# IN THE HIGH COURT OF JUDICATURE AT BOMBAY
## CIVIL APPELLATE JURISDICTION

## WRIT PETITION (ST) NO. 6772 OF 2024

Shailja Nitin Mishra .. Petitioner

Versus

Nitin Kumar Mishra and Anr. .. Respondents

.....

- Mr. Ganesh K. Gole a/w Mr. Ateet Shirodkar, Mr. Bhavin Jain, Mr. Viraj Shelatkar, Ms. Kunjan Makwana, Mr. Ojas Gole & Mr. Akshay Bansode i/by Mr. Rahul Shelke for Petitioner.
- Ms. Kokila Kalra a/w Ms. Alifiya Manasawala for Respondent No.1.
- Mr. Hamid Mulla, AGP for Respondent No.2 – State.
- Ms. Devyani Kulkarni – *Amicus Curiae.*

.....

CORAM : MILIND N. JADHAV, J.
RESERVED ON : AUGUST 02, 2024.
PRONOUNCED ON : AUGUST 13, 2024.

JUDGMENT

**1.** Heard Mr. Gole, learned Advocate for Petitioner; Ms. Kalra, learned Advocate for Respondent No.1; Mr. Mulla, learned AGP for Respondent No.2 – State and Ms. Kulkarni, learned *Amicus Curiae*.

**2.** For the sake of convenience, nomenclature of the parties in this judgment shall be as follows:- husband as Respondent No.1, wife as Petitioner, Petitioner's sister as her younger sister and the children as twin daughters.

**3.** Petitioner is the mother and Respondent No.1 is the father of the twin daughters. Application filed for access to the daughters by the

Petitioner has been rejected by virtue of the impugned order dated 25.09.2023.

**4.** Present Writ Petition was heard by me on 01.08.2024 and the hearing was concluded on 02.08.2024. It has been a shocking revelation for me while hearing this Petition. Though the challenge in the present Writ Petition is with respect to rejection of Petitioner's Application seeking access and visitation rights to the twin daughters, there are various hidden alleged controversies which have been argued in the course of submissions made by learned Advocates for the private parties. Writ Petition has been filed by the mother i.e. wife of Respondent No.1 seeking custody of her twin daughters (twin girls who are turning 5 years old on 25.08.2024). This is so because every passing day in this case is severely detrimental, traumatic and prejudicial to the right of the Petitioner whereas every passing day as the daughters grow old is beneficial to Respondent No.1. The twist or rather more difficult part arises because of the birth of the twin daughters by surrogacy.

**5.** Considering the severity of the charges traded by both sides against each other, by order dated 19.07.2024, Ms. Devyani H. Kulkarni, learned Advocate and Counsel practicing in this Court was appointed by me as *Amicus Curiae* to assist the Court.

**6.** Relevant facts for adjudication of the present Writ Petition are as follows:-

(i) Petitioner and Respondent No.1 are legally wedded husband and wife and their marriage is admittedly in subsistence. This fact is not in dispute.

(ii) Their marriage was solemnized as per Hindu vedic rites and rituals in Ranchi, Jharkhand on 28.11.2012. At that time, Petitioner's age was 30 years and Respondent No.1's age was 32 years. At present Petitioner's age is 42 years and Respondent No.1's age is 44 years. Post marriage they both resided together as husband and wife at Sanpada, Navi Mumbai.

(iii) Petitioner failed to conceive naturally due to medical issues of both parties as averred in the Petition, hence they consulted a Gyneacologist and it was diagnosed that eggs of the Petitioner were non-viable. Their Gyneacologist advised them "altruistic surrogacy" through an egg donor. Petitioner approached her real younger sister to be the egg donor to which her sister agreed.

(iv) The sister was herself married at the then time and had one daughter. The procedure was carried out at Kiran Infertility Centre, Bengaluru where parties entered into a Surrogacy

Agreement dated 30.11.2018. Both parties have vehemently commented on the said Agreement and I shall advert to that later in my observations and findings.

(v) IVF treatment commenced in the month of December 2018. At the then time Petitioner was employed. Petitioner's sister donated her eggs some time in January 2019. Surrogacy procedure commenced thereafter with the surrogate mother. On 21.04.2019, the sister, her husband and daughter met with a road accident on Agra Expressway leading to demise of her husband and daughter. Petitioner's sister i.e. the egg donor survived, but met with disability.

