

Before
THE HONORABLE FAMILY COURT
DELHI
2016

PROCEEDING UNDER GUARDIANS AND WARDS ACT, 1890

IN THE MATTER OF:

MR. Y (GENETIC FATHER) - - - - - PLAINTIFF

V.

MS. Z (GENETIC MOTHER) - - - - - DEFENDANT

WRITTEN SUBMISSION ON BEHALF OF THE DEFENDANT

TABLE OF CONTENTS

INDEX OF ABBREVIATIONS	-	-	-	-	-	-	-	II
INDEX OF AUTHORITIES	-	-	-	-	-	-	-	IV
STATEMENT OF JURISDICTION	-	-	-	-	-	-	-	VII
STATEMENT OF FACTS	-	-	-	-	-	-	-	VIII
QUESTIONS PRESENTED	-	-	-	-	-	-	-	X
SUMMARY OF ARGUMENTS	-	-	-	-	-	-	-	XI
PLEADINGS AND AUTHORITIES	-	-	-	-	-	-	-	1
I. WHETHER THERE IS ANY EXISTENCE OF SURROGACY AGREEMENT IN THE PRESENT CASE?	-	-	-	-	-	-	-	1
A. SURROGACY AGREEMENT WAS NOT SIGNED BETWEEN MS. Z AND SAME SEX COUPLE.								
B. AGREEMENT WITHOUT SURROGATE MOTHER, MS. Z, IS NOT ENFORCEABLE.	-							2
II. WHETHER MS. Z VOLUNTARILY RELINQUISHED THE CUSTODY OF CHILD?								
III. WHETHER MS. Z IS AN ABLE GUARDIAN FOR THE SURROGATE CHILD?	-	-						2
A. MS. Z IS NOT INCLINED TOWARDS MONETARY CONSIDERATIONS.								
B. Z IS HAVING TRUE AFFECTION TOWARDS THE CHILD.								
C. BEST INTEREST OF THE CHILD LIES WITH MS. Z.								
PRAYER	-	-	-	-	-	-	-	XII

INDEX OF ABBREVIATIONS

¶	Paragraph
&	And
AIR	All India Reporter
AWC	Allahabad Weekly Cases
All.	Allahabad
Anr.	Another
APLJ	Andhra Pradesh Law Journal
Bom.	Bombay
BOMLR	Bombay Law Reporter
Cal	Calcutta
Co.	Company
Cha.	Chapter
CrPC	Criminal Procedure Code
A./App.	Appeal
DMC	Divorce and Matrimonial Cases
DLT	Delhi Law Times
Edn. / Ed.	Edition
Govt.	Government
H.P.	Himachal Pradesh
Hon`ble	Honorable

L.J.	Law Journal
Ltd.	Limited
Mr.	Mister
Mad.	Madras
MLJ	Madras Law Journal
MP	Madhya Pradesh
MPLJ	Madhya Pradesh Law Journal
No.	Number
HC	High Court
Ors.	Others
Pg.	Page
Re.	Reference
Pvt.	Private
SCC	Supreme Court Cases
SC	Supreme Court
Sd/	Signed
UOI	Union Of India
V.	Versus
Vol.	Volume

INDEX OF AUTHORITIES

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STATEMENT OF JURISDICTION

The counsels representing the defendant have endorsed their pleadings before the Hon`ble Family Court, New Delhi, under Section 7<sup>1</sup> of the Family Courts Act, 1984 in which the Hon`ble Court has the jurisdiction.

The present memorandum sets forth the facts, contentions and arguments.

¹S. 7. Jurisdiction. - (1) Subject to the other provisions of this Act, a Family Court shall

- (a) have and exercise all the jurisdiction exercisable by any district Court or any subordinate Civil Court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the Explanation; and
- (b) be deemed, for the purposes of exercising such jurisdiction under such law, to be a district Court or, as the case may be such subordinate Civil Court for the area to which the jurisdiction of the Family Court extends.

Explanation -The suits and proceedings referred to in this subsection are suits and proceedings of the following nature, namely:

- (g) a suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor.

