

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 PLAINTIFF

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INDEX OF ABBREVIATIONS

¶	Paragraph
&	And
AIR	All India Reporter
AWC	Allahabad Weekly Cases
All.	Allahabad
Anr.	Another
Bom.	Bombay
BOMLR	Bombay Law Reporter
Cal	Calcutta
C A	Civil Appeal
Crl.A.	Criminal Appeal
CTC	Current Tamil Nadu Cases
DLT	Delhi Law Times
Edn. / Ed.	Edition
Govt.	Government
Hon`ble	Honorable
HP	Himachal Pradesh
I.L.R	Indian Law Reporter
Ker.	Kerala
KLJ	Kerala Law Journal

L.J.	Law Journal
Mr.	Mister
Mad.	Madras
Mh/Mah	Maharashtra
MLJ	Madras Law Journal
MPLJ	Madhya Pradesh Law Journal
No.	Number
HC	High Court
Ors.	Others
Pat.	Patna
Pg.	Page
Re.	Reference
SCC	Supreme Court Cases
SCR	Supreme Court Reporter
SC	Supreme Court
Sd/	Signed
UP	Uttar Pradesh
UOI	Union Of India
V.	Versus
Vol.	Volume

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STATEMENT OF JURISDICTION

The counsels representing the plaintiff 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 & Mr Y are 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 AGREEMENT OF COMMERCIAL SURROGACY IN THE PRESENT CASE IS VALID?**
- II. WHETHER MR. Y CAN BE A SOLE LEGAL GUARDIAN UNDER INDIAN LAWS?**
- III. WHETHER THE BEST INTEREST OF CHILD LIES WITH MR. Y?**

SUMMARY OF ARGUMENTS

I. THE AGREEMENT OF COMMERCIAL SURROGACY IN THE PRESENT CASE IS VALID.

Firstly, commercial surrogacy is legal in India as it was recognized by Supreme Court, High Courts and Law Commission of India.

Secondly, surrogacy agreement in the present case is also valid because obtaining child through surrogacy is not illegal in India.

II. MR. Y CAN BE A SOLE LEGAL GUARDIAN UNDER INDIAN LAWS.

Firstly, as per Indian laws a foreigner can become sole legal guardian of a child born through surrogacy.

Secondly, Indian laws do not stop a homosexual to be the sole legal guardian of the child.

III. THE BEST INTEREST OF THE CHILD LIES WITH MR. Y.

Firstly, Ms. Z is not a fit guardian as she is a money grabber and her intention is to extort money from petitioner.

Secondly, Mr. Y is a rightful & able guardian as he is the genetic father and natural guardian and it is in the best interest and welfare of child to live with Mr. Y.

Thirdly, the child will get the US citizenship with all the rights & privileges available to a US citizen.

PLEADINGS AND AUTHORITIES

I. Agreement of Commercial Surrogacy in the present case is valid.

1. It is humbly submitted before this Hon`ble court that commercial surrogacy is legal in India and the surrogacy agreement in the present case is also valid.

A. Commercial surrogacy is valid in India.

2. According to the Black's Law Dictionary², surrogacy means the process of carrying and delivering a child for another person. The present case is of commercial surrogacy because agency has received money from the couple and there was an agreement signed from both surrogate mother³ and commissioning couple. Due to the commercial element in the instant case it is a fit case of commercial surrogacy.
3. There is no statutory framework for surrogacy in India but it does not make commercial surrogacy illegal.⁴ Courts in India do not find anything immoral and unethical about obtaining child through surrogacy arrangement.⁵ Apex Court has already cleared all the doubts regarding commercial surrogacy and specifically stated that commercial surrogacy is legal in India and surrogacy agreements are governed by Indian Contract Act, 1872.⁶ Further, Court as well as Law Commission of India⁷ heavily relied on ICMR⁸ guidelines which also recognize commercial surrogacy.⁹ Thus, commercial surrogacy is valid in India.

B. Surrogacy agreement is valid.

4. Illiteracy of Ms. Z does not have any adverse effect on the legality of surrogacy agreement. It is a settled position of law that whenever any party in contract is illiterate then to establish that contract was valid; it has to be shown that there was not mere physical act of the executant but the mental act also¹⁰ and person was capable of understanding what he

²Garner B.A., Black's Law Dictionary, (9th ed., 2009)

³Sample Surrogacy Agreement.

