which makes provision for maternity, for the sake of convenience, is extracted hereinbelow:

> "…43. Maternity Leave:
>
> (1) A female Government servant (including an apprentice) with less than two surviving children may be granted maternity leave by an authority competent to grant leave for a period of (180 days) from the date of its commencement.
>
> (2) During such period, she shall be paid leave salary equal to the pay drawn immediately before proceeding on leave. NOTE:- In the case of a person to whom Employees' State Insurance Act, 1948 (34 of 1948), applies, the amount of leave salary payable under this rule shall be reduced by the amount of benefit payable under the said Act for the corresponding period.
>
> (3) Maternity leave not exceeding 45 days may also be granted to a female Government servant (irrespective of the number of surviving children) during the entire service of that female Government in case of miscarriage including abortion on production of medical certificate as laid down in Rule

19: 'Provided that the maternity leave granted and availed of before the commencement of the CCS (Leave) Amendment Rules, 1995, shall not be taken into account for the purpose of this sub-rule'.

(4) (a) Maternity leave may be combined with leave of any other kind. (b) Notwithstanding the requirement of production of medical certificate contained in sub-rule (1) of Rule 30 or sub-rule (1) of Rule 31, leave of the kind due and admissible (including commuted leave for a period not exceeding 60 days and leave not due) up to a maximum of one year may, if applied for, be granted in continuation of maternity leave granted under sub-rule (1).

(5) Maternity leave shall not be debited against the leave account…"

12.5 A perusal of Rule 43 would show that a female employee including an apprentice with less than two surviving children, can avail of maternity leave for 180 days from the date of its commencement. Sub-rule (3) of Rule 43 is indicative of the fact that where the female employee has suffered a miscarriage, including abortion, she can avail of maternity leave not exceeding 45 days. Importantly, clause (a) of sub-rule (4) of Rule 43, states that maternity leave can be combined with leave of any other kind. Furthermore, under clause (b) of sub-rule (4) such a female employee is entitled to leave of the kind referred to in Rule 31(1) notwithstanding the requirement to produce a medical certificate, subject to a maximum of two years, if applied for, in continuation of maternity leave granted to her. Sub-rule (5) of Rule 43 states that, maternity leave shall not be debited against leave account.

13. There are three other Rules to which I would like to refer to. These are Rules 43-A, 43-AA and 43-B.

13.1 Rule 43-A deals with paternity leave available to a male employee for the defined period, where "***his wife***" is confined on account of child birth. The said Rule allows a male employee, including an apprentice, with less than two surviving children, to avail of 15 days leave during the confinement of his wife for child birth, that is, up to 15 days "***before***" or "***up to 6 months***" from the date of delivery of the child.

[**43-A. Paternity leave:**

(1) A male Government servant (including an apprentice) with less than two surviving children, may be granted Paternity Leave by an authority competent to grant leave for a period of 15 days, during the confinement of his wife for childbirth, i.e., up to 15 days before, or up to six months from the date of delivery of the child.

(2) During such period of 15 days, he shall be paid leave salary equal to the pay drawn immediately before proceeding on leave.

(3) The paternity Leave may be combined with leave of any other kind.

(4) The paternity leave shall not be debited against the leave account.

(5) If Paternity Leave is not availed of within the period specified in sub-rule (1), such leave shall be treated as lapsed.

NOTE:- The Paternity Leave shall not normally be refused under any circumstances.]

13.2 Sub-rule (4) of Rule 43-A makes it clear that if paternity leave is not availed of within the period specified above, such leave shall be treated as lapsed.

13.3 Like in the case of a female employee, paternity leave can be combined with leave of any other kind, and the said leave is not debited against the male employee's leave account. This position emanates upon reading of sub-rule (3) and sub-rule (4) of Rule 43-A above.

13.4 Rule 43-AA deals with paternity leave made available, to a male employee, for the defined period, albeit from the date of "**valid adoption**".