(vi) On 25.08.2019, twin daughters were born through surrogacy to the surrogate mother at Kiran Infertility Centre, Bengaluru. The period thereafter is being narrated conversely by both parties by slinging allegations against each other which I shall consider cursorily at the time of recording their respective submissions. From August 2019 to March 2021, Petitioner, Respondent No.1 and their twin daughters resided together at Navi Mumbai.

(vii) Due to issues between parties, on 25.03.2021 Respondent No.1 moved alongwith the twin daughters to Ranchi i.e. his native place without informing Petitioner when she was at

work.

(viii) According to Respondent No.1, sister of Petitioner was in depression after her accident and on losing her husband and daughter and with the help and support of her parents, she moved to Ranchi at that time and started residing with Respondent No.1 and took care of the twin daughters and continues to do so even as on date of Kharghar, Navi Mumbai, where the Respondent No.1 lives.

(ix) Petitioner filed a police complaint immediately on 09.04.2021. Immediately thereafter, Petitioner filed Civil Misc. Application No.302 of 2021 seeking custody of the twin daughters under the provisions of the Guardians and Wards Act, 1890 (for short "**the said Act**") in the District Court at Thane. The Application was transferred to the Court of learned Ad-hoc District Judge-1, Belapur and is now renumbered as Civil Misc. Application No.18 of 2023. On 17.03.2022, alongwith the said Civil Misc. Application, Petitioner filed Interim Application below Exhibit "12" seeking interim visitation rights to her twin daughters. Respondent No.1 filed his Reply dated 29.03.2022 thereto and opposed the same. Intervention Application was filed by sister of the Petitioner in the proceedings.

(x) Since hearing on Civil Misc. Application and Interim Application was getting delayed, Petitioner filed Writ Petition No.2250 of 2023 in this Court seeking expeditious disposal of the Civil Misc. Application. By order dated 26.07.2023, this Court directed that the Interim Application be determined expeditiously within eight weeks from the date of the order with further direction to make an endeavour to dispose of the main matter for custody as early as possible.

(xi) After hearing parties, Petitioner's Application below Exhibit "12" seeking access and visitation rights to the twin daughters in the interregnum is rejected by the impugned order dated 25.09.2023. Petitioner being aggrieved with rejection of her Application has filed the present Writ Petition taking exception to the said order.

(xii) Hence, the present Petition.

**7.** Mr. Gole, learned Advocate appearing for Petitioner has drawn my attention to the impugned order and would submit that keeping in mind the aforesaid facts, the order is passed on a complete non-application of mind with respect to the admitted factual and legal facts involved in the present case. He would submit that the impugned order proceeds on the premise that the egg doner i.e. the younger sister of Petitioner is herself the surrogate mother of the twin

daughters which is factually incorrect. He would submit that apart from donating her eggs voluntarily, younger sister of Petitioner has no legal right nor role and/or nexus whatsoever either legally or otherwise to intervene in the proceedings before the Trial Court or stake any claim on the purported ground that she is the biological mother of the twin daughters. He would submit that her such purported claim is contrary to the legal provisions, as also the then prevailing Regulations and Guidelines which governed surrogacy birth and Surrogacy Agreements at the then time. He would submit that Respondent No.1 has supported the case of the younger sister's intervention before the Trial Court.

**7.1.** He would urge an expeditious intervention of the High Court in the present case since the twin daughters are as on date 5 years old and as they grow older day by day, according to him, it would be detrimental to the Petitioner's case altogether who is their mother legally and juridically to convince their growing minds to accept her as their mother. According to him, the slow pace at which the proceedings before the Trial Court have proceeded is clearly prejudicial to Petitioner's right and in turn it benefits none other than Respondent No.1. He would submit that the twin daughters are now 5 years old and are addressing the younger sister of Petitioner (who is merely the egg donor and has no legal and juridical right over them whatsoever) as "*maa*" meaning "mother", that their fragile growing minds are

