
Neutral Citation No.2023:PHHC:149307

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRWP-460-2023 (O&M)
Reserved on : 25.08.2023
Pronounced on : 23.11.2023

[redacted] ... Petitioners

Versus

Union of India and others .. Respondents

CORAM :HON'BLE MR. JUSTICE ANUPINDER SINGH GREWAL

Present:- Mr. Gagan Oberoi, Advocate and
Ms. Ayna Vasudeva, Advocate for the petitioners.

Ms. Tanu Bedi, Advocate (*Amicus Curiae*),
Mr. Sumit Kumar, Advocate and
Ms. Vibhu Agnihotri, Advocate

Ms. Shweta Nahata, Advocate for respondents No.1 & 2/UOI.

Mr. Luvinder Sofat, DAG, Punjab.

Ms. Jaya Kumari, Advocate for respondents No.4 & 5.

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Anupinder Singh Grewal, J.

The petitioners are seeking a writ in the nature of *habeas corpus* permitting the petitioner No.2 to take the petitioner No.1 to Australia as he is *de facto* and *de jure* guardian and respondents No.4 & 5 do not have any legal right upon him. He has sought a further direction to respondents No.1 & 2 for clarifying the specific provisions in the Surrogacy (Regulation) Act, 2021 and the Assisted Reproductive Technology (Regulation) Act, 2021 (hereinafter referred to as 'ART Act, 2021'). A writ in the nature of certiorari has also been sought for modification of Section 7 of the Guardians and Wards Act, 1890. He had thereafter preferred an application bearing CRM-W-1217 of 2023 confining the prayer in this petition to the declaration that petitioner No.2 is the

sole lawful guardian and has exclusive legal rights on petitioner No.1.

I. Submissions

2. Learned counsel for the petitioners had submitted that the petitioner No.2 is the single biological parent and petitioner No.1 was born out of surrogacy after an agreement had been entered between petitioner No.1 and the surrogate mother (respondent No.4) on 20.04.2019 (Annexure P-4). The petitioner No.2 is the permanent resident of Australia and is currently residing there and he intends to take petitioner No.1 with him to Australia. Petitioner No.1 has a valid Indian passport but the Australian Embassy is not granting him VISA and vide letter dated 11.06.2022 (Annexure P-10), it has put a condition that as the child was born by way of surrogacy arrangement in India with only one commissioning parent, the laws in India are unclear and therefore, a declaration be obtained from a Court which confirms the petitioner No.2 (commissioning parent) with regard to full legal custody of the child, the right to remove from India and the legal right to determine where the child shall live. It should also declare that no other parties involved in the surrogacy arrangement, including the person who donated the egg, have any legal right on petitioner No.1.

3. Learned counsel for respondents No.4 & 5 had submitted that they have no objection to the declaration sought by petitioner No.2. They have also furnished their respective affidavits-cum-declaration dated 21.06.2022 at Annexures P-8 & P-9 supporting the case of the petitioner No.2 and further declaring that they will never claim and have no intention to claim any custodial or parental rights of petitioner No.1 at any time in future.

4. Ms. Tanu Bedi, learned *Amicus Curiae,* had submitted that the Court should consider the best interest of the child which would be of

paramount importance and the relief can be moulded disregarding the technicalities of law. She had also referred to the provisions of the Indian Law with regard to surrogacy and submitted that although a legal framework was put in place in the year 2021 in the form of Surrogacy (Regulation) Act, but prior thereto, the Courts have accepted the arrangement of surrogacy for intending parents and protected the interest of the child born thereafter. There is no impediment before this Court to issue the declaration as sought by petitioner No.2 which would be in the best interest of the child as petitioner No.2 is the sole claimant to the legal guardianship of the child.