[**43-AA. Paternity Leave for Child Adoption. –**

(1) A male Government servant (including an apprentice) with less than two surviving children, on valid adoption of a child below the age of one year, may be granted Paternity Leave for a period of 15 days within a period of six months from the date of valid adoption.

(2) During such period of 15 days, he shall be paid leave salary equal to the pay drawn immediately before proceeding on leave.

(3) The paternity leave may be combined with leave of any other kind.

(4) The Paternity Leave shall not be debited against the leave account.

(5) If Paternity leave is not availed of within the period specified in sub-rule (1) such leave shall be treated as lapsed.

[Note 1]: - The Paternity Leave shall not normally be refused under any circumstances.]

[Note 2]: - "Child" for the purpose of this rule will include a child taken as ward by the Government servant, under the Guardians and Wards Act, 1890 or the personal law applicable to that Government servant, provided such a ward lives with the Government servant and is treated as a member of the family and provided such Government servant has, through a special will, conferred upon that ward the same status as that of a natural born child.]

13.5 The aforementioned rule is *pari materia* with Rule 43-A, in all other aspects; the only difference being that the paternity leave of 15 days available to the male employee should be availed of within 6 months from the date of a valid adoption.

13.6 Under the Leave Rules, a female employee is also entitled to leave if she were to adopt a child as against taking recourse to the surrogacy route. In other words, there is a provision in the Leave Rules for **Child Adoption Leave**. The relevant provision in this behalf is made in Rule 43-B.

[**43-B. Leave to a female Government servant on adoption of a child:**

(1) A female Government servant, with fewer than two surviving children, on valid adoption of a child below the age of one year may be granted child adoption leave, by an authority competent to grant leave, for a period of [180 days] immediately after the date of valid adoption.

(2) During the period of child adoption leave, she shall be paid leave salary equal to the pay drawn immediately before proceeding on leave.

(3)(a) Child adoption leave may be combined with leave of any other kind.

(b) In continuation of the child adoption leave granted under sub-rule (1), a female Government servant on valid adoption of a child may also be granted, if applied for, leave of the kind due and admissible (including leave not due and commuted leave not exceeding 60 days without production of medical certificate) for a period upto one year reduced by the age of the adopted child on the date of valid adoption, without taking into account child adoption leave.

Provided that this facility shall not be admissible in case she is already having two surviving children at the time of adoption.

(4) Child adoption leave shall not be debited against the leave account.]

[Note: - "Child" for the purpose of this rule will include a child taken as ward by the Government servant, under the Guardians and Wards Act, 1890 or the personal Law applicable to that Government servant, provided such a ward lives with the Government servant and is treated as a member of the family and provided such Government servant has, through a special will, conferred upon that ward the same status as that of a natural born child.]

The said Rule was substituted by notification dated 31.03.2006 and was published in the gazette of India on 27.04.2006; to take effect from 31.03.2006.

It appears that prior to the insertion of Rule 43-B, the said rule was numbered as 43-A and was inserted vide notification dated 22.10.1990, which was published in the gazette of India, on 26.01.1991. The said notification was, however, substituted by another notification dated 04.03.1992, which in turn was published in the gazette of India on 14.03.1992.]

13.7 Rule 43-B, which enables the female employee with fewer than two surviving children, to avail of child adoption leave for a period of 180 days affixes, inter alia, a condition that there should be in place a "***valid adoption***" of a child below the age of one year. The period of 180 days commences immediately after the date of valid adoption. [See sub-rule (1) of Rule 43-B]

13.8 Clause (a) of sub-rule (3) of Rule 43-B enables a female employee to combine child adoption leave with leave of any other kind. Clause (b) of sub-rule (3) of Rule 43-B, entitles a female employee in continuation of child adoption leave granted under sub-rule (1), on valid adoption of a child to apply for leave of the kind due and admissible (including leave not due and commuted leave not exceeding 60 days without production of medical certificates) for a period up to one year, albeit reduced by the age of adopted child on the date of "valid adoption". In other words, this sub-rule allows a female employee to apply for any other leave which is due and admissible in addition to child adoption leave. There is, however, a proviso added to the said sub-rule which prevents a female employee to avail of such leave if she already has two surviving children at the time of adoption.

