

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
R/SPECIAL CRIMINAL APPLICATION NO. 6490 of 2022

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ENA W/O ASHISH JAIN
Versus
STATE OF GUJARAT

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Appearance:

MS POONAM M MAHETA(11265) for the Applicant(s) No. 1,2
NOTICE NOT RECD BACK for the Respondent(s) No. 2,3,4
MR HARDIK SONI, APP for the Respondent(s) No. 1
MS KITTY MEHTA, for the Respondent(s) No.5.

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CORAM:HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI
and
HONOURABLE MR. JUSTICE SANDEEP N. BHATT

Date : 27/06/2022

ORAL ORDER
(PER : HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI)

1. The present petition is filed under Article 226 of the Constitution of India by the petitioners praying that the writ of Habeas Corpus be issued directing the respondent nos.2 to 5 to hand over the custody of the corpus-newly born baby girl to the present petitioners.

2. Heard learned advocate Ms.Poonam Maheta for the petitioners, learned APP Mr.Hardik Soni for respondent nos.1 to 4 and learned advocate Ms.Kitty Mehta for respondent no.5. Learned advocate Ms.Kitty Mehta is permitted to file vakalatnama in the Registry.

3. Learned advocate for the petitioners submitted that the petitioners are married couple and residing at Rajasthan. Since even after a long married life, they were not fortunate enough to enjoy parenthood, they decided to go for surrogacy. Therefore, the petitioners entered into

the agreement with the respondent no.5 who is surrogate mother on 27.12.2021 and it was decided that immediately after the birth of the child, the custody of the child would be handed over to the petitioners i.e. the intended parents. It is further submitted that after following the due procedure and as per the agreement entered into between the parties, the respondent no.5 has delivered a girl child. At this stage, learned advocate for the petitioners submitted that before the due date of the delivery, the respondent no.5 was arrested by the police in connection with the FIR being C.R.No.11191018220235 of 2022 registered with Gomtipur police station Ahmedabad city on 18.2.2022 and she was taken to the judicial custody. Thereafter, the petitioners learnt that on 20.6.2022, there was a natural labour pain to the respondent no.5 as the due date was coming nearer and therefore she was taken to the Civil Hospital Ahmedabad considering her medical condition and thereafter on 21.6.2022, the respondent no.5 had delivered a baby girl at the civil hospital.

4. It is further submitted that the petitioners came to know that respondent no.5 had immediately conveyed to the medical staff and the police officers that as per the surrogacy agreement entered into between the petitioners and respondent no.5, the respondent no.5 was under obligation to hand over the custody of the newly born child to the intended parents i.e. the present petitioners. Accordingly, the concerned officers of the respondent no.3-hospital have contacted the petitioners through Wings hospital and on 21.6.2022, the petitioners along with the consulting and administrative staff of Wings hospital have rushed to the civil hospital for taking custody of the newly born baby girl. Thereafter, the custody was given to the petitioners in presence of the medical staff and the concerned doctor.

5. At this stage, learned advocate submits that now the grievance of the petitioners is that the concerned medical officer and staff of the civil hospital conveyed the petitioners to bring back the newly born baby girl to the civil hospital as the respondent no.2 i.e. Superintendent of Police, Sabarmati jail is insisting for the custody of the child. It was also orally informed that unless and until there is an order of any court of law, the custody of the newly born child would not be given to the petitioners.

6. Learned advocate for the petitioners thereafter submitted that the respondent no.5-biological mother i.e. surrogate mother has also given her consent to hand over the custody of the child to the present petitioners. In spite of that, the custody of the child is not given by the respondent nos.2 and 4 to the petitioners. It is, therefore, urged that appropriate direction be issued to the concerned respondent authorities for handing over the custody of the corpus i.e. the newly born child to the petitioners who are intended parents as per the agreement.

7. On the other hand, learned advocate Ms.Mehta appearing for respondent no.5 has placed on record the affidavit of the respondent no.5 wherein the respondent no.5 has categorically stated that by virtue of surrogacy agreement executed between her and the petitioners, she is under a statutory and contractual obligation to hand over the custody of the minor child to the petitioners being the intended parents. It is further submitted in the affidavit that she confirms the contents of the surrogacy agreement and also given the consent that if the custody of the child is given to the petitioners, she has no objection.

8. Learned APP has fairly submitted after referring to The Surrogacy Regulation Act, 2021 (hereinafter referred to as 'the Act') that

there is no provision in the Act that for a particular period, the custody of the child is to be retained by the surrogate mother for the purpose of breast feeding. Learned APP has also fairly submitted that as per the agreement entered into between the parties, the custody of the child is required to be handed over to the intended parents immediately. However, learned APP has referred to the National Guidelines on Infant and Young child Feeding issued by the Ministry of Human Resource Development Department of Women and Child Development (Food and Nutrition Board), Government of India, in which there is a reference with regard to the importance of breast feeding of the child for first six months from the date of birth.

9. Learned APP, therefore, urged that in the facts of the present case, this Court may pass appropriate order in the interest of justice.

10. Having heard learned advocates for the parties and having gone through the material placed on record, it would emerge that the present petitioners who are intended parents have executed surrogacy agreement on 27.12.2021 with the present respondent no.5. As per the said agreement, the respondent no.5 has agreed to all the terms and conditions stated in the said agreement. Copy of the said agreement is placed on record at page no.16. It is further revealed from the record that as per the said agreement, respondent no.5 has delivered the child recently on 21.6.2022. However, prior thereto, the respondent no.5 has been arrested in connection with the FIR registered with Gomtipur police station and she was in judicial custody. She was brought to the Civil Hospital Ahmedabad on 20.6.2022 where she had given birth to a baby girl. It is further revealed from the record that the respondent no.5 has filed affidavit before this Court wherein she has categorically admitted

the contents of the agreement entered into between the parties and also stated that if the custody of the child is handed over to the petitioners, she has no objection.