II. Factual Matrix

5. The petitioner No.2 is a single parent and the biological father of the child (petitioner No.1) as per DNA report (Annexure P-6). The identity of the oocyte woman is confidential. Petitioner No.2 had entered into surrogacy agreement with respondent No.4 who is the surrogate mother, on 20.04.2019 (Annexure P-4). The relevant extract of the agreement (Annexure P-4) is set out hereunder:-

> "9. The Commissioning parent shall at all times be the parent of the child to be born out of the surrogacy arrangement of this agreement and the surrogate mother shall have no right or claim over the child at any time whatsoever.
>
> xxxx
>
> 12. It is agreed by all the parties to this agreement that the child born out of this arrangement, shall be the child of the Commissioning parent and that the custody of the child so born shall be handed over to the commissioning parent as soon as possible after the birth of such child. It is also agreed that all expenses of the child right from the birth of the child shall be borne by the commissioning parent. It is further agreed that the surrogate mother shall not have any right or claim over the

property of the child born out of this agreement.

xxxxx

19(k) The surrogate mother agrees and undertakes to appear before the Govt. offices/authorities/local bodies and also appear before appropriate judicial authorities to give full effect to this arrangement and to ensure that the intending parent is awarded legal custody and parentage of the child."

6. The child was born on 12.12.2019 and at present is almost 04 years of age. He is currently being looked after by his paternal grandmother, who has the special power of attorney of the petitioners, while petitioner No.2 is the sole claimant to the guardianship of the child (petitioner No.1). The petitioner No.2 is resident of VPO Fatehpur Rajputan, Tehsil and District Amritsar, Punjab and has a valid Indian passport. He is presently residing in Australia at 16, Waterways Drive, Granbourne North Victoria-3977, Melbourne. He being the father and sponsor of petitioner No.1 had applied for VISA on 08.10.2020 vide file No.CLF 2020/77284 under the head of 'Child (Migrant) (Class-AH) Child (sub-class 101) visa' but on 11.06.2022 (Annexure P-10), the Australian Government, Department of Home Affairs had issued a letter stating that a requirement of parental responsibility (custody) for every child upto 18 years of age is mandatory and in absence of any regulatory framework for surrogacy in India, they had asked him to provide an order from Indian Court confirming that petitioner No.2 (commissioning parent) sponsor has full custody over petitioner No.1. In pursuance to this communication, petitioner No.2, being resident of VPO Fatehpur Rajputan, Tehsil and District Amritsar, Punjab, had filed a civil suit before the competent Court in Amritsar seeking declaration against general public that he is the sole guardian of petitioner No.2 which was dismissed on 05.12.2022 on the ground that the

Court in Amritsar has no territorial jurisdiction. It had held that since surrogacy agreement was executed at Maharashtra and the surrogate mother as well as the clinic have their addresses of Mumbai, Maharashtra, therefore, the Court at Amritsar cannot entertain the civil suit.

7. The Coordinate Bench of this Court vide order dated 24.03.2023 had directed the respondent/State to depute some official to visit the home of respondents No.4 and 5 to confirm the identity of surrogate mother and file an affidavit after verifying the factum of surrogacy of the petitioner No.1. In response thereto, short reply by way of an affidavit of Deputy Superintendent of Police, C.A.W. AND C, Amritsar (Rural) had been filed on 26.04.2023 stating that the police official had visited the house of respondent No.4 and recorded her statement wherein she had stated that she had given birth to a male child (petitioner No.1) through surrogacy in the year 2019 and now she had no right upon him and had already handed over his custody to the petitioner No.2. The statement of Arpinder Kaur w/o Late Baljeet Singh, who is the paternal grandmother of the child and special power of attorney-holder of the petitioners had also been recorded and placed on record as Annexure R-1/T along with the affidavit of the DSP filed on 16.02.2023 about the surrogacy process undertaken by her son and that petitioner No.1 (the child) is living with her.

III. Best Interest of the child

(a) *Parens patriae* jurisdiction

8. The instant case involves the rights of a child, who has approached this Court through his guardian. It is trite that when the issue for consideration before the Court involves the rights of a child, the Court assumes *parens patriae* jurisdiction and it is of paramount importance for this Court to

safeguard the interest of the child keeping in view his welfare and issue necessary directions in that regard. Reference can be made to the judgment of the Supreme Court in the case of **Gaurav Nagpal versus Sumedha Nagpal, (2009) 1 SCC 42** wherein it was held that when the rights of the child are before the Court, then the Court assumes jurisdiction of *parens patriae* (parent of the nation). The relevant extract of the judgment is reproduced hereunder:-

> "The word `welfare' used in Section 13 of the Act has to be construed literally and must be taken in its widest sense. The moral and ethical welfare of the child must also weigh with the Court as well as its physical well being. Though the provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the Court exercising its parens patriae jurisdiction arising in such cases."