taught to recognise the younger sister of Petitioner as their mother and most importantly they are unable to recognise the Petitioner who is infact their real mother. He would remind the Court that from August 2019 to March 2021, the Petitioner and Respondent No.1 have jointly taken care of the twin daughters, which is an admitted fact. He would submit that the finding returned by the learned Trial Court in the impugned order that the twin daughters are in the care and custody of Respondent No.1 and the surrogate mother is factually incorrect thereby leading to depriving the right to parenting in the infant years to the Petitioner, who is their real mother. He would vehemently argue that the initial cognitive years of growing and development of the twin daughters are extremely critical and crucial for the growth of their mind and their psychological impression and imprint about the fact that Petitioner is their mother and if that is not corrected at the earliest, then it would be a travesty of justice to the Petitioner's case altogether. He apprehends that once the twin daughters grow older, they would fail to recognise the Petitioner as their mother and hence the sense of urgency and expeditiousness is expressed.

**7.2.** That apart, he would submit that welfare of the twin daughters as they are growing is of vital significance and paramount importance to be nurtured by both parents and more specifically by their mother since it would affect their physical, mental, moral, emotional and social development as also their well being as they grow

older and are able to understand relationships. He would vehemently urge the Court that facts in the present case are such that every attempt in the book is being exploited by Respondent No.1 husband to ensure that delay takes place and should take place for determination of the Misc. Application filed under Section 25 of the said Act for seeking custody of the twin daughters by Petitioner, since delay in the case is the only potent weapon that would come to the aid of the regressive mindset of the Respondent No.1 in achieving the inevitable which he desires.

**7.3.** He would submit that during the interregnum, rejection of the Interim Application for seeking access and visitation rights to Petitioner is an incorrect and shocking decision, thereby denying the legal and juridical mother to have access to her own daughters who are very young. He would submit that an erroneous finding has been returned by the Trial Court while determining the Interim Application that Petitioner is not the biological mother of the twin daughters when the law clearly holds to the contrary. He would submit that the provisions of the Surrogacy (Regulation) Act, 2021 (for short "**Surrogacy Act**") have been completely misread and understood by the Trial Court as also the provisions of the Assisted Reproductive Technology (Regulation) Act, 2021 (for short "**ART Act**") under which parties entered into the Surrogacy Agreement, while referring to the Surrogacy Act in the impugned order.

**7.4.** He would submit that the Surrogacy Agreement dated 30.11.2018 executed between parties under the then prevailing Indian Council of Medical Research (for short "**ICMR**") Guidelines has been completely misread by the learned Trial Court while returning obviously incorrect findings that Petitioner is not the biological mother of the twin daughters whereas her younger sister is their surrogate mother. He would submit that the younger sister of Petitioner who is at present residing alongwith Respondent No.1 and the twin daughters and taking care of the twin daughters as her daughters, has no legal right whatsoever over the twin daughters.

**7.5.** In support of his submissions, he has drawn my attention to the Surrogacy Act which has come into effect from 25.01.2022 and in juxtaposition thereto drawn my attention to the National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India issued by the Ministry of Health and Family Welfare, Government of India and the ICMR, National Academy of Medical Sciences (India) in the year 2005. He would submit that under the aforesaid Guidelines (for short "**Guidelines**") which were prevailing at the time of entering into the Surrogacy Agreement, it is important for the Court to consider Guideline No.3.12 pertaining to the rights of a child born through various ART technologies alongwith Guideline No.3.16 and more specifically 3.16.1 pertaining to legitimacy of such a child born through ART for considering Petitioner's Interim Application which has been

incorrectly determined. He would submit that before the learned Trial Court, Respondent No.1 opposed the Application by making a submission that Petitioner used to threaten Respondent No.1 and that she is suffering from depression and she is taking treating from a Psychiatrist and therefore it would not be safe to allow her to meet the twin daughters. According to Mr. Gole, these are mere allegations to circumvent the statutory legal right of Petitioner being the intending mother of the twin daughters and the same is *sans* any *prima facie* evidence itself. He would submit that the impugned order is passed in such a cursory manner that findings returned in paragraph Nos.5 and 6 are on the face of record contrary to the admitted facts as well as law and would therefore urge the Court to set aside the impugned order dated 25.09.2023 and pass appropriate directions for granting access and visitation rights to the Petitioner in the interregnum and further directions be passed to the Trial Court to decide the Custody Application as expeditiously as possible.