⁴P. Geetha v. Kerala Livestock Development Board Ltd., 2015 (1) KLJ 494.

⁵K. Kalaiselvi v. Chennai Port Trust, (2013) 3 MLJ 493; *See also*: M. Veersamy v. State of Tamil Nadu, 2012 (3) CTC 641.

⁶Baby Manzi Yamada v. Union of India, AIR 2009 SC 84.

⁷Law 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.

⁸Indian Council of Medical Research, 1949.

⁹National Guidelines for Accreditation, Supervision & Regulation of ART Clinics in India, Guidelines No. 3.5.4. (Issued by ICMR).

¹⁰Krishna Mohan Kul @ Nani Charan Kul. v. Pratima Maity., AIR 2003 SC 4351; *See also*: Sulender Singh v. Pritam, MANU/HP/0107/2013.

was doing.¹¹ In simple words, intention of parties at the time of entering into contract is utmost important.¹²

5. In the present case, Ms. Z accepted the money as token of her services from the couple, which means she was having this knowledge that couple would be taking the child and money is being given as token of her services and she voluntarily gave the custody to couple which means she knew the terms of the contract. These two instances clearly establish that entering into the contract of surrogacy by Ms. Z was not mere a physical act but it was mental too, thus, surrogacy agreement was valid.
6. In addition to above, in the present case agreement was signed through emails. It is a settled position of law that agreements can be signed via emails and they are valid contracts.¹³ Therefore, in the present case surrogacy agreement is valid.

II. Whether Mr. Y can be a sole legal guardian under Indian Laws?

7. In the present case, Mr. Y is a foreigner and he is applying for sole legal guardianship of surrogate child. As per the settled position of the law a single foreign male or gay parent can become legal guardian of a child born out of surrogacy. Further, it is submitted that Mr. Y is the only person who needs to be considered by Hon'ble court for determining guardianship.

A. Single foreigner male can be a legal Guardian in India.

8. Single foreigner male can be a legal guardian in India. 228th Law Commission Report affirms this proposition which states that a single foreigner parent can be considered to be the guardian by virtue of being the genetic or biological parent of the child born out of a surrogacy arrangement. Case of *Baby Manji Yamada v. UOI*¹⁴ also supports plaintiff's contention where Supreme Court had allowed foreign single male to have guardianship of the girl child born out of surrogacy arrangement in India. Apex Court in the case of *Laxmi Kant Pandey v. UOI*¹⁵ also stated that single foreigner parent can be a legal guardian of an Indian child.
9. In addition to the above, it is significant to mention that circular¹⁶ issued by Ministry of Home Affairs has no applicability in the present case because at the time of commissioning

¹¹Smt. Sonia Parshini v. Sheikh Moula Baksha, AIR 1955 Cal 17.

¹²Smt. Benarasi Devi v. New India Assurance Co. Ltd. AIR 1959 Pat. 540.

¹³S. 10A, Information Technology Act, 2000; See also: Trimex International FZE Limited, v. Vedanta Aluminium Limited, (2010) 3 SCC 1.

¹⁴AIR 2009 SC 84.

¹⁵AIR 1986 SC 272.

¹⁶Circular No.: 5/10/8/2008-RHN, Indian Council of Medical Research, dated: 27/10/2015.

of surrogacy Mr. Y was an Indian National, thus, the present status of Mr. Y becomes irrelevant in determining the guardianship of the child.

10. Therefore, in the present case, Mr. X being the biological father of the surrogate child, can obtain sole legal guardianship of surrogate children despite of he being a foreigner.

B. Homosexual can be a legal guardian of child in India.

11. Hon'ble Apex Court has made it clear that a homosexual can be a legal guardian of the minor child.¹⁷ Law Commission in its 228th report also affirmed that a homosexual can be considered to be the guardian in cases of surrogacy arrangement if he is biological father of the child.

C. Ms. Z has no claim on the child due to her status of a genetic mother.

12. There was valid agreement in the present case, in which one of the conditions was traditional method of surrogacy. However, this method does not grant any special right to surrogate mother due to her status of a genetic mother. In this method child is conceived with the intention of relinquishing the child to be raised by others particularly by the biological father and possibly his spouse or partner, either male or female.¹⁸
13. The above proposition was also considered by Hon'ble Apex court of India.¹⁹ Case of Baby M²⁰ is also significant to mention here because in this case New Jersey Court gave custody to intended father instead of the genetic surrogate mother and affirmed that surrogate mother is not entitle to have any special right under traditional surrogacy. Thus, surrogate mother under the method of traditional surrogacy does not enjoy any special right; her status is same as the surrogate mother under the gestational surrogacy. Therefore, as per the terms & condition of the surrogacy agreement Ms. Z can't be lawful mother of the child.