(b) Indian framework

9. The Constitution of India along with various legislations protects the interest of the child. Article 39(f) of the Constitution of India provides that opportunities and facilities be accorded to the children to develop in a healthy manner. The same is reproduced hereunder:-

> "**39.** The State shall, in particular, direct its policy towards securing-
>
> **(a)** to **(e)** xxxxxxxx
>
> **(f)** that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment"

10. It is enshrined in Article 45 of the Constitution of India that the

children should be provided early childhood care and education upto the age of six years, which is reproduced hereunder:-

> "**45. Provision for early childhood care and education to children below the age of six years**
>
> The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years."

11. The Hindu Minority and Guardianship Act, 1956 and the Guardian and Wards Act, 1890 have vested the powers in the Courts to appoint any person as guardian of a minor keeping in view the welfare of the child as supreme consideration. Section 13 of the Hindu Minority and Guardianship Act, 1956 is reproduced hereunder:-

> 13. **Welfare of minor to be paramount consideration**.—(1) In the appointment of declaration of any person as guardian of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration.
>
> (2) No person shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindus, if the court is of opinion that his or her guardianship will not be for the welfare of the minor.

12. Sections 7(1) and 17 of the Guardian and Wards Act, 1890 reads as under:-

> "7. Power of the Court to make order as to guardianship.—
>
> (1) where the Court is satisfied that it is for the welfare of a minor that an order should be made—
>
> (a) appointing a guardian of his person or property, or both, or
>
> (b) declaring a person to be such a guardian, the Court may make an order accordingly."
>
> "17. Matters to be considered by the Court in appointing

guardian.-

(1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.

(2) In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property."

(emphasis supplied)

(c) Best interest of child through landmark judgments

13. The Supreme Court in the cases involving custody of a child has emphasised on the importance of Court adopting child centric approach keeping in view the best interest of the child. The Supreme Court in the case of **Aman Lohia versus Kiran Lohia, (2021) 5 SCC 489,** while considering the case of custody of a child between the parents, observed that the central concern of the Court should be of paramount welfare and interest of the minor child and the approach of the Court ought to be child-centric. The relevant extract of the judgment is reproduced hereunder:-

"The appellant asserts that he is a loving, caring, concerned and affectionate father and the minor cannot be denied of all that merely because of events that unfolded during the pendency of habeas corpus petition(s) or contempt petition(s) before the High Court. **The central concern of the Court should be the paramount welfare and interest of the minor child. The**

> **approach of the Court in that regard ought to be child-centric.**
> The issue cannot be answered on the basis of claims and counter claims of the warring parents, as to deny the child of parentage of her father because of other acts of commission and omission of the father. To do so would, in effect, be punishing the minor child and depriving her of the love and affection of her father. That must be eschewed.
> The Family Court in such proceedings is obliged to record a clear finding about the unfitness or otherwise of the father to be a guardian. That must be in the context of the child care and not other matters or worldly activities of father."
>
> **(emphasis supplied)**

14. In the case of **Vivek Singh versus Romani Singh, (2017) 3 SCC 231**, it had been held by the Supreme Court that the best interest of the child would be foremost consideration and the optimal growth and development of the child would override other considerations. The relevant extract is reproduced hereunder:-

> "Second justification behind the 'welfare' principle is the public interest that stand served with the optimal growth of the children. It is well recognised that children are the supreme asset of the nation.
> **Rightful place of the child in the sizeable fabric has been recognised in many international covenants, which are adopted in this country as well. Child- centric human rights jurisprudence that has been evolved over a period of time is founded on the principle that public good demands proper growth of the child, who are the future of the nation.**"
>
> **(emphasis supplied)**

(d) International framework

15. The Court would like to refer to the International framework highlighting the necessity of Courts to act in the best interest of the child.

India is a signatory to the United Nations Convention on the Rights of the Child, 1989 (UNCRC). Article 3 bestows upon all social institutions whether public or private, Courts of law, administrative authorities or legislative bodies to ensure that the primary consideration while taking any decision would be in the best interest of the child. Articles 7 and 8 thereof also provide for preserving the identity of the child including nationality, name, family relations and the right to know and be cared for by his or her parents, as recognized by law without unlawful interference. The relevant Articles are reproduced hereunder:-

> **"Article 3** 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
>
> 2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
>
> 3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.
>
> **Article 7**
>
> 1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and. as far as possible, the right to know and be cared for by his or her parents.
>
> 2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the

relevant international instruments in this field, in particular where the child would otherwise be stateless.