STATEMENT OF FACTS

For the sake of brevity and convenience of the Hon`ble Court the facts of the present case are summarized as follows:

1. Mr X & Y are a same sex couple who live in the United States of America. Both of them are Indians by nationality though they have initiated the process of acquiring U.S. citizenship. They have been together in their relationship since 2005 and live together in the same house in the U.S.
2. Mr X and Y are desirous of starting a family and for this purpose; both of them started looking for surrogate mothers based in India. Their plan is to get a child through surrogacy and when the child is a new born, to bring him/her with them to the U.S. on a long term visa.
3. In the year 2013, Mr X and Mr Y identified an agency based in New Delhi which offers surrogacy to foreigners. They commenced negotiations with the agency and understood the terms of the agreement. They finally agreed to the surrogacy that it would be traditional surrogacy with Mr Y being the genetic father of the child and the surrogate mother being the genetic mother of the same. The agreement was signed while both Mr X and Y were in the U.S. by means of emails exchanged. The couple deposited the first sum of to the agency amounting to \$2,500 in September, 2014.
4. In February 2015, Mr Y travelled to India and an artificial fertilisation was carried out on the surrogate mother, Ms Z, selected to carry the child. Thereafter, Mr Y returned to the U.S. The couple made the second instalment of the payment of \$2,500 in the same month.
5. On 20th November, 2015, the child, a healthy baby girl, was born to the surrogate mother in New Delhi. Mr X and Y both returned to India and were present at the hospital at the time of the birth of the baby.
6. The final payment of \$2500 was made to the agency by the couple on 21st November, 2015 and as a token of their appreciation, they also paid Ms Z \$1000. Mr Y made an application before the appropriate court that he be considered the child's sole legal guardian.
7. On the 21st of November itself, Mr Y had to suddenly return to the U.S. on urgent business which could not be deferred. Mr X stayed in India at this time. On 28th

November, formally became a U.S. citizen. He informed the Indian High Commission and Embassy in the U.S. of the same.

8. The Indian Embassy in the U.S. asked Mr Y to surrender his Indian passport and to obtain a Person of Indian Origin Card if he so desired. Mr Y realised that this would mean that he would not be able to go back to India immediately.
9. In the meantime, Ms Z claimed that she did not want to give up custody of the child as she had become emotionally attached to it. When she went to meet Mr X in order to see the child, Mr X did not allow her inside the house or to even see the baby. She claimed that she could decide whether she wanted to give the baby or not as that was what the surrogacy agency had told her at the time she decided to carry the child. She is an illiterate woman.
10. Mr X threatened Ms Z that he would call the police and get her arrested and abused her in filthy language. He called her a cheat and said that she was creating this ruckus only to extort more money from the couple. Hearing this, Ms Z forcefully returned the \$1000 they had given her at the time of the birth of the baby.
11. Finally, Mr Y obtained a U.S. passport and visited India in December, 2015. He withdrew the earlier proceedings in view of the change of his citizenship, amended the same and filed a fresh proceeding under the Guardians and Wards Act in order to be declared the sole legal guardian of the child.
12. The surrogate mother, who heard from her acquaintances that such a proceeding was pending before the Courts, filed a PIL challenging the proceedings before the Delhi High Court on the grounds that she was cheated and her right to life had been violated.
13. The High Court admitted the petition and stayed the guardianship proceedings that were pending. On 15th January, 2016, the High Court decided by a short order that the issues of fact in the matter needed adjudication and therefore directed this court under the Guardians and Wards Act to adjudicate the matter while impleading the biological mother as a party in the same.
14. The same matter is pending before this Court as both Mr Y and the biological mother claim guardianship over the child.

QUESTIONS PRESENTED

The following questions are presented before this Hon'ble court for adjudication in the instant matter:

- I. WHETHER THERE IS ANY EXISTENCE OF SURROGACY AGREEMENT IN THE PRESENT CASE?**
- II. WHETHER MS. Z VOLUNTARILY RELINQUISHED THE CUSTODY OF CHILD?**
- III. WHETHER MS. Z IS AN ABLE GUARDIAN FOR THE SURROGATE CHILD?**

SUMMARY OF ARGUMENTS

I. THERE IS NO EXISTENCE OF SURROGACY AGREEMENT IN THE PRESENT CASE.

Firstly, surrogacy agreement was signed between agency and same sex couple and not between same sex couple and Ms. Z as all the negotiations took place between first two.