13.9 As in the other rules, child adoption leave is not to be debited against the leave account.

14. Thus, a reading of Rule 43 would show that while it is indicated in sub-rule (1) as to when the period of leave is to commence, that is, from the date of maternity; the expression 'maternity' by itself has not been defined. As a matter of fact, sub-rule (3) of Rule 43 shows that if the pregnancy is not carried to full term on account of miscarriage, which may include abortion, a female employee is entitled to leave not exceeding 45 days.

15. There are two ways of looking at Rule 43. One, that the word, 'maternity' should be given the same meaning, which one may argue inheres in it, on a reading of sub-rule (3) of Rule 43; which is the notion of child bearing. The other, that the word "***maternity***", as appearing in sub-rule (1) of Rule 43, with advancement of science and technology, should be given a meaning, which includes within it, the concept of motherhood attained via the surrogacy route. The latter appears to be more logical if, the language of Rule 43-A, which deals with paternity leave, is contrasted with sub-rule (1) of Rule 43. Rule 43-A makes it clear that a male employee would get 15 days of leave "***during the confinement of his wife for child birth***", either 15 days prior to the event, or thereafter, i.e. after child birth, subject to the said leave being availed of within 6 months of the delivery of the child.

15.1 There is no express stipulation in sub-rule (1) of Rule 43 to the effect that the female employee (applying for leave) should also be one who is carrying the child. The said aspect while being implicit in sub-rule (1) of Rule 43, does not exclude attainment of motherhood via surrogacy. The attributes such as "***confinement***" of the female employee during child birth or the conditionality of division of leave into periods before and after child birth do not find mention in Rule 43(1).

15.2 Having regard to the aforesaid position emanating upon reading of the Rules, one is required to examine the tenability of the objections raised by the respondents.

16. The argument of the respondents, in sum, boils down to this: that the word 'maternity' can be attributed to only those female employees, who conceive and carry the child during pregnancy. In my view, the argument is partially correct, for the reason that the word 'maternity' pertains to the 'character, condition, relation or state of a mother' [Black's Law Dictionary, 6th Edition at page 977]. In my opinion, where a surrogacy arrangement is in place, the commissioning mother continues to remain the legal mother of the child, both during and after the pregnancy…

16.1 Therefore, according to me, maternity is established vis-a-vis the commissioning mother, once the child is conceived, albeit in a womb, other than that of the commissioning mother.

16.2 It is to be appreciated that Maternity, in law and/or on facts can be established in any one of the three situations: First, where a female employee herself conceives and carries the child. Second, where a female employee engages the services of another female to conceive a child with or without the genetic material being supplied by her and/or her male partner. Third, where female employee adopts a child.

16.3 In so far as the third circumstance is concerned, a specific rule is available for availing leave, which as indicated above, is provided for in Rule 43-B. In so far as the first situation is concerned, it is covered under sub-rule (1) of Rule 43. However, as regards the second situation, it would necessarily have to be read into sub-rule (1) of Rule 43.

16.4 To confine sub-rule (1) of Rule 43 to only to that situation, where the female employee herself carries a child, would be turning a blind eye to the advancement that science has made in the meanwhile. On the other hand, if a truncated meaning is given to the word 'maternity', it would result in depriving a large number of women of their right to avail of a vital service benefit, only on account of the choice that they would have exercised in respect of child birth.

17. The argument of the respondents that the underlying rationale, for according maternity leave (which is to secure the health and safety of pregnant female employee), would be rendered nugatory - to my mind, loses sight of the following:

(i) First, that entitlement to leave is an aspect different from the right to avail leave.

(ii) Second, the argument centres, substantially, around, the interest of the carrier, and in a sense, gives, in relative terms, lesser weight to the best interest of the child.