Article 8

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

2. **Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity**.

Article 9

1. xxxxx

2. xxxxx

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned."

(emphasis supplied)

IV. Reproductive choice recognized as fundamental right

(a) International Scenario

16. The International Bill on Human Rights comprising of Universal Declaration of Human Rights,1948 (UDHR), International Covenant on Civil

and Political Rights,1966 (ICCPR) and International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR) have recognized procreation and family as basic human rights of the individual and that the State shall take appropriate measures to safeguard these rights. The relevant Articles of UDHR follow as under:-

> **"Article 7**
>
> All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.
>
> **Article 8**
>
> Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.
>
> **Article 12**
>
> No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.
>
> **Article 16**
>
> 1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
> 2. Marriage shall be entered into only with the free and full consent of the intending spouses.
> 3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."

17. Article 17 of ICCPR provides for protection of the law against any unlawful interference with one's family and privacy which reads as under:-

> 1. No one shall be subjected to arbitrary or unlawful interference

with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks.

18. Articles 10, 11 & 13 of ICESCR stipulate that the State should provide protection to the family and children and safeguard their right to adequate standard of living. The relevant provisions read as under :-

Article 10

(1) The States Parties to the present Covenant recognize that: 1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.

xxxxx

Article 11

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation based on free consent.

xxxxxx

Article 13

xxxxxx

3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of

their children in conformity with their own convictions."

(b) Indian Scenario

19. The Indian Courts over the years have actively contributed in widening the scope of fundamental rights as enshrined in the Constitution of India. The Supreme Court through its judgment in the case of **Justice K.S. Puttaswami (Retd.) and another versus Union of India and others, (2017) 10 SCC 1** has recognised various rights which fall in the ambit of Article 21 including the reproductive choice of an individual. The relevant extract thereof is reproduced hereunder:-

> "323. Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. Privacy also connotes a right to be left alone. Privacy safeguards individual autonomy and recognises the ability of the individual to control vital aspects of his or her life. Personal choices governing a way of life are intrinsic to privacy. Privacy protects heterogeneity and recognises the plurality and diversity of our culture. While the legitimate expectation of privacy may vary from the intimate zone to the private zone and from the private to the public arenas, it is important to underscore that privacy is not lost or surrendered merely because the individual is in a public place. Privacy attaches to the person since it is an essential facet of the dignity of the human being;
>
> (324) This Court has not embarked upon an exhaustive enumeration or a catalogue of entitlements or interests comprised in the right to privacy. The Constitution must evolve with the felt necessities of time to meet the challenges thrown up in a democratic order governed by the rule of law. The meaning of the Constitution cannot be frozen on the perspectives present when it was adopted. Technological change has given rise to concerns which were not present seven decades ago and the rapid growth of

> technology may render obsolescent many notions of the present. Hence the interpretation of the Constitution must be resilient and flexible to allow future generations to adapt its content bearing in mind its basic or essential features."

20. The Supreme Court in the case of **Justice K.S. Puttaswami (Retd.) and another (supra)** while discussing the fundamental right to privacy under Article 21 of the Constitution of India considered and elucidated that privacy has both positive and negative content but it is still constitutionally protected right which emerges primarily from the guarantee of life and personal liberty. Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. The Petitioner No.2 had adopted the surrogacy arrangement after the judgment of the Supreme Court in the case of **Justice K.S. Puttaswami (Retd.) and another (supra).**

V. Recognition of Surrogacy before enactment of the Surrogacy (Regulation) Act, 2021

21. In the absence of any law governing surrogacy before 2021, reference should be made to the National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India issued by the Indian Council of Medical Research, 2005 which provides for parental rights and rights of the child born through ART. The following guidelines presume that such a child is considered as legitimate child of couple and has all legal rights to parental support, inheritance and all other privileges:-

> "3.12.1 A child born through ART shall be presumed to be the legitimate child of the couple, having been born in wedlock and with the consent of both the spouses. Therefore, the child shall have a legal right to parental support, inheritance, and all other privileges of a child

born to a couple through sexual intercourse.