D. Mr. X has no relevance in process of guardianship.

14. In the present case there is no relevance of Mr. X and only Mr. Y should be taken into consideration while determining the legal guardianship of child under Guardianship and Wards Act. In Baby Manzi case²¹ also, husband and wife both entered into surrogacy agreement. However, only father turned up for the legal guardianship. Apex Court did not consider the relevance of wife, who was also one of the parties in the agreement and guardianship was granted to the father.

¹⁷Supra note 6.

¹⁸Garner B.A., Black's Law Dictionary, (9th ed., 2009); See also: 228th Law Commission Report, Baby Manji Yamada v. Union of India, AIR 2009 SC 84.

¹⁹Supra note 16.

²⁰In re baby 537 A.2d 1227 (NJ.02/03/1988).

²¹Supra note 6.

15. In addition to above, if any party does not claim his rights in the courts as given under the contract then the court need not to consider his rights.²² Parental rights in surrogacy come through a surrogacy agreement. In the instant case, Mr. X has not made any claim on the baby. Thus, his rights need not to be taken into consideration.

III. Whether the best interest of Child lies with Mr. Y?

16. It is humbly submitted that Ms. Z is not a fit guardian as she is a money grabber and her failed attempt to extort more money from the couple has forced her to file a PIL out of resentment. This act of hers' was nothing but a way to get revenge from the couple. On the contrary, it is to be noted that Mr. Y is a rightful & able guardian for the child.

A. Ms. Z is a crafty woman and not fit to be a legal guardian.

17. Ms. Z stated that she did not want to give the custody of the child. However, she accepted the token money from the couple. Now, these two instances are contradictory to each other because any mother, who would not want to give away her child, would never accept money for her services. In the present case, couple was in hospital for at least 24 hours. She would be having this knowledge that couple would take away her child, despite of this fact Ms. Z accepted money as token of her services from those people who were about to take her child. In reality, she was never having any desire to keep the baby that is why she happily accepted the token money as symbol of her services.
18. Later on, Ms. Z returned the money. However, she did not return the money because of affection towards the baby, she returned the money out of resentment when she was called cheat and abused in filthy language. If she would have any desire to return the money since beginning then certainly she would not have waited to be abused in such a bad way. She returned the money only when she was abused by Mr. X.
19. In addition to the above, Ms. Z has claimed that she was given choice to either keep or give the child by the agency. However, it has been already established that she never had any bond with the child; she voluntarily gave the child and accepted the money as token of her services. It means at the very first instance she decided to give the child. Thus, her claim is not maintainable as she had no desire to keep the child with her at the first place. Consequently, it is safe to conclude that Ms. Z is not a fit guardian.

B. Mr. Y is a rightful & able guardian in the present case.

²²Housing Development and Infrastructure Limited v. Mumbai International Airport, MANU/MH/1399/2013.

20. Mr. Y is a rightful & able guardian as he is the genetic father and natural guardian and it is in the best interest and welfare of child to live with Mr. Y. It is a settled position of law that if the mother is not fit to be a guardian, father has a undisputable right to have guardianship of the child, considering the child`s interest to be paramount.²³
21. Now, it is imperative to note that crucial test to determine rightful & able guardian is to ascertain the capability and willingness on the part of either of the parties to provide to the minor children, a healthy environment, good education and guidance and a physical, emotional and financial support for the development of his integrated personality.²⁴
22. In the present case, act of Mr. Y towards the child and his financial status fulfils the above laid down test because firstly, he took elaborate time from year 2013 to September, 2014 to negotiate the terms of agreement, meaning thereby, he really wanted to become a parent, secondly, he was present at the hospital at the time of the birth of the child which shows his commitment towards the birth of the baby and lastly, when the Indian embassy asked him to obtain a PIO card and surrender his Indian passport he realized that now he would not be able to go to India immediately, meaning thereby, at that time also he was thinking to come back to India to be with his child.
23. It is also imperative to note that when Mr. Y returned to US on urgent business which could not be deferred, he had not left the child alone as Mr. X was always there with the child, meaning thereby, welfare of child is of utmost importance for Mr. Y. It is an undisputable fact that Mr. Y is financially stable, thus, can nurture the child in a holistic manner by providing her with all the required comforts.
24. Furthermore, it is significant to mention that Mr. Y`s sexual orientation has no association to the child adjustment.²⁵ It has been statistically established that parent sexual orientation is unrelated to child adjustment.²⁶ There is significant presence of at least 1, 63,879 households headed by homosexual parents in U.S. society.²⁷

