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BABY MANJI YAMADA

v.

UNION OF INDIA & ANR.

(Writ Petition (C) No. 369 of 2008)

B

SEPTEMBER 29, 2008

**[DR. ARIJIT PASAYAT AND DR. MUKUNDAKAM
SHARMA, JJ.]**

C

Constitution of India, 1950: Article 32 – Child welfare – Surrogate baby – Writ petition challenging directions of High Court relating to production/custody of surrogate baby – Maintainability of – Held: Not maintainable – Complaint in this regard was required to be made before the Commission constituted under 2005 Act – Commissions for protection of Child Rights, 2005.

D

Words and phrases: Surrogacy, gestational surrogacy, Altruistic surrogacy, Commercial surrogacy – Meaning of – Discussed.

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A writ of habeas corpus was filed in High Court by respondent no. 3-NGO, wherein certain directions were passed relating to the custody/production of a surrogate baby. The present petition is filed by grandmother of the surrogate baby on her behalf challenging the directions of the High Court. It was stated in the petition that the biological parents of surrogate baby had come to India in 2007 and had chosen a surrogate mother in Gujarat and entered into a surrogacy agreement with her. The surrogate baby was born on 25.7.2008. On 3.8.2008, the baby was moved to Arya Hospital following the law and order situation in Gujarat. Meanwhile, the genetic father had to return to Japan due to expiration of his visa. The stand of respondent no. 3-NGO was that there is no law governing surrogation in India and in the name of surrogation lot of irregularities were being committed. The petitioner

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also questioned the *locus standi* of respondent no. 3 to file *habeas corpus* petition. Another grievance of the petitioner was that the permission to travel so far as the child was concerned including issuance of a Passport was under consideration of the Central Government; but no orders had been passed in that regard.

Disposing of the Writ Petition, the Court

HELD : 1. Surrogacy is a well known method of reproduction whereby a woman agrees to become pregnant for the purpose of gestating and giving birth to a child she will not raise but hand over to a contracted party. The word "surrogate", from Latin "subrogare", means "appointed to act in the place of". The intended parent(s) is the individual or couple who intends to rear the child after its birth. In "traditional surrogacy" (also known as the Straight method) the surrogate is pregnant with her own biological child, but this child was conceived with the intention of relinquishing the child to be raised by others; by the biological father and possibly his spouse or partner, either male or female. In "gestational surrogacy" (also know as the Host method) the surrogate becomes pregnant through embryo transfer with a child of which she is not the biological mother. She may have made an arrangement to relinquish it to the biological mother or father to raise, or to a parent who is unrelated to the child (e. g. because the child was conceived using egg donation, germ donation or is the result of a donated embryo). The surrogate mother may be called the gestational carrier. "Altruistic surrogacy" is a situation where the surrogate receives no financial reward for her pregnancy or the relinquishment of the child (although usually all expenses related to the pregnancy and birth are paid by the intended parents such as medical expenses, maternity clothing, and other related expenses). "Commercial surrogacy" is a form of surrogacy in which a gestational carrier is paid to carry a child to maturity in her womb and is

A usually resorted to by well off infertile couples who can
afford the cost involved or people who save and borrow in
order to complete their dream of being parents. This medi-
cal procedure is legal in several countries including in India
where due to excellent medical infrastructure, high interna-
B tional demand and ready availability of poor surrogates it is
reaching industry proportions. Commercial surrogacy is
sometimes referred to by the emotionally charged and po-
tentially offensive terms "wombs for rent", "outsourced
C pregnancies" or "baby farms". Surrogates may be relatives,
friends, or previous strangers. Many surrogate arrange-
ments are made through agencies that help match up in-
tended parents with women who want to be surrogates for
a fee. The agencies often help manage the complex medi-
cal and legal aspects involved. Surrogacy arrangements can
D also be made independently. In compensated surrogacies,
the amount a surrogate receives varies widely from almost
nothing above expenses to over \$ 30,000. Careful screen-
ing is needed to assure their health as the gestational car-
rier incurs potential obstetrical risks. [Paras 5 to 12] [1133,B;
E 1133, D-E; 1133,F-H; 1134, A-C; 1134,F-H]

2. The Commissions for Protection of Child Rights
Act, 2005 has been enacted for the constitution of a Na-
tional Commission and State Commissions for protection
of child rights and children's courts for providing speedy
F trial of offences against children or of violation of child
rights and for matters connected therewith or incidental
thereto. It has a right to inquire into complaints
and even to take *suo motu* notice of matters relating to, (i)
G deprivation and violation of child rights (ii) non-implemen-
tation of laws providing for protection and development
of children and (iii) non-compliance of policy decisions,
H guidelines or instructions aimed at mitigating hardships
to and ensuring welfare of the children and to provide
relief to such children, or take up the issues arising out of

such matters with appropriate authorities. No complaint has been made by anybody relating to the child, the petitioner in this Court. If the petitioner has any grievance in relation to the order to be passed by the Central Government, such remedy, as is available in law may be availed. [Paras 4, 13, 14 and 17] [1130,H; 1131,A; 1135,A-C; 1135,F]

CIVIL ORIGINAL JURISDICTION: Writ Petition (Civil) No. 369 of 2008

(Under Article 32 of The Constitution of India)

Indira Jaising, Lalit Mohini Bhat, Hetu Arora and Naveen R. Nath for the Petitioner.