3.16.1 Legitimacy of the child born through ART A child born through ART shall be presumed to be the legitimate child of the couple, born within wedlock, with consent of both the spouses, and with all the attendant rights of parentage, support and inheritance. Sperm/oocyte donors shall have no parental right or duties in relation to the child, and their anonymity shall be protected except in regard to what is mentioned under item 3.12.3."

22. In August 2009, 18th Law Commission had submitted its 228th report titled as "Need For Legislation To Regulate Assisted Reproductive Technology Clinics as well as Rights And Obligations Of Parties To a Surrogacy" which had recognized the surrogacy arrangements and provided for the rights of the child born through surrogacy. A draft Bill was proposed and the relevant extract thereof is as under:-

II. THE DRAFT ASSISTED REPRODUCTIVE TECHNOLOGY (REGULATION) BILL AND RULES 2008

2.1 xxxxxxxxxx

"2.2 The Bill acknowledges surrogacy agreements and their legal enforceability. This will ensure that surrogacy agreements are treated on par with other contracts and the principles of the Indian Contract Act 1872 and other laws will be applicable to these kinds of agreements. The Bill provides that single persons may also go for surrogacy arrangements.

2.3 It is further provided that the commissioning parents or parent shall be legally bound to accept the custody of the child irrespective of any abnormality that the child may have, and the

refusal to do so shall constitute an offence. A surrogate mother shall relinquish all parental rights over the child. **The birth certificate in respect of a baby born through surrogacy shall bear the name(s) of genetic parents/parent of the baby.**

2.4 The Bill also provides that a child born to a married couple or a single person through the use of ART shall be presumed to be the legitimate child of the couple or the single person, as the case may be. If the commissioning couple separates or gets divorced after going for surrogacy but before the child is born, then also the child shall be considered to be the legitimate child of the couple.

3.5(d) As of today, it may be stated that a single or a gay parent can be considered to be the custodial parent by virtue of being the genetic or biological parent of the child born out of a surrogacy arrangement. Japanese baby Manji Yamada's case and the Israel gay couple's case who fathered the child in India are clear examples to establish that this is possible. Under paragraph 3.16.1 of the Guidelines dealing with legitimacy of children born through ART (which was the basis of the claim in the Japanese baby's case in the Supreme Court), this claim can be made. However, only in a 22 petition for guardianship under the Guardians and Wards Act and/or in a suit for declaration in a civil court, the exclusive custodial rights can be adjudicated by a court of competent jurisdiction upon appreciation of evidence and considering all claims made in this regard.

3.5(f) In answer to this question it can be stated that the biological parents would be considered to be the legal parents of

the child by virtue of the surrogacy agreement executed between them and the surrogate mother. Under paragraph 3.16.1 of the Guidelines dealing with legitimacy of the child born through ART, it is stated that "a child born through ART shall be presumed to be the legitimate child of the couple, born within wedlock, with consent of both the spouses, and with all the attendant rights of parentage, support and inheritance". Even in the 2008 draft Bill and 23 Rules, a child born to a married couple, an unmarried couple, a single parent or a single man or woman, shall be the legitimate child of the couple, man or woman, as the case may be.

4.2 The draft Bill prepared by the ICMR is full of lacunae, nay, it is incomplete. However, it is a beacon to move forward in the direction of preparing legislation to regulate not only ART clinics but rights and obligations of all the parties to a surrogacy including rights of the surrogate child. Most important points in regard to the rights and obligations of the parties to a surrogacy and rights of the surrogate child the proposed legislation should include may be stated as under:

[1] Surrogacy arrangement will continue to be governed by contract amongst parties, which will contain all the terms requiring consent of surrogate mother to bear child, agreement of her husband and other family members for the same, medical procedures of artificial insemination, reimbursement of all reasonable expenses for carrying child to full term, willingness to hand over the child born to the commissioning parent(s), etc. But such an arrangement should not be for commercial

purposes."

[2] & [3] xxxxxx

[4] One of the intended parents should be a donor as well, because the bond of love and affection with a child primarily emanates from biological relationship. Also, the chances of various kinds of child-abuse, which have been noticed in cases of adoptions, will be reduced. In case the intended parent is single, he or she should be a donor to be able to have a surrogate child. Otherwise, adoption is the way to have a child which is resorted to if biological (natural) parents and adoptive parents are different.

[5] Legislation itself should recognize a surrogate child to be the legitimate child of the commissioning parent(s) without there being any need for adoption or even declaration of guardian.