**7.6.** Before parting Mr. Gole has also drawn my attention to various definitions and terminologies in the said Act and would submit that in so far as legitimacy of the child born out of surrogacy and parent's rights are concerned, the egg donor does not have any parental right or duty in relation to the child born out of surrogacy / child born through ART. He would submit that such child / children will have to be deemed to be the legitimate child / children of the

couple within wedlock with consent of both the spouses with all rights to them as biological parents.

**7.7.** Hence, he would submit that findings returned in the impugned order that Petitioner is not the biological mother as per the Surrogacy Act, that the younger sister of Petitioner is the surrogate mother of the twin daughters are patently incorrect and have to be set aside. He would submit that the learned Trial Court has considered the Surrogacy Act in reference to the present case in paragraph No.6 of the impugned order and in that context draw my attention to the said Act and more specifically to the definitions of intending couple [Section 2(r)], Surrogacy [Section 2(zd)], surrogate mother [Section 2(zg)] and would submit that the admitted facts in the present case are that the younger sister of Petitioner is the egg donor, the surrogate mother is the anonymous person who agreed to provide her womb and fulfil the conditions of Surrogacy Agreement and the Petitioner and Respondent No.1 are the intending couple who executed the Surrogacy Agreement with the surrogate mother and the Doctor who carried out the surrogacy procedure. In this context, he would also venture into submitting that Petitioner is the biological mother whereas Respondent No.1 is the biological father of the twin daughters, though this stance is vehemently opposed by Ms. Kalra on behalf of Respondent No.1.

**7.8.** In support of his above submissions, Mr. Gole has referred to and relied upon the following decisions of the Supreme Court:-

(i) ***Baby Manji Yamada Vs. Union of India and Anr.***[1]; and

(ii) ***Arun Muthuvel Vs. Union of India and Ors.***[2]

**8.** ***PER-CONTRA***, Ms. Kalra, learned Advocate appearing for Respondent No.1 has at the outset placed before me a copy of the Surrogacy Agreement dated 30.11.2018 and advanced her submissions thereon. The said Agreement is taken on record and marked "X" for identification since it is not part of pleadings in the Writ Petition. She would submit that the said Agreement as executed comprises of 8 pages and it is executed between the surrogate mother, Respondent No.1 and the Doctor at Kiran Infertility Centre, Bengaluru. She would submit that the said Agreement is not executed by the Petitioner as alleged and therefore she has no right whatsoever to even file the Custody Application as no right accrues to her from the said Agreement.

**8.1.** Before I advert to further submissions of Ms. Kalra, it would be prudent to deal with the above submission here itself at the outset. The Surrogacy Agreement dated 30.11.2018 though in the recital gives reference to the surrogate (mother), Respondent No.1 and the Doctor, it is seen that at the bottom of each page of the said Agreement,

1 (2008) 13 SCC 518
2 WP (Civil) No.756 of 2022 decided on 18.10.2023.

including the page on which the execution clause occurs, there is a specific provision made for effecting the signature of both the intending parents and the Doctor. It is seen that the Petitioner and Respondent No.1, both, being recognised as the intending parents have infact signed and executed the said Agreement at the specified place on each page of the said Agreement. Though it is faintly argued by Ms. Kalra that the said Agreement merely bears the signatures of Respondent No.1 at the specified place where the words 'signature of intending parent' occurs, however, Ms. Kalra is not right, since alongwith the signature of Respondent No.1 who is the father, rather referred to as the genetic father in the recital of the said Agreement, the signature of Petitioner is also clearly seen. I have compared and matched the said signature of Petitioner appearing therein with the signature of Petitioner in the verification clause of the present Petition as also on the Vakalatnama signed by the Petitioner which is appended to the present Petition and I find that the signatures of the Petitioner do not differ at all. At least to a naked eye, there is no ambiguity whatsoever while observing and even concluding that it is the Petitioner who has also alongwith Respondent No.1 signed the Surrogacy Agreement as intending parent and executed the said Surrogacy Agreement. Therefore, submission made by Ms. Kalra that Petitioner would have no right whatsoever to maintain the Custody Application is unacceptable and cannot be countenanced at all.

**8.2.** In so far as the specific findings returned in paragraph Nos.5 and 6 are concerned, Ms. Kalra has chosen not to address the Court on them at all. However, in her usual fairness would submit that she would not disagree with the definition of intending couple under the Surrogacy Act as also the definition of commissioning couple under ART Act when pointed out by the Court.