17.1 In a surrogacy arrangement, the concern of the commissioning parents, in particular, the commissioning mother is to a large extent, focused on the child carried by the gestational mother. There may be myriad situations in which the interest of the child, while still in the womb of the gestational mother, may require to be safeguarded by the commissioning mother. To cite an example, a situation may arise where a commissioning mother may need to attend to the surrogate/gestational mother during the term of pregnancy; because the latter may be bereft of the necessary wherewithal. The lack of wherewithal could be of: financial nature (the arrangement in place may not suffice for whatever reasons), physical

condition or emotional support or even a combination of one or more factors stated above. In such like circumstances, the commissioning mother can function effectively, as a care-giver, only if, she is in a position to exercise the right to take maternity leave. To my mind, to curtail the commissioning mother's entitlement to leave, on the ground that she has not conceived the child, would work, both to her detriment, as well as, that of the child.

18. The likelihood of such right, if accorded to the commissioning mother, being misused can always be curtailed by the competent leave sanctioning authority.

18.1 At the time of sanctioning leave the competent authority can always seek information with regard to circumstances which obtain in a given case, where application for grant of maternity leave is made. The competent authority's scrutiny, to my mind, would be keener and perhaps more detailed, where leave is sought by the commissioning mother at the pre-natal stage, as against post-natal stage. If conditions do not commend that leave be given at the pre-natal stage, then the same can be declined.

18.2 In so far as post-natal stage is concerned, ordinarily, leave cannot be declined as, under most surrogacy arrangements, once the child is born, its custody is immediately handed over to the commissioning parents. The commissioning mother, post the birth of the child, would, in all probability, have to play a very crucial role in rearing the child.

18.3 However, these are aspects which are relatable to the time and the period for which maternity leave ought to be granted. The entitlement to leave cannot be denied, to my mind, on this ground.

…

20. In our Constitution, under Article 39(f), which falls in part IV, under the heading Directive Principles of the States policy, the state is obliged to, inter alia, ensure that the children are given opportunities and facilities to develop in a healthy manner. Similarly, under Article 45, State has an obligation to provide early childhood care.

20.1 Non-provision of leave to a commissioning mother, who is a employee, would, to my mind, be in derogation of the stated Directive Principles of State Policy as contained in the Constitution.

21. In this context, regard may also be had to Article 6 of the United Nations Convention on Rights of Child (UNCRC).

21.1 Article 6 of the UNCRC provides that the States, which are party to the Convention, shall recognize that every child has the inherent right to life. A State-party is thus obliged to ensure, to the maximum extent possible, the survival and development of the child. Undoubtedly, India is a signatory to the UNCRC.

21.2 There is no municipal law, which is in conflict with the provisions of Article 6 of the UNCRC. The State, therefore, is obliged to act in a manner which ensures that it discharges its obligations under the said Article of the UNCRC. [See *Jolly George Varghese* v. *Bank of Cochin*, (1980) 2 SCC 360; *Vishaka* v. *State of Rajasthan*, (1997) 6 SCC 241 and *National Legal Services Authority* v. *Union of India*, (2014) 5 SCC 438 at para 484 to 487/para 51 to 60].

22. The Madras High Court in *K. Kalaiselvi's* case equated the position of an adoptive parent to that of a parent who obtains a child via a surrogacy arrangement. The observations of the court, to that effect, are found in the following paragraphs of the judgement.

> "13. Alternatively, he contended that if law can provide child care leave in case of adoptive parents as in the case of Rule 3-A of the Madras Port Trust (Leave) Regulations, 1987, then they should also apply to parents like the petitioner who obtained child through surrogate agreement since the object of such leave is to take care of the child and developing good bond between the child and the parents.
>
> [Rule 3-A - Leave to female employees on adoption of a child:
>
> A female employee on her adoption a child may be granted leave of the kind and admissible (including commuted leave without production of medical certificate for a period not exceeding 60 days and leave not due) upto one year subject to the following conditions:
>
> (i) the facility will not be available to an adoptive mother already having two living children at the time of adoption;
>
> (ii) the maximum admissible period of leave of the kind due and admissible will be regulated as under:
>
> (a) If the age of the adopted child is less than one month, leave upto one year may be allowed.
>
> (b) If the age of the child is six months or more, leave upto six months may be allowed.
>
> (c) If the age of the child is nine months or more leave upto three months may be allowed.]