[6] The birth certificate of the surrogate child should contain the name(s) of the commissioning parent(s) only.

[7] Right to privacy of donor as well as surrogate mother should be protected."

(emphasis supplied)

23. The Indian Courts had recognised surrogacy arrangements even prior to the enactment of the Surrogacy (Regulation) Act. The Supreme Court in the case of **Baby Manzi Yamda versus Union of India and another, 2008(13) SCC 518** had directed the Central Government to expedite the process of issuing passport and relevant documents to a surrogate child for her travel as a matrimonial discord had arisen between the biological parents. It

had also observed that the intending parent may be a single male or a male homosexual couple.

24. The Division Bench of the Gujarat High Court in LPA No.2151 of 2009 titled as **Jan Balaz versus Anand Municipality,** decided on November 11, 2009, has held that in the absence of legislation to the contrary, gestation surrogate mother is the natural mother. The children were considered to be the Indian citizen and passports were issued to them. It was also observed by the Gujarat High Court while referring to the Law Commission's 228th report that the commercial surrogacy has never been considered as illegal in India and there are no civil/criminal penalties for the same. In that case, the biological father was a foreign national while the twin children were born to the Indian surrogate mother. The judgment was challenged before the Supreme Court in Civil Appeal No.8714 of 2010, titled as **'Union of India versus Jan Balaz'** and the order passed by the Gujarat High Court was initially stayed with directions to issue travel certificate to the children including the request to Central Adoption Recruitment Agency (CARA) to collaborate with German Authorities for expeditious adoption of children. Although it was treated as Public Interest Litigation in 2015 as an alarming public issue arose dealing with commercial surrogacy and rights of the children born but it was dismissed for want of prosecution and all interim orders were discharged vide the order dated 16.08.2023.

25. The Surrogacy (Regulation) Act, 2021 has been enacted in the year 2021 while it has come in force on 25.01.2022. The Surrogacy (Regulation) Act, 2021 recognizes the arrangement of surrogacy for the couples who cannot conceive a child. However, a single lady can avail the arrangement of surrogacy but this is restricted to divorcees or widows only.

Neither an unmarried lady nor a single male is permitted to adopt surrogacy under the Act. But the prohibitions and regulations as mentioned under Sections 3 & 4 of Surrogacy Regulation Act clarify the same to be operative prospectively using the words- "ON AND FROM THE DATE OF COMMENCEMENT OF THIS ACT". The Act also provides for the rights of child born through surrogacy and a period of 10 months for gestation to existing surrogate mothers in order to protect their well being. The relevant provisions of the Act are reproduced hereunder:-

> "2 (h) "couple" means the legally married Indian man and woman above the age of 21 years and 18 years respectively;
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> xxxx
>
> 2(r) "intending couple" means a couple who have a medical indication necessitating gestational surrogacy and who intend to become parents through surrogacy;
>
> (s) "intending woman" means an Indian woman who is a widow or divorcee between the age of 35 to 45 years and who intends to avail the surrogacy;
>
> xxxxx
>
> 8. **Rights of surrogate child -** A child born out of surrogacy procedure, shall be deemed to be a biological child of the intending couple or intending woman and the said child shall be entitled to all the rights and privileges available to a natural child under any law for time being in force.
>
> 53. **Transitional provision**- Subject to the provisions of this Act, ***there shall be provided a gestation period of ten months from the date of coming into force of this Act to existing surrogate mothers' to protect their well being***.
>
> **(emphasis supplied)**

26. It is apt to notice that there are several writ petitions pending before the Supreme Court challenging the Surrogacy (Regulation) Act, 2021 on the ground that it does not permit single man and unmarried girls to avail the

arrangement of surrogacy. The Kerala High Court in the case of **Nandini K. and another versus Union of India, 2022 SCC Online Kerala 8234** while relying upon the judgment in **Justice K.S. Puttaswami (Retd.) and another versus Union of India and others, (2017) 10 SCC 1** permitted the persons, who were barred under the Act due to age limit but already undergoing ART services on 25.01.2022 to continue their treatment in the light of the transitional provision under Section 53 of the Act.