**8.3.** Once again showing absolute fairness while addressing the Court, she would agree with the fact that in the present case the younger sister of Petitioner was the egg donor whereas the surrogate mother was a separate anonymous woman who gave birth to the twin daughters in Bengaluru. This position is clearly accepted by her in view of the admitted fact that in the month of April 2019 i.e. 4 months before the birth of the twin daughters, the younger sister of Petitioner i.e. the egg donor had met with a life-threatening accident which left her severely injured and permanently disabled her, as informed by her. In that accident, husband and daughter of the younger sister perished. Therefore, both findings returned by the learned Trial Court in paragraph Nos.5 and 6 proceed on an incorrect appreciation of facts and are not sustainable at all.

**8.4.** Apart from the aforesaid submissions, Ms. Kalra would make certain other submissions, *inter alia*, pertaining to the relationship between the Petitioner and Respondent No.1 and would submit that

this Court should take it into cognizance before passing any order in the present Petition. She would submit that the Petitioner had obtained a divorce from her first marriage on 24.10.2011 and thereafter got married to Respondent No.1 on 28.11.2012. She would submit that on 07.10.2014 Petitioner joined HDFC Life Insurance Company and took up a job. She would submit that sometime in May / June 2015, Respondent No.1 was detected with brain tumour, due to which in September 2015, Petitioner left her matrimonial home and Respondent No.1.

**8.5.** She would next submit that in December 2015, Petitioner and Respondent No.1 filed a Petition for divorce by mutual consent, which was mutually withdrawn and it stood dismissed on 19.07.2017. She would submit that between September 2015 and November 2017, Petitioner stayed separately away from Respondent No.1 at Kharghar. She would submit that according to her instructions, from 18.02.2018 onwards Petitioner consulted a Doctor for depression, anxiety, bi-polar disorder and suicidal tendencies with several follow-up sessions thereafter upto May 2020. She would submit that in June 2018, Petitioner visited Jaslok Hospital where Dr. Firuza Parekh confirmed that her eggs are fine and she is competent to become a mother. Next, she would submit that on 24.08.2018 Respondent No.1 alongwith Petitioner approached Kiran Infertility Centre, Bengaluru for surrogacy and infertility treatment. She would submit that on 16.09.2018,

medical reports of Petitioner and Respondent No.1 were shared by Petitioner with Kiran Infertility Centre, Bengaluru. She would submit that on 30.11.2018, Petitioner and Respondent No.1 and Petitioner's younger sister went to Bengaluru for medication and handing over of medical kit to the younger sister for one month and during that period, Respondent No.1 shared his semen with the clinic in Bengaluru. Next, she would submit that on 19.12.2018, the younger sister of the Petitioner alongwith her husband and daughter visited Kiran Infertility Centre, Bengaluru for egg extraction.

**8.6.** She would submit that on 20.12.2018, eggs were extracted from the younger sister and she became the egg donor. She would submit that on 27.12.2018, conception of babies was confirmed. Thereafter, on 20.04.2019 younger sister of Petitioner and her husband and daughter met with a life-threatening accident on Agra expressway wherein her husband and daughter perished. She would submit that from 21.04.2019 to 06.05.2019, younger sister of Petitioner was under treatment at Apollo Hospital and from 31.07.2019 she was on bed rest due to her accident. She would submit that on 25.08.2019 the surrogate mother gave birth to the twin daughters in Bengaluru. She would submit that on 27.08.2019 Petitioner left for Mumbai leaving both daughters in the custody of Respondent No.1 and his mother in Bengaluru as she had to join her duty. She would submit that between September 2019 and 2021

Petitioner committed certain acts and was involved in certain incidents, which I do not find it relevant to mention herein, *inter alia*, pertaining to her relationship with Respondent No.1. This is so because, for the purpose of deciding the present Petition, I cannot be swayed by those allegations and / or acts and incidents at this interim stage. In any event, some of the submissions made by Ms. Kalra would even otherwise be the subject matter of trial and evidence in so far as the principal relief of custody of the twin daughters is concerned and if that be so, it would be imprudent to consider those incidents and acts in this order *prima facie* for determining the present Writ Petition. Nevertheless, it shall be open to Respondent No.1 to lead evidence in rebuttal as available to him in the trial for custody of the twin daughters and all his contentions are kept open as also equally right of Petitioner to cross-examine the Respondent No.1 in rebuttal is also expressly kept open.