Secondly, Ms. Z has no obligation towards anyone as she was never a party to the surrogacy agreement entered between agency and same sex couple.

II. MS. Z DID NOT RELINQUISH THE CUSTODY OF THE CHILD VOLUNTARILY.

Firstly, Ms. Z was in intimidating surroundings at hospital where everybody was expecting from her to give up the custody of her new born child.

Secondly, on the very next day of the delivery, Ms. Z was not mentally & physically fit to resist the taking of baby by same sex couple.

Thirdly, when she got physically and mentally fit, she immediately went to the house of Mr. X, returned his money and asked for the child.

III. MS. Z IS AN ABLE GUARDIAN FOR THE SURROGATE CHILD.

Firstly, Ms. Z has true affection to baby child as she is her genetic mother.

Secondly, Ms. Z is not inclined towards monetary considerations, so that she attempted to approach Court of law to claim her lawful rights on the child.

Thirdly, Best interest of the child lies with Ms. Z. As she only can fulfil the biological & emotional needs of newly born girl child.

PLEADINGS AND AUTHORITIES

I. THERE IS NO EXISTENCE OF SURROGACY AGREEMENT IN THE PRESENT CASE.

1. In the present case, there was no surrogacy agreement between Ms. Z and Mr. X & Mr. Y. Surrogacy agreement was signed between agency and Mr. X & Mr. Y. Thus, Ms. Z has no obligation towards anyone as she was never a party to the surrogacy agreement.

A. Surrogacy agreement was not signed between Ms. Z and Mr. X & Mr. Y.

2. In the present case, surrogacy agreement was never signed between Ms. Z and intended parent i.e. Mr. X & Mr. Y which is necessary for any surrogacy arrangement.² In simple words, no surrogacy agreement exists between Ms. Z and Mr. X & Mr. Y in the present matter.
3. In reality, agreement was signed between agency and Mr. X & Mr. Y as it is clearly given that all the terms and conditions were negotiated with the agency by Mr. X and Mr. Y, couple paid whole money to the agency and most importantly during the entire period of the negotiation there was no description of Ms. Z.³ Thus, agreement was signed only between agency and Mr. X & Mr. Y, meaning thereby, Ms. Z had no role in that agreement.
4. Aforesaid mention submission can be affirmed through this fact that the same sex couple negotiated with the agency for at least one year, which means they were very cautious towards the process. Thus, no prudent person after negotiating for such a long time, would be ready to let an anonymous woman carry his child. Such a cautious person would certainly choose the surrogate mother to carry his child by himself. Therefore, Mr. Y came to India in the month of February to find out the suitable surrogate mother and then he selected the surrogate mother i.e. Ms. Z to carry the child.⁴
5. Hence, in the present matter, agreement was signed between same sex couple and agency. Ms. Z only came in the picture when Mr. Y came to India to select the surrogate mother to carry his child.

B. Agreement without surrogate mother, Ms. Z, is not enforceable.

6. It has already been established that Ms. Z was never a party to the agreement signed between the agency and Mr. X & Mr. Y. Therefore, she has no obligation to adhere to

²*Baby Manji Yamada v. Union of India*, AIR 2009 SC 84; See also: 228th Law Commission Report.

³Moot proposition ¶ 3.

⁴Moot proposition ¶ 4.

the terms of agreement⁵ i.e. renunciation of parenthood rights. Thus, she has all the rights on the new born baby as lawful mother. Furthermore, it is pertinent to mention that Mr. Y does not enjoy any privilege over Ms. Z to have guardianship of the child as there was no existence of surrogacy agreement between him and Ms. Z.