14. However, the learned counsel for the Port Trust contended that in the absence of any specific legal provision, the question of this court granting leave will not arise.

15. In the light of these rival contentions, it has to be seen whether the petitioner is entitled for a leave similar to that of the leave provided under Rule 3-A and whether her child's name is to be included in the FMI Card for availing future benefits?

16. This court do not find anything immoral and unethical about the petitioner having obtained a child through surrogate arrangement. For all practical purpose, the petitioner is the mother of the girl child G.K. Sharanya and her husband is the father of the said child. When once it is admitted that the said minor child is the daughter of the petitioner and at the time of the application, she was only one day old, she is entitled for leave akin to persons who are granted leave in terms of Rule 3-A of the Leave Regulations. The purpose of the said rule is for proper bonding between the child and parents. Even in the case of adoption, the adoptive mother does not give birth to the child, but yet the necessity of bonding of the mother with the adoptive child has been recognised by the Central Government. Therefore, the petitioner is entitled for leave in terms of Rule 3-A. Any other interpretation will do violence to various international obligations referred to by the learned counsel for the petitioner. Further, it is unnecessary to rely upon the provisions of the Maternity Benefit Act for the purpose of grant of leave, since that act deals with actual child birth and it is mother centric. The Act do not deal with leave for taking care of the child beyond 6 weeks, i.e., the post natal period. The right for child care leave has to be found elsewhere. However, this court is inclined to interpret Rule 3-A of the Madras Port Trust (Leave) Regulations, 1987 also to include a person who obtain child through surrogate arrangement…"

22.1 The ratio of the judgement, to my mind, is that, an adoptive parent is no different from a commissioning parent, which seeks to obtain a child via a surrogacy arrangement. The Madras High Court thus interpreted Rule 3-A of the Madras Port Trust Regulation to include a female employee who seeks to obtain a child via a surrogacy arrangement.

23. In the instant case, in so far as Rule 43-B obtains, the situation is somewhat similar to that which prevailed in *K. Kalaiselvi's* case.

23.1 Having said so, in my opinion, the impediment perhaps in applying the ratio set forth in *K. Kalaiselvi's* case would be, if at all, on account of the presence of the expression, 'valid adoption', in Rule 43-B; which is also one of the objections taken by the respondents to the entitlement to leave by a commissioning mother under the said Rule.

23.2 For the sake of completeness I must refer to the judgement of the Kerala High Court on somewhat similar issue in the matter of *P. Geetha* v. *The Kerela Livestock Development Board Ltd.* 2015 (1) KLJ 494. However, the gamut of rules that this court is called upon to examine are not, in their entirety, similar to the ones that were before the Kerala High Court. To cite an example in *P. Geetha's* case the rules framed by the Kerala Livestock Development Board did not provide for paternity leave.

23.3 Therefore, in my view, in such like situations, the appropriate course would be to allow commissioning mothers to apply for leave under Rule 43(1).

24. In view of the discussion above, the conclusion that I have reached is as follows:-

(i). A female employee, who is the commissioning mother, would be entitled to apply for maternity leave under sub-rule (1) of Rule 43.

(ii). The competent authority based on material placed before it would decide on the timing and the period for which maternity leave ought to be granted to a commissioning mother who adopts the surrogacy route.

(iii). The scrutiny would be keener and detailed, when leave is sought by a female employee, who is the commissioning mother, at the pre-natal stage. In case maternity leave is declined at the pre-natal stage, the competent authority would pass a reasoned order having regard to the material, if any, placed before it, by the female employee, who seeks to avail maternity leave. In a situation where both the commissioning mother and the surrogate mother are employees, who are otherwise eligible for leave (one on the ground that she is a commissioning mother and the other on the ground that she is the pregnant women), a suitable adjustment would be made by the competent authority.