**8.7.** Next she would submit that between 14.03.2021 to 17.03.2021, a precursor incident happened, whereby Petitioner continuously threatened Respondent No.1 that she would commit suicide, which compelled Respondent No.1 to file a criminal complaint against Petitioner at Sanpada Police Station. She would submit that in view of this, Respondent No.1 had no option but to leave for his native place at Ranchi by taking the twin daughters and their nanny without informing the Petitioner. She would submit that on 27.03.2021, local

police visited Respondent No.1's residence at Ranchi and verified the safety of the twin daughters with him. She would submit that on 28.03.2021 Petitioner herself visited Respondent No.1's residence in Ranchi despite which she filed a missing complaint with Sanpada Police Station on 09.04.2021 against Respondent No.1. She would submit that despite the above, on 31.05.2021 Petitioner once again re-visited Respondent No.1's residence in Ranchi.

**8.8.** In view of the above, Ms. Kalra would vehemently argue and submit that in the present case, younger sister of Petitioner who is now taking care of the twin daughters is and should be construed to be the biological mother of the twin daughters on the ground that she is admittedly the egg donor in this case.

**8.9.** On the basis of the above submissions, she would submit that the twin daughters are now well entrenched with the younger sister of Petitioner who is their biological mother according to her and she is taking care of them alongwith Respondent No.1. She would submit that Respondent No.1 is employed and more specifically he has studied law and is employed in a Corporate Company. She would also inform the Court that Respondent No.1 alongwith the twin daughters and the younger sister of Petitioner are all residing together at Kharghar, Navi Mumbai at present and not at Ranchi.

**8.10.** On the basis of her above submissions, she would submit that this Court be pleased to uphold the impugned order in the facts and circumstances of the present case as prevailing and pass appropriate directions for disposal of the Custody Application as deemed fit by the Court.

**9.** Ms. Kulkarni, learned *Amicus Curiae* appointed by this Court has ably assisted this Court. She has drawn Court's attention to the facts and circumstances of the case and the legal provisions that would be applicable to those facts. This is so because the date of Surrogacy Agreement in this case is 30.11.2018 whereas the Surrogacy Act is enacted subsequently and has come into effect on and from 25.01.2022.

**9.1.** Learned Amicus Curiae would however submit that the real issue involved in the present case is with respect to the right and entitlement of the intending mother/surrogate mother vis-à-vis a biological mother and the egg donor to seek access and custody of the children as also the law evolved on the said issue.

**9.2.** She would submit that the Surrogacy (Regulation) Act, 2021 which came into effect on 25.01.2022 is effective prospectively and the same is ascertained from a reading of Sections 3 and 4 of the said Act which begin with the words "*On and from the date of commencement of this Act….*" and these sections need to be read in consonance with

Section 53 of the said Act which is the transitional provision, and states as follows:-

> *"**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."*

**9.3.** She would submit that since the twin daughters were born to the couple on 25.08.2019, the issues to be decided in these facts will be governed by the "National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India by Indian Council of Medical Research, 2005" which were the only prevalent guidelines at the time. She would submit that as the Surrogacy (Regulation) Act, 2021 and the Assisted Reproductive Technology (Regulation) Act, 2021 were enacted subsequently, the National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India published by the Indian Council of Medical Research in 2005 and prevailing at the then time regulated the Surrogacy Agreement. According to her these guidelines will be applicable to the present case. She has also placed reliance on Report No.228 of the Law Commission of India in support of her submissions.

**9.4.** At the outset, she has drawn my attention to the definition of 'Surrogacy' under Rule 1.2.33 to mean *an arrangement in which a woman agrees to carry a pregnancy that is genetically unrelated to her and her husband, with the intention to carry it to term and hand over*

*the child to the genetic parents for whom she is acting as a surrogate*.