27. The provisions of the Surrogacy (Regulation) Act, 2021 would not come in the way of the declaration being sought by petitioner No.2 for the reason that the Act itself provides that it is applicable prospectively and it has come into force in the year January, 2022. Section 53 thereof provides that it will not be applicable to the existing surrogate mothers by providing the gestation period of 10 months from the date of its enactment i.e. 25.01.2022. In the instant case, the agreement of surrogacy had been entered into on 20.04.2019 and the child was also born on 12.12.2019 i.e. much prior to the enactment of the Act. Besides, the counsel for the petitioners had relied upon the birth certificate of the child (Annexure P-5) and the DNA report (Annexure P-6) which supports the case of petitioner No.2 that he is the biological father of the petitioner No.1 and the identity of the oocyte is confidential. Reliance can be placed on item No.3.5.4 of the ICMR Guidelines, 2005 which deals with the birth certificate to be issued to the child born through ART and states that the birth certificate shall be in the name of the genetic parents. Consequently, there does not seem to be any legal impediment for issuance of declaration as sought by petitioner No.2 in the best interest of the child.

VI. Moulding of relief

28. The prayer of the petitioners is confined to the declaration that the

petitioner No.2 is the sole lawful guardian of petitioner No.1 as the condition has been imposed by the Australian Embassy for grant of VISA to the child. This Court while considering the best interest of the child would not be bound down by the technicalities of law. Even otherwise, this Court while exercising jurisdiction under Article 226 of the Constitution of India has ample powers to mould the relief in an appropriate manner without driving the litigants from pillar to post. Reference can be made to the judgment of the Supreme Court in the case of **Dwarka Nath versus Income Tax Officer, AIR 1966 SC 81** wherein it was held that the High Courts can also issue directions, orders or writs other than the prerogative writs to meet the peculiar and complicated requirements of this country. The relevant extract thereof is reproduced hereunder:-

> "This article is couched in comprehensive phraseology and it ex facie confers a wide power on the high court to reach injustice wherever it is found. The constitution designedly used a wide language in describing the nature of the power, the purposes for which and the person or authority against whom it can be exercised. It can issue writs in the nature of prerogative writs as understood in England; but the scope of those writs also is widened by the use of the expression "nature", for the said expression does not equate the writs that can be issued in India with the those in England, but only draws in analogy from them. That apart, **High Courts can also issue directions, orders or writs other than the prerogative writs. It enables the High Courts to mould the reliefs to meet the peculiar and complicated requirements of this country. Any attempt to equate the scope of the power of the High Court under Article 226 of the Constitution with that of the English courts to issue prerogative writs is to introduce the unnecessary procedural restrictions grown over the years** in a comparatively small

> country like England with a unitary from of Government to a vast country like India functioning under a federal structure. Such a construction defeats the purpose of the article itself. To say this is not to say that the High Courts can function arbitrarily under this Article. Some limitations are implicit in the article and others may be evolved to direct the article through defined channels."
>
> (**emphasis supplied**)

VII No bar under writ jurisdiction despite the availability of alternative remedy

29. The petitioner No.2 is stated to have preferred a civil suit seeking declaration that he is the single father of petitioner No.1 born on 12.12.2019 by the process of surrogacy agreement dated 12.04.2019 which is legally valid and binding and that he is the legal and lawful father of the minor child petitioner No.1 but the same had been dismissed on 05.12.2022 (Annexure P-20) on the ground that surrogacy agreement dated 20.04.2019 (Annexure P-4), the surrogate mother (respondent No.4) and the surrogacy clinic are having their addresses in Mumbai, Maharashtra and the Court at Amritsar has no territorial jurisdiction to entertain and decide the suit.

30. The existence of alternative remedy is not an absolute bar to the Constitutional Court exercising writ jurisdiction. The petitioners are permanent residents of Amritsar and therefore, this Court has the territorial jurisdiction to decide this petition. This Court while considering the best interest of the child as of paramount importance would not hesitate to entertain this writ petition despite the existence of an alternative remedy available to the petitioner challenging the order passed by the Trial Court dismissing the declaration suit before the Lower Appellate Court but the same is not expeditious and efficacious remedy as a writ petition under Article 226 of the Constitution of

India. Reference can be made to the judgment of the Supreme Court in the case of **Radha Krishan Industries versus State of HP and others, AIR 2021 SC 2114** and the relevant extract thereof is reproduced hereunder:-

> "25 In this background, it becomes necessary for this Court, to dwell on the "rule of alternate remedy" and its judicial exposition. In Whirlpool Corporation v Registrar of Trademarks, Mumbai, a two judge Bench of this Court after reviewing the case law on this point, noted:
>
> "14. The power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the Fundamental Rights contained in Part III of the Constitution but also for "any other purpose".
>
> 15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged."