(iv). In so far as grant of leave qua post-natal period is concerned, the competent authority would ordinarily grant such leave except where there are substantial reasons for declining a request made in that behalf. In this case as well, the competent authority will pass a reasoned order.

25. The writ petition is disposed of, in the aforementioned terms.

26. Parties shall, however, bear their own costs."

IN THE HIGH COURT OF DELHI

Major Anamdeep Singh Dhingra v. Union of India & Ors.
2016 SCC OnLine Del 4060
Pradeep Nandrajog and Pratibha Rani, JJ.

The petitioner was employed with the Army Dental Corps as a Short Service Commission Officer. His wife suffered from a medical condition because of which she was unable to conceive without fertility treatment. The treatment was only available at Delhi, where the petitioner was posted. Further, the petitioner's presence with his wife in Delhi was necessary for at least seven months as ART procedures could require three to four attempts with interval periods between each attempt. The petitioner was directed to move to a field hospital where ART procedures were not available. Being aggrieved of his posting order, he invoked the writ jurisdiction of the Delhi High Court, seeking quashing of such posting order as he wanted to remain in Delhi with his wife where they could undertake the required medical treatment.

Nandrajog, J.: "The petitioner joined the Army Dental Corp. as a Short Service Commission Officer on January 17, 2008. He was married in November, 2009. Unfortunately petitioner's wife suffered from Polycystic Ovarian disease. Under strict medical supervision petitioner's wife could conceive and good luck blessed the couple with a baby boy born on August 30, 2013. But ill luck followed. The infant was suffering from a severe disability having Hypoplastic Left Heard (sic) Syndrome. Adding a number to the population of this country on August 30, 2013, after fourteen days the unfortunate infant reduced the number by one to the population. He passed away.

2. Desirous of having a progeny of their own, the petitioner and his wife sought for a transfer to a family station so that they could avail the benefit of specialised IVF facilities. The petitioner was posted at a family station and is aggrieved by his posting to the 2136 Field Hospital at Pooh in Himachal Pradesh. The reason why the petitioner questions the posting order is the need to be with his wife who needs expert medical supervision in trying to conceive. Polycystic Ovarian Disease with which petitioner's wife is inflicted means that the ovum inside the ovary either does not form or forms immature and hence unfit for fertilization by the sperm; the result is no conception. A drug called Metformin is administered to females suffering from Polycystic Ovarian disease. It cuts down the blood sugar level, which are generally high due to insulin resistance in such patients. This helps the ovum to mature for fertilization by the sperm. It also has to be ensured that Luteinizing hormone is below a particular level to sustain the embryo after fertilization takes place. All this requires constant monitoring.

3. Medical documents evince that petitioner's wife consulted the expert on December 20, 2015 who started administering Metformin to petitioner's wife under strict vigil, constantly monitoring her parameters. Medical documents shows that the regular follicular monitoring over three months suggest hormonal profile stabilising suggesting that petitioner's wife could continue further treatment for conception. But the requisite hormonal profile not being achieved oral medication continued. The wife of the petitioner can, as per the medical expert, have intrauterine insemination and for which the likely date is July 29, 2016. If first attempt of intrauterine insemination fails two or three more attempts would be made in the next menstrual cycles and if this fails the expert would go in for a test tube baby in medical parlance 'In Vitro Fertilization'. Three-four attempts would be made with an interval of month each if the first, second or third IVF fails. If petitioner's wife conceives she would be under constant supervision because she carries a very high risk of Gestational Diabetes Mellitus (Deranged sugar), preeclampsia (Deranged high blood pressure) throughout her pregnancy. Age is a major concern because post 35, petitioner's wife would hardly had (sic) any chance of conception.