G.E. Vahanvati, Abhinav Sharma, R.K. Singh, Narender Tripathi, Debasis Misra, Devadatt Kamat, Sushma Suri, Saket Sikri, V.K. Rao and madhu Sikri for the Respondents.

The Judgment of the Court was delivered by

DR. ARIJIT PASAYAT, J. 1. This petition under Article 32 of the Constitution of India, 1950 (hereinafter for short 'the Constitution') raises some important questions.

2. Essentially challenge is to certain directions given by a Division Bench of the Rajasthan High Court relating to production/custody of a child Manji Yamada. Emiko Yamada, claiming to be grandmother of the child, has filed this petition. The Writ Petition before the Rajasthan High Court was filed by M/s. SATYA, stated to be an NGO, the opposite party No. 3 in this petition. The D.B. Habeas Corpus Writ Petition No. 7829 of 2008 was filed by M/s. SATYA wherein the Union of India through Ministry of Home Affairs, State of Rajasthan through the Principal Secretary, The Director General of Police, Government of Rajasthan and the Superintendent of Police Jaipur City (East), Jaipur were made the parties. There is no dispute about Baby Manji Yamada having been given birth by a surrogate mother. It is stated that the biological parents Dr. Yuki Yamada and Dr. Ikufumi Yamada came to India in 2007 and

A had chosen a surrogate mother in Anand, Gujarat and a surrogacy agreement was entered into between the biological father and biological mother on one side and the surrogate mother on the other side. It appears from some of the statements made that there were matrimonial discords between the biological
B parents. The child was born on 25th July, 2008. On 3rd August, 2008 the child was moved to Arya Hospital in Jaipur following a law and order situation in Gujarat and she was being provided with much needed care including being breastfed by a woman. It is stated by the petitioner that the genetic father Dr. Ifukumi
C Yamada had to return to Japan due to expiration of his visa. It is also stated that the Municipality at Anand has issued a Birth Certificate indicating the name of the genetic father.

3. Stand of respondent No. 3 was that there is no law governing surrogation in India and in the name of surrogation lot of
D irregularities are being committed. According to it, in the name of surrogacy a money making racket is being perpetuated. It is also the stand of the said respondent that the Union of India should enforce stringent laws relating to surrogacy. The present
E petitioner has questioned the locus standi of respondent No. 3 to file a habeas corpus petition. It is pointed out that though custody of the child was being asked for but there was not even an indication as to in whose alleged illegal custody the child was. It is stated that though the petition before the High Court was styled as a "Public Interest Litigation" there was no
F element of public interest involved. Learned counsel for respondent No. 3 with reference to the counter-affidavit filed in this Court had highlighted certain aspects relating to surrogacy. The learned Solicitor General has taken exception to certain statements made in the said counter affidavit and has submitted that the petition before the High Court was not in good faith and
G was certainly not in public interest.

4. We need not go into the locus standi of respondent No. 3 and/or whether bonafides are involved or not. It is to be noted that the Commissions For Protection of Child Rights Act, 2005
H (hereinafter for short 'the Act') has been enacted for the consti-

tution of a National Commission and State Commissions for protection of child rights and children's courts for providing speedy trial of offences against children or of violation of child rights and for matters connected therewith or incidental thereto. Section 13 which appears in Chapter III of the Act is of considerable importance. The same reads as follows:

"13. Functions of Commission.

(1) The Commission shall perform all or any of the following functions, namely:-

- (a) examine and review the safeguards provided by or under any law for the time being in force for the protection of child rights and recommend measures for their effective implementation;
- (b) present to the Central Government, annually and at such other intervals, as the Commission may deem fit, reports upon the working of those safeguards;
- (c) inquire into violation of child rights and recommend initiation of proceedings in such cases;
- (d) examine all factors that inhibit the enjoyment of rights of children affected by terrorism, communal violence, riots, natural disaster, domestic violence, HIV/AIDS, trafficking, maltreatment, torture and exploitation, pornography and prostitution and recommend appropriate remedial measures.
- (e) look into the matters relating to children in need of special care and protection including children in distress, marginalized and disadvantaged children, children in conflict with law, juveniles, children without family and children of prisoners and recommend appropriate remedial measures;
- (f) study treaties and other international instruments and undertake periodical review of existing policies, programmes and other activities on child rights and

- A make recommendations for their effective implementation in the best interest of children;
- (g) Undertake and promote research in the field of child rights;
- B (h) spread child rights literacy among various sections of the society and promote awareness of the safeguards available for protection of these rights through publications, the media, seminars and other available means;
- C (i) inspect or cause to be inspected any juvenile custodial home, or any other place of residence or institution meant for children, under the control of the Central Government or any State Government or any other authority, including any institution run by a social organisation; where children are detained or lodged for the purpose of treatment, reformation or protection and take up with these authorities for remedial action, if found necessary;
- D
- E (j) inquire into complaints and take suo motu notice of matters relating to, -
- (i) deprivation and violation of child rights;
- (ii) non-implementation of laws providing for protection and development of children;
- F
- (iii) non-compliance of policy decisions, guidelines or instructions aimed at mitigating hardships to and ensuring welfare of the children and to provide relief to such children, or take up the issues arising out of such matters with appropriate authorities; and
- G
- (k) such other functions as it may consider necessary for the promotion of child rights and any other matter incidental to the above functions
- H

2) The Commission shall not inquire into any matter which is pending before a State Commission or any other Commission duly constituted under any law for the time being in force.” A

5. Surrogacy is a well known method of reproduction whereby a woman agrees to become pregnant for the purpose of gestating and giving birth to a child she will not raise but hand over to a contracted party. She may be the child’s genetic mother (the more traditional form for surrogacy) or she may be, as a gestational carrier, carry the pregnancy to delivery after having been implanted with an embryo. In some cases surrogacy is the only available option for parents who wish to have a child that is biologically related to them. B C

The word “surrogate”, from Latin “subrogare”, means “appointed to act in the place of”. The intended parent(s) is the individual or couple who intends to rear the child after its birth. D

6. In “traditional surrogacy” (also known as the Straight method) the surrogate is pregnant with her own biological child, but this child was conceived with the intention of relinquishing the child to be raised by others; by the biological father and possibly his spouse or partner, either male or female. The child may be conceived via home artificial insemination using fresh or frozen sperm or impregnated via IUI (intrauterine insemination), or ICI (intra cervical insemination) which is performed at a fertility clinic. E

7. In “gestational surrogacy” (also know as the *Host* method) the surrogate becomes pregnant via embryo transfer with a child of which she is not the biological mother. She may have made an arrangement to relinquish it to the biological mother or father to raise, or to a parent who is themselves unrelated to the child. (e. g. because the child was conceived using egg donation, germ donation or is the result of a donated embryo). The surrogate mother may be called the gestational carrier. F G

8. “Altruistic surrogacy” is a situation where the surrogate receives no financial reward for her pregnancy or the relinquish- H

A ment of the child (although usually all expenses related to the pregnancy and birth are paid by the intended parents such as medical expenses, maternity clothing, and other related expenses).

B 9. "*Commercial surrogacy*" is a form of surrogacy in which a gestational carrier is paid to carry a child to maturity in her womb and is usually resorted to by well off infertile couples who can afford the cost involved or people who save and borrow in order to complete their dream of being parents. This medical procedure is legal in several countries including in India where due to excellent medical infrastructure, high international demand and ready availability of poor surrogates it is reaching industry proportions. Commercial surrogacy is sometimes referred to by the emotionally charged and potentially offensive terms "wombs for rent", "outsourced pregnancies" or "baby farms".

D 10. Intended parents may arrange a surrogate pregnancy because a woman who intends to parent is infertile in such a way that she cannot carry a pregnancy to term. Examples include a woman who has had a hysterectomy, has a uterine malformation, has had recurrent pregnancy loss or has a healthy condition that makes it dangerous for her to be pregnant. A female intending parent may also be fertile and healthy, but unwilling to undergo pregnancy.

E 11. Alternatively, the intended parent may be a single male or a male homosexual couple.

F 12. Surrogates may be relatives, friends, or previous strangers. Many surrogate arrangements are made through agencies that help match up intended parents with women who want to be surrogates for a fee. The agencies often help manage the complex medical and legal aspects involved. Surrogacy arrangements can also be made independently. In compensated surrogacies the amount a surrogate receives varies widely from almost nothing above expenses to over \$ 30,000. Careful screening is needed to assure their health as the gestational carrier incurs potential obstetrical risks.

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

14. It appears that till now no complaint has been made by anybody relating to the child, the petitioner in this Court.

15. We, therefore, dispose of this writ petition with a direction that if any person has any grievance, the same can be ventilated before the Commission constituted under the Act. It needs no emphasis that the Commission has to take into account various aspects necessary to be taken note of.

16. Another grievance of the petitioner is that the permission to travel so far as the child is concerned including issuance of a Passport is under consideration of the Central Government; but no orders have been passed in that regard. The other prayer in the petition is with regard to an extension of the visa of the grandmother of the child requesting for such an order.

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

18. The writ petition is accordingly disposed of without any order as to costs. All proceedings pending in any High Court relating to the matter which we have dealt with in this petition shall stand disposed of because of this order.