11. Now, the dispute in the present case is with regard to the custody of the corpus i.e. the newly born baby girl. It is alleged that the respondent nos.2 and 4 are not granting the custody of the newly born child to the petitioners on the ground that there is no order of the Court for handing over the custody of the child to the petitioners and therefore as the respondent no.5 is required to be sent in judicial custody, the custody of the newly born child will not be handed over to the petitioners, who are now biological parents of the child as per the provisions contained in the Act of 2021 and as per the agreement entered into between the parties.

12. In view of the aforesaid background, this Court would like to refer the relevant clauses of the agreement entered into between the parties dated 27.12.2021 and the relevant sections of the Act of 2021, which are as under:

Clause 1(J) provides as under:

“1(J) . Except as otherwise specifically stated herein in this Agreement, the Intended parents shall take immediate, full and absolute custody of the child upon birth, notwithstanding any congenital, physical or mental abnormality of child.”

Clause 1(O) provides as under:

“1(O). Any child conceived and born as a result of the conduct contemplated by this Agreement shall have all testamentary and inheritance rights from Intended parents as their natural child, and the child shall have no testamentary right with Surrogate or her husband. The Intended parents or each of them shall have

testamentary and inheritance rights from the child as parents, neither the Surrogate nor her husband shall have those rights.”

Clause 6(B) provides as under:

“6(B). The Surrogate agrees to give immediate custody of child to Intended parents for their parental rights.”

Section 2(zd) of Act of 2021 provides the definition of surrogacy as under:

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

Section 8 of the Act of 2021 provides as under:

“8. A child birth 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.”

13. Keeping in view the aforesaid clauses provided in the agreement entered into between the parties and the provisions of Act of 2021, it is clear that after giving birth to the child, the respondent no.5 is required to hand over the custody of the newly born child to the present petitioners who are intended parents and child born out of the surrogacy procedure shall be deemed to be the biological child of the intended couple and the said child shall be entitled to all the rights and privileges available to a natural child under any law for the time being in force.

14. At this stage, this Court would like to refer to the decision rendered by the Hon’ble Supreme Court in the case of *Navjot Singh Sidhu v/s State of Punjab and Another* reported in (2007) 2 SCC 574, wherein the Hon’ble Supreme Court has observed in paragraphs 20 and 21 as under:

“20. Shri Rakesh Dwivedi, learned senior Counsel for the

complainant has submitted that in order to maintain purity and probity in public bodies, criminalisation of politics has to be stopped and persons who have been convicted of any offence should not be allowed to enter Parliament. He has elaborated his argument by submitting that irrespective of quantum of sentence if a person is convicted for an offence referred to in sub-section (1) of Section 8 where the punishment imposed may be only a fine, a person will incur the disqualification from the date of conviction which will remain for a period of six years and this evinces the intention of the legislature that a convict should not enter the precincts of Parliament or legislature of a State. In our opinion the contention raised cannot be accepted. The Representation of the People Act, 1951 is a complete code. The preamble of the Act is -

“An Act to provide for the conduct of elections to the Houses of Parliament and to the House or Houses of the legislature of each State, the qualifications and disqualifications for membership of those Houses, the corrupt practices and other offences at or in connection with such elections and the decision of doubts and disputes arising out of or in connection with such elections.”

21. The Act provides not only the eligibility and qualification for membership of the House of People and Legislative Assembly but also for disqualification on conviction and other matters. Parliament in its wisdom having made a specific provision for disqualification on conviction by enacting Section 8, it is not for the Court to abridge or expand the same. The decisions of this Court rendered in *Rama Narang v Ramesh Narang* and *Ravikant S Patil v. Sarvabhuma S Bagali* having recognized the power possessed by the court of appeal to suspend or stay an order of the conviction and having also laid down the parameters for exercise of such power, it is not possible to hold, as a matter of rule, or, to lay down, that in order to prevent any person who has committed an offence from entering Parliament or the Legislative Assembly the order of the conviction should not be suspended. The courts have to interpret the law as it stands and not on considerations which may be perceived to be morally more correct or ethical.”

From the aforesaid decision rendered by the Hon’ble Supreme Court, it can be said that the Courts have to interpret the law as it stands and not on considerations which may be perceived to be morally more correct or ethical.

15. We have considered the National Guidelines on Infant and Young child Feeding issued by the Ministry of Human Resource Development Department of Women and Child Development (Food and Nutrition Board), Government of India. We have also considered the interest of the child and the aforesaid decision rendered by the Hon'ble Supreme Court. In absence of any provision contained in the Act of 2021 providing that for the purpose of breast feeding, the custody of the child is to be retained by the surrogate mother for a particular period, this Court is of the view that the custody of the corpus i.e. newly born child is required to be handed over to the present petitioners.

16. In view of the aforesaid discussion, this petition is allowed. The respondent nos.2 and 4 are hereby directed to hand over the custody of the corpus i.e. the newly born child delivered by the respondent no.5 on 21.6.2022 to the present petitioners -intended parents immediately. Direct service today is permitted.

(VIPUL M. PANCHOLI, J)

(SANDEEP N. BHATT, J)

SRILATHA