II. MS. Z DID NOT VOLUNTARILY RELINQUISH THE CUSTODY OF THE CHILD.

7. It is humbly submitted that Ms. Z never wanted to give up the custody of the child to Mr. X & Y. In order to understand this proposition we have to understand the condition of Ms. Z soon after the birth of the child and her actions later on.
8. In the present case, it is undisputable fact that Mr. X and Mr. Y were present in the hospital at the time of birth of the child and the arrangements of delivery were made by agency, meaning thereby, she was in intimidating surroundings where everybody was expecting from her to give up the custody. Child was taken from her on the very next day of the delivery. Now, a mother who has recently given the birth to a child cannot even talk properly and under this critical period no mother can be physically and mentally fit.⁶ Thus, how is it possible if Ms. Z had given the baby voluntarily, particularly, just a day after birth of the child.
9. In reality she never wanted to give up the custody of the child to Mr. X & Y that is why when she got physically and mentally fit, she immediately went to the house of Mr. X, returned his money and asked for the child.

III. MS. Z IS AN ABLE GUARDIAN FOR THE SURROGATE CHILD.

10. It is humbly submitted before this Hon`ble Court that Ms. Z is an able guardian because she is the genetic mother of the child, she had no desire to keep the money given by the Mr. X & Y and she is a women of high courage as despite of threats and abuses from Mr. X, she did not get scared and went to High Court to claim her lawful rights on the child.

A. Ms. Z is not inclined towards monetary considerations.

11. In the present case, Ms. Z was never a money grabber. It is given that couple paid Ms. Z \$1000, however, nowhere it is given that money was accepted voluntarily. In

⁵*Harnam Singh v. Purbi Devi*, AIR 2000 HP 108; See also: *Narayani Devi v Tagore Commerical Corp. Ltd*, AIR 1973 Cal 401.

⁶Margaret Wahl, Amy Labbe and Miriam Davidson, “*Great Expectations: Pregnancy and Childbirth with Neuromuscular*” (Available at: <https://www.mda.org/sitesPregnancy>).

reality she never wanted money at the first place that is why when she got physically fit, she immediately went to the home of Mr. X and returned \$1000 to Mr. X. In order to understand this proposition, we have to corroborate the previous incident with the subsequent incident which is:

12. When Ms. Z went to return the money and see the child, Mr. X abused her and called her money grabber. However, when Ms. Z tried to return the money, he was not ready to take it back. It means it in nature of Mr. X that he does not take back money easily once he gives it. This conduct of Mr. X is helpful to understand the reality of that incident when he along with Mr. Y gave Ms. Z the money in hospital. It means, even at the time of giving custody she would have refused to take money but couple had forced her to keep it because it was their natural behavior and as she was not physically well, she could not do firm protest against them. Hence, it can be safely concluded that Ms. Z is not inclined towards monetary considerations. She, despite of Mr. X's reluctance, gave back the money to him.

B. Ms. Z is having true affection towards the child.

13. Ms. Z is genetic mother of the child. It means it is natural that she would be having affection towards her daughter.⁷ This proposition can also be affirmed through the fact that Ms. Z, despite of being an illiterate woman, approached the High Court to get the custody of her child. This action of hers' shows her commitment towards the child. She is having an innate bond with her child which is making her take all the remedies within her reach so that she can get the custody of the child.
14. It is also important to note that for a human it is very difficult to let his self-respect get undermine in front of anyone. Ms. Z was so adamant to meet her child that not for even once she thought about her self-respect, she went to Mr. X's home and kept on hearing the filthy abuses of Mr. X. She was so courageous that she did not fear even a bit when Mr. X threatened her by saying that he will call the police and get her arrested. These instances shows what the new born baby means to her i.e., nothing but means to live the life.

⁷ Law Commission Of India, Report No.228, "*Need For Legislation To Regulate Assisted Reproductive Technology Clinics As Well As Rights And Obligations Of Parties To A Surrogacy*" (August 2009).