4. The position, therefore, would be that if God willing, the intrauterine insemination sustains by the end of the month the petitioner's wife would be blessed with the baby after nine months. Meaning thereby petitioner's presence with his wife would be a must for at least ten months reckoning from now. If the first intrauterine insemination fails and the second succeeds this period would be extended to eleven months. If even the second fails, and number third succeeds, this period of stay would be extended to a year. If intrauterine insemination fails and petitioner's wife is to go for a test-tube baby, the first IVF attempt would be made after four months from today. If it fails, the next after five months. If that fails the next after six months.

5. The future is uncertain. But one thing is clear. In the next seven months at least the petitioner's presence at Delhi is necessary. Whether further presence is necessary would depend upon whether petitioner's wife conceives.

6. Conscious of the fact that the Indian Army is short of doctors, but the Indian Army can surely spare one officer.

7. It is a competing claim of hardships. The petitioner claims hardships so do the respondents.

8. But in the competition we find petitioner's hardship to be more pressing and of the kind that if the petitioner is not with his wife for at least seven months, the cause for which the petitioner and his wife are struggling for shall be lost forever.

9. The policy dated October 20, 2009 regarding treatment at Assisted Reproductive Technology for officers of the Indian Army on which the respondents rely may strictly not vest a power with the competent authority to permit the petitioner to stay on in Delhi, but we find that there is no negative stipulation in the policy.

10. Under the circumstances in view of the exceptional facts of the instant case we dispose of the petition quashing the posting and the movement orders dated May 9, 2016 and June 16, 2016 respectively. We direct that the petitioner should be posted at a duty station in the NCR where he can stay with his wife and be properly monitored by the Gynaecologist under whom petitioner's wife is being treated.

…"

Endnotes

1 The Indian Council for Medical Research (ICMR) in its guidelines relating to Artificial Reproductive Technologies (ART) clinics, defines ART to include "all techniques that attempt to obtain a pregnancy by manipulating the sperm or/and oocyte outside the body, and transferring the gamete or embryo into the uterus." Ministry of Health and Family Welfare, Government of India, National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India (2005), *available at* https://www.icmr.nic.in/sites/default/files/guidelines/Chapter.pdf (ART include Artificial Insemination, Assisted Hatching, Intracytoplasmic Sperm Injection, Intrauterine Insemination, In *vitro* Fertilisation-Embryo Transfer).

2 *See* Ministry of Health and Family Welfare, Government of India, National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India (2005), *available at* https://www.icmr.nic.in/sites/default/files/guidelines/b.pdf.

3 *See* Ministry of Health and Family Welfare, Government of India, Commission of Surrogacy-Instructions Regarding (2015), *available at* https://dhr.gov.in/sites/default/files/latest Govt. instructions on ART Surrogacy Bill.pdf.

4 (2008) 13 SCC 518.

5 The parents of the baby had separated during the pregnancy. The intending mother was no longer interested in taking custody of the child. Hence, the intending father of the child, and his mother came to India to take custody of the child. Due to law and order issues, the child had to be moved from Gujarat (where it was born) to Rajasthan. The visa of the intending father expired during the process. Hence, the paternal grandmother was the one seeking custody of the child.

6 For a discussion of cases on the issue of maternity benefits in the context of employment, *see* Chapter 12, "Pregnancy, Maternity and Child Care Leave, and Employment."

7 (2015) 221 DLT 756. *See also* Hema Vijay Menon v. State of Maharashtra, (2015) SCC OnLine Bom 6127; Kalaiselvi v. Chennai Port Trust, (2013) 3 Mad LJ 493; P. Geetha v. The Kerala Livestock Development Board, 2015 (1) KLJ 494.

8 2016 SCC OnLine Del 4060.

9 U.N. Office of the High Commissioner for Human Rights, "Status of Ratification Interactive Dashboard—India," http://indicators.ohchr.org/.

10 Dr*aft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the Commission at its fifty-third session in 2001 (Final Outcome) (International Law Commission [ILC]), contained i*n U.N. Doc. A/56/49(Vol. I)/Corr.4 (2001)*, Arts. 3-4.*

11 Vishaka v. State of Rajasthan, AIR 1997 SC 3011.