²³Anjali Anil Rangari v. Anil Kripasagar Rangari 1997 10 SCC 342; *See also*: PrabhatiMitra v. D.K. Mitra, 25 (1984) DLT 186, Thrity Hoshie Dolikuka V. Hoshiam Shavaksha Dolikuka, AIR 1982 SC 1276; Ram Kishore Singh v. Nirmala Devi Kuhwaha, (2006) 3 MPLJ 194, Akbar v. State of U.P., (2008) 65 AIC 348 (ALL).

²⁴J. Selvan v. N. Punidha, (2007) 4 CTC 566, 2007 (4) MLJ 967; *See also*: Nil rattan Kundu v. Abhijit Kundu, (2008) 9 SCC 413, Mausami Moitra Ganguli v. Jayant Ganguli, (2008) 7 SCC 673.

²⁵Paige, R. U., *Proceedings of the American Psychological Association, Incorporated, for the legislative year 2004. Minutes of the meeting of the Council of Representatives July 28 & 30, 2004, Honolulu*, Volume 60, Issue Number 5, American Psychologist (2005). (Available at: <http://www.apa.org/governance/>).

²⁶Rachel H. Farr, Stephen L. Forssell, Charlotte J. Patterson “*Parenting and Child Development in Adoptive Families: Does Parental Sexual Orientation Matter?*” Applied developmental science journal, 164–178, 2010, Psychology Press.

²⁷*Id.*

25. In the present matter, it is important to note that in determining child's best interest, court need to consider that if the guardianship would be granted to Mr. Y, child would be staying in US where homosexual parenting is very common²⁸, meaning thereby, the child will not be discarded by the society because there will be other children as well who will be living with their homosexual parents.

26. As the above submissions clearly establishes that Mr. Y is a rightful and able guardian, hence, the best interest of the child lies with him as it is a settled position of law that child's interest is supreme and rights of mother and father are secondary to determine the guardianship of a child.²⁹

C. New born child will get the citizenship of US.

27. Child will get the US citizenship, thus, giving him all the rights of an US citizen. It is significant to mention that in the present case, process of surrogacy has started in February 2015, so the circular³⁰ which stops the foreign nationals from getting an exit permit for the surrogate child by FRRO is not valid as it does not have a retrospective effect.

28. Now, it is imperative to note that US embassy has laid down certain factors to be considered before granting US citizenship to the child born out of surrogacy in India.³¹ Those factors are: (1) the ability of the biological US citizen parent to demonstrate that he has acquired sufficient physical presence in the US and (2) evidence of the biological connection to the child. In the present case Mr. Y has been living in US since at least 11 years, which is a sufficient period to demonstrate his physical presence and it is an undisputable fact that the child has a biological connection with him because he has given his sperm in the process of surrogacy.

29. Hence, it is in the best interest of the child to live with Mr. Y and there will be no problem in getting US citizenship for the child and she will be able to go to US without any hassle

²⁸*Supra* Note 25.

²⁹*Anjali Kapoor v. Rajiv Baijal*, (2009) 7 SCC 322.

³⁰Circular No. 462 dated 03.11.2015, Issued by Ministry of Home Affairs, Government of India. (Addressed, among others, to Indian Missions/Posts abroad)

³¹*Important Information for U.S. Citizens Considering Use of Assisted Reproductive Technology (ART) Abroad*, Embassy of United States of America, New Delhi. (Available at: <http://kaylegal.com/2014/05/USA.pdf>)

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. Agreement between Ms. Z and Mr. X & Y is valid.
2. Best interest of the minor child lies with Mr. Y.
3. Ms. Y 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

MR. Y (GENETIC FATHER)

Counsels for the Petitioner

Sd/