**9.5.** Next, she has drawn my attention to certain other relevant Rules which are directly applicable to the facts of the present case to govern the rights of the parties. The relevant Rules are Rule 3.5 (3.5.5), 3.12 (3.12.1), 3.16 (3.16.1) and 4.7 which are reproduced below for reference:-

> *"**3.5** Desirable Practices/Prohibited Scenario-*
> ***3.5.5** A third-party donor and a surrogate mother must relinquish in writing all parental rights concerning the offspring and vice versa.*
>
> ***3.12** Rights of a Child Born through various ART Technologies-*
> ***3.12.1** A child born through ART shall be presumed to be the legitimate child of the couple, baring 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** Legal Issues-*
> ***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."*
>
> ***4.7** Agreement for Surrogacy-*
> *Provides for agreement between the surrogate woman, the husband and the wife whereby the biological parents of the child have a legal obligation to accept their child and the child would have all the inheritance rights of a child of the biological parents as per the prevailing law."*

**9.6.** She has laid stress on Rule 3.5.5 which clearly elucidates that the donor and the surrogate mother has to relinquish all parental rights and would submit that in the present case Petitioner's younger sister being the donor cannot stake any claim on the twin daughters and that they are to be considered as the legitimate children of Petitioner and Respondent No.1. She has also stressed upon the giving of consent of the couple / both spouses as stated in Rule 3.16.1.

**9.7.** She has next drawn my attention to the 228th Report of the Law Commission of India which introduced the draft Assisted Reproductive Technology (Regulation) Bill and Rules, 2008. Relevant clauses of the said Law Commission of India-Report No.228 which are germane to this case are reproduced below:-

> *"**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.(b)*** *In the absence of any law to govern surrogacy, the 2005 Guidelines apply. But, being non-statutory, they are not enforceable or justiciable in a court of law. Under paragraph 3.10.1 of the Guidelines a child born through surrogacy must be adopted by the genetic (biological) parents. However, this may not be possible in case of those parents who cannot adopt in India.*

***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.*

***(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.*

***(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."*

**9.8.** Next my attention is drawn to the Surrogacy (Regulation) Act, 2021 and she would submit that even though the said Act came into effect on 25.01.2022, the intent of the said legislation be taken into consideration as the said Act clearly retains the intention behind the ICMR Guidelines of 2005 i.e. the Rules and the subsequent 228th Law Commission of India Report which were prevalent at the then time. She has drawn my attention to the relevant provisions of the said Act which are reproduced herein below for reference:-

> *"**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.*
>
> ***2(zg)** "surrogate mother" means a woman who agrees to bear a child (who is genetically related to the intending couple or intending woman) through surrogacy from the implantation of embryo in her womb and fulfils the conditions as provided in sub-clause (b) of clause (iii) of Section 4;*
>
> ***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."*

**9.9.** With respect to the Assisted Reproductive Technology (Regulation) Act, 2021, she would submit that this Act also came into force with effect from 25.01.2022 and the intent of the said legislation be considered as it clearly retains the intention behind the ICMR Guidelines of 2005 and the 228th Report of the Law Commission of

India which were prevalent at the then time without any change whatsoever. She has drawn my attention to Section 31 of the ART Act, which reads as under:-

> *"**31.** Rights of child born through assisted reproductive technology -*
> *(1) The child born through assisted reproductive technology shall be deemed to be a biological child of the commissioning couple and the said child shall be entitled to all the rights and privileges available to a natural child only from the commissioning couple under any law for the time being in force.*
> *(2) A donor shall relinquish all parental rights over the child or children which may be born from his or her gamete."*

**9.10.** She would submit that under Section 31(2) of this Act, there is a mandate for the donor to relinquish all parental rights over the child / children born from his / her gamete / oocyte.

**9.11.** She would submit that the Letters Patent jurisdiction of the High Court of Judicature under Section 17 also grants this High Court "guardian like power and authority" with respect to persons and estate of infants, idiots, and lunatics within the Bombay Presidency. Hence, she would submit that this Court can pass any order as it deems fit in the interest and welfare of such children within its jurisdiction who may not be amenable to the said Act or the ART Act, but are covered by the ICMR Guidelines (Rules).

**9.12.** She has referred to and relied upon the decision of the Punjab and Haryana High Court in the case of ***Master Eric Thind and Anr. Vs. Union of India and Ors.***[3] wherein the Punjab and Haryana

3 2023:PHHC:149307

High Court ordered the Centre and Punjab government in a case where the Petitioner, a commissioning parent was refused Visa for the surrogate child as Australia's Department of Home Affairs asked him first to get a Court order confirming that he has a right to remove the child from India. She would submit that a similar issue which arises herein with respect to rights of the intending parents was considered by the Punjab and Haryana High Court in that case and the Court has held that the Guidelines of 2005 will apply to surrogacies prior to the Act of 2021 coming into force.