C. Best interest of the child lies with Ms. Z.

15. It is humbly submitted that Ms. Z is a rightful & able guardian as she is a genetic mother and it is in the best interest of the child to live with Ms. Z.⁸
16. In the present case Mr. Y is an affluent person but this should not be taken into consideration while determining the custody of the child because Ms. Z may be illiterate but she is not incapable to cater to the needs of the child. It is a settled position of law that affluence of the father is not a factor to give the custody of the child to him.⁹ The fact that mother is financially weak cannot be a ground for giving custody of child to father.¹⁰
17. In addition to above, it is a settled position of law that welfare and interest of the child is paramount in cases of guardianship.¹¹ Now, in order to determine where the best interest of a minor child lies, certain factors need to be considered which are: biological and emotional needs of a minor¹² and nature of attachment to the prospective guardian.¹³
18. In the present case the minor child is in a feeding state i.e., she needs her mother's milk for proper nutrition.¹⁴ It is also medically advised to breast-feed the child for at least six months so that the minor child growth is not affected.¹⁵ In addition to this, a mother has an innate emotional attachment with her minor child because the child is an integral part of her body. It is a settled position of law that, when both the parties who are seeking the custody of a minor child are rightful and able guardians than in that case the custody should be given to the mother.¹⁶ In such a

⁸*Lekha v. P. Anil Kumar*, App. (Civil) 5131 of 2006 (SC); See also: *Navin Singh v. Smt. Jyoti Parashar.*, AIR 2004 All 441, *Ramakrishna Balasubramanian v. Ms. Priya Ganesan*, H.C.P.NO.108 OF 2007 (Mad HC).

⁹*Ashok Samji bhai Dharod v. Neeta Ashok Dharod*, II (2001) DMC 48 Bom; See also: *Mausami Moitra Ganguli v. Jayant Ganguli*, 2008 (7) SCC 673, *Minocher Dinshaw Irani v. Keki Rustomji Irani.*, II (1998) DMC 298.

¹⁰*Rajiv Chouksey v. Kirti Chouksey*, 2006 (3) MPLJ 58; See also: *Dhanwanti Joshi v. Madhav Unde*, (1998)1 SCC 112, *USA. Lindley, L.J. in Re. v. McGrath (Infants)*, 1893(1) Ch. 143 (148)

¹¹*Thrity Hoshie Dolikuka v. Hoshiam Shavaksha Dolikuka*, AIR 1982 SC 1276; See also: *Roxann Sharma v. Arun Sharma*, App. (Civil) No. 1966 of 2015 (SC), *Mausami Moitra Ganguli v. Jayant Ganguli*, (2008) 7 SCC 673, *Syyad Sabdarali Nyajali v. Shahista begum*, 2007 (109) BOMLR 1633.

¹²*Ram Kishore Singh v. Nirmala Devi Kuhwaha*, (2006) 3 MPLJ 194.

¹³*J. Selvan v. N. Punidha*, (2007) 4 CTC 566.

¹⁴*Smt. Veena Agrawal v. Shri Prahlad das Agarwal*, AIR 1976 MP 92.

¹⁵Article 24, Convention on the Rights of the Child (General Assembly resolution 44/25 of 20 November 1989) (entry into force 2 September 1990)

¹⁶*C. Meena v. C. Suresh Kumar*, 1993 (1) APLJ (HC) 113; See also: *Nil Rattan Kundu v. Abhijit Kundu*, (2008) 9 SCC 413

situation, the best interest of new born girl child lies with her genetic mother i.e. Ms. Z.

19. Therefore, considering all the above circumstances of present case, it can be said that physical and emotional needs of the girl child will be best taken care if she is kept with her mother Ms. Z. The same approach was taken by various Indian Courts for granting custody to mother in cases concerning custody of minor.¹⁷

¹⁷*Gaurav Nagpal v. Sumedha Nagpal*, App. (Civil) No. 5099 of 2007 (SC); *See also: Roxann Sharma v. Arun Sharma*, App. (Civil) No.1966 of 2015., *Raj Rani v. Subhash Chander*, 23 (1983) DLT 240.

PRAYER FOR RELIEF

Wherefore, in light of the facts stated, issues raised, authorities cited & arguments advanced, Hon`ble Family Court, Delhi may be pleased to *adjudge & declare that*:

1. There is no existence of surrogacy agreement between Ms. Z and Mr. X & Y.
2. Best interest of the minor child lies with Ms. Z.
3. Ms. Z is the sole legal guardian of the child.

AND

Pass any other order that it may deem fit in the interest of justice, equity & good conscience.
All of which is most humbly prayed.

On behalf of

MS. Z (GENETIC MOTHER)

Counsels for the Respondent

Sd/