VIII. Conclusion

31. The instant case depicts a peculiar and an unprecedented situation. The precedents or the judicial pronouncements where it has been held that the best interest and welfare of the child has to be kept in mind are in the backdrop

of battle of custody of the child between the parents while here it is only the biological father, who is seeking a declaration that he is the sole legal guardian of the child. The respondents No.4 & 5, who include the surrogate mother of the child and her husband respectively, are, in fact, supporting the petition and have filed a joint reply and affidavits-cum-declaration in that regard. In the battle of custody often the opinion of the child is taken into account provided he/she is mature enough to make an individual choice. The child in the instant case is about 04 years old. The sole claimant to the custody and legal guardianship is the father and the minor child is not capable of making an informed decision in this regard. The fate and future of the child is at stake and in the event the petitioner No.2 is not declared to be the lawful guardian, the child would stare at an uncertain future. He is being brought up by his grandmother, who is about 60 years old. This Court would not allow a situation where a child would be a destitute, abandoned or left to fend for himself. The petitioner, who is the single parent, would be in a better position to provide education, material comforts and moral support for the proper upbringing of the child. The education and upbringing of the child would not only shape the future of the child but that of the nation as well. In the instant case, the interest of the child coincides with the interest of the father. The child may go to Australia with his father and may or may not return to India but the Indian diaspora abroad is well known to contribute immensely towards our society, culture and economy.

32. The technicalities and rigmarole of the law would be subservient to the best interest and welfare of the child particularly when the Court is exercising *parens patriae* jurisdiction. It is the moral duty of a constitutional Court to adopt to the exigencies of the situation as the law is not static but

dynamic and keeps evolving. The Supreme Court in the case of **Nil Ratan Kundu versus Abhijit Kundu, (2008) 9 SCC 413** had observed that while dealing with custody cases of minor children, Court is neither bound by statutes, strict rules of evidence, procedure nor by precedents. It is a human problem which is required to be solved with a human touch. The relevant extract of the judgment is reproduced hereunder:-

> "In our judgment, the law relating to custody of a child is fairly well-settled and it is this. In deciding a difficult and complex question as to custody of minor, a Court of law should keep in mind relevant statutes and the rights flowing therefrom. But such cases cannot be decided solely by interpreting legal provisions. It is a humane problem and is required to be solved with human touch. A Court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. In selecting proper guardian of a minor, the paramount consideration should be the welfare and well-being of the child. In selecting a guardian, the Court is exercising parens patriae jurisdiction and is expected, nay bound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or we may say, even more important, essential and indispensable considerations. If the minor is old enough to form an intelligent preference or judgment, the Court must consider such preference as well, though the final decision should rest with the Court as to what is conducive to the welfare of the minor."

33. Children of today will shape the future of the nation as they are the greatest gift to humanity. It is necessary to impart them proper education and inculcate moral values to enable them to grow as responsible citizens of the country. A child has also been called the 'father of the man' and reference can

be made to the following poem of William Wordsworth :-

My heart leaps up when I behold
A rainbow in the shy;
So was it when my life began;
So is it now I am a man;
So be it when I shall grow old,
Or let me die!
The child is father of the Man;
And I could wish my days to be
Bound each to each by natural piety.

34. Therefore, I have no hesitation in declaring the petitioner No.2- as the sole lawful guardian of petitioner No.1.

35. The petition is allowed. The petitioner No.2- is declared as the sole lawful guardian of petitioner No.1- . Petitioner No.2 shall have legal custody, right to determine where petitioner No.1 shall reside and right to remove him from India. No other person has any legal right of guardianship and custody of petitioner No.1.

36. This Court deeply appreciates the valuable assistance rendered by the *Amicus Curiae*-Ms. Tanu Bedi, Advocate and the counsel for the parties.

37. Pending application(s) shall stand disposed of accordingly.

(ANUPINDER SINGH GREWAL)
JUDGE

Pronounced on : 23.11.2023
sonia gugnani

Whether speaking/reasoned : Yes/No
Whether Reportable : Yes/No