**9.13.** She would submit that as per the 2005 Guidelines as well as the said Act of 2021 the position in law is therefore clear that the intending parents are to be considered as the biological parents of the surrogate child; that the child born through surrogacy is considered to be the legitimate child of the intending couple for all rights and purposes and that the surrogate mother and the donor will not have any parental rights concerning the offspring and vice versa. She would submit that the present Petition will have to be decided as per the provisions of the personal laws and the laws applicable with respect to custody and guardianship of the children as are applicable to the Petitioner and Respondent No.1 as the children are considered to be as their biological children under the law.

**9.14.** She has also referred to and relied upon the decision of the Delhi High Court in the case of ***Kiran Lohia Vs. The State Government of NCT of Delhi and Ors.***[4] and drawn my attention to paragraph No.50 therein which reads thus:-

> *"**50.** In our view, the professional and social obligations and activities of the mother need not necessarily have an adverse impact on the upbringing and safety of the minor child. In today's day and age, women are actively pursuing their professions and avocations. They are also socializing as their peers, friends, family and colleagues. That does not mean that they are necessarily failing in performance of their maternal obligations. In fact, working women are, by and large, having to put in extra time and effort to keep both ends up, and they are doing it successfully. The child is an infant. At this age, the child has little understanding of the actions and conduct of the parents, particularly, those acts and conduct which take place outside the child's environment."*

**9.15.** On the basis of the above, she would contend that the Petitioner is a working woman and has a corporate job, hence this Court may consider the same appropriately while passing order or directions in this case in the interregnum until the Custody Application is decided.

**9.16.** She has placed on record a copy of the National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India and copy of the 228th Report of the Law Commission of India.

**10.** I have heard Mr. Gole, learned Advocate for the Petitioner; Ms. Kalra, learned Advocate for Respondent No.1; Mr. Mulla, learned AGP for Respondent No.2 – State and Ms. Kulkarni, learned *Amicus*

4 2018 SCC Online Del 8686

*Curiae* and with their able assistance perused the record and pleadings of the case. Submissions made by the learned Advocates have received due consideration of this Court.

**11.** After hearing the learned Advocates for the parties, it is seen that in the present case, the prevailing Guidelines namely National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India, enacted in 2005 are applicable and there is no issue or discrepancy about the same. The decision in the case of *Master Eric Thind* (*third supra*) clearly states that the Guidelines will apply to surrogacies prior to the Surrogacy Act coming into force. It is seen that under Guideline No.3.12.1 of the said Guidelines which directly apply to the present case and the Surrogacy Agreement dated 30.11.2018, it is clearly stated that a child born through ART shall be presumed to be the legitimate child of the couple as having been born from the wedlock and with the consent of both the spouses. Here both spouses would mean the Petitioner and Respondent No.1. In that view of the matter, twin daughters born in the present case would be the daughters of Petitioner and Respondent No.1.

**12.** It is further seen that under Guideline No.3.16.1, it is clearly stated that the sperm / oocyte donor shall not have any parental right or duties in relation to the child and in that view of the matter, the younger sister of Petitioner can have no right whatsoever to intervene

and claim to be the biological mother of the twin daughters as argued by Ms. Kalra. The submissions on behalf of Respondent No.1 that the younger sister of the Petitioner being the oocyte donor is the biological mother stands rejected outrightly in view of the settled position in law on the basis of the Guidelines and the Surrogacy Act enacted subsequently. It is purely an issue of law and not fact which is clearly governed by the then prevailing guidelines. Though admittedly the younger sister of Petitioner is the oocyte donor in the present case she has no legitimate right to claim that she is the biological parent / mother of the twin daughters. In so far as the Surrogacy Agreement is concerned, on perusal of the Agreement produced by Ms. Kalra, it is seen that even though if the said Agreement is claimed to be executed by Respondent No.1 with the surrogate mother and the Doctor, it cannot be accepted as the Agreement is signed by the Petitioner also and it is on exclusively contract between the intending parents i.e. the Petitioner and Respondent No.1, the surrogate mother