

Court No. - 39

Case :- WRIT - C No. - 13696 of 2022

Petitioner :- Snigdha Majumdar And Another

Respondent :- Union Of India And 3 Others

Counsel for Petitioner :- Kartikeya Saran,Ujjawal Satsangi

Counsel for Respondent :- A.S.G.I.

Hon'ble Attau Rahman Masoodi,J.

Hon'ble Vikram D. Chauhan,J.

The case was mentioned. The case pertaining to the guardianship of a child i.e. petitioner no.2 is certainly urgent. The urgency is for the reason that the birth of the child is through a surrogate mother and petitioner no.1 and respondent no.4 are the biological parents. The parents are settled in Australia. A tripartite agreement was entered into by petitioner no.1 and opposite party no.4 with the surrogate mother i.e. opposite party no.3 and the clinic i.e. opposite party no.2 binding the parties in terms thereof. The agreement for all purposes has been carried out by the parties and this is what is averred in the writ petition. The child was born on 1st April, 2021 whereafter a passport has also been issued in his favour by the Union Government for the purposes of travelling abroad along with his parents. The condition of Visa postulates as under:-

"I acknowledge that the child's Birth certificate records the commissioning parents as the child's parents, and a DNA test has established a biological link to the commissioning parents. However in themselves these do not meet the requirements for the grant of the visa. PIC 4017 provided there is a legally valid surrogacy contract and a court order which confers sole custody to the commissioning parents. To satisfy Australia's legislative requirements please provide a court order in relation to the ongoing custody arrangements of the child, in accordance with PIC 4017 above. The court order should specify that the commissioning parents have full consent over where the child can reside; and no other parties involved in the surrogacy arrangement have any legal rights to the child."

For satisfaction of the aforesaid condition, the biological parents are faced with a difficulty on account of the promulgation of the Surrogacy (Regulations) Act, 2021 which has come into force w.e.f. 25th December, 2021. Section 4(iii) of the Act for ready reference is extracted hereunder:-

"4. On and from the date of commencement of this Act,

(iii) no surrogacy or surrogacy procedures shall be conducted, undertaken, performed or initiated, unless the Director or in-charge of the surrogacy clinic and the person qualified to do so are satisfied, for

reasons to be recorded in writing, that the following conditions have been fulfilled, namely:

(a) the intending couple is in possession of a certificate of essentiality issued by the appropriate authority, after satisfying itself, for the reasons to be recorded in writing, about the fulfilment of the following conditions, namely:

(I) a certificate of a medical indication in favour of either or both members of the intending couple or intending woman necessitating gestational surrogacy from a District Medical Board.

Explanation.—For the purposes of this item, the expression "District Medical Board" means a medical board under the Chairpersonship of Chief Medical Officer or Chief Civil Surgeon or Joint Director of Health Services of the district and comprising of at least two other specialists, namely, the chief gynaecologist or obstetrician and chief paediatrician of the district;

(II) an order concerning the parentage and custody of the child to be born through surrogacy, has been passed by a court of the Magistrate of the first class or above on an application made by the intending couple or the intending woman and the surrogate mother, which shall be the birth affidavit after the surrogate child is born; and"

The difficulty arises when we look at Section 4(iii)a(II) of the Act of 2021 which requires the intending couple or the intending woman and surrogate mother to make an application for order before the Magistrate of Ist class which shall be the birth affidavit after the surrogate child is born.

The case at hand is different for the reason that the surrogate mother in terms of the tripartite agreement dated 27th July, 2020 has already given birth to the surrogate child on 1st April, 2021. Except the tripartite agreement, the surrogate child does not have an order concerning the parentage and custody and due to the promulgation of law after his birth, for issuance of an order concerning parentage and custody, the other relevant provisions are Section 8 read with Section 53 which, for ready reference, may be extracted hereunder:-

"8. 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. 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 mother's to protect their well being."

Before consideration of the aforesaid provisions enabling the minor child to have an order concerning his parentage and custody, we deem it proper that notice through registered post

as well as Dasti may be issued to opposite party nos.2 and 3. Opposite party no.1 is already represented by Sri Manoj Kumar Singh, learned counsel for Union of India. Issuance of notice to opposite party no.4 is dispensed with for the reason that the opposite party no.4 is the biological father and is presently stationed in Australia under employment.

Let necessary steps for service of notice be taken within a week.

Affidavit of service may accordingly be filed before this Court as soon as the Dasti notice is served.

Let a service report be also placed on record before the next date of listing.

List on 5th July, 2022 as fresh amongst the first five cases.

Order Date :- 24.5.2022

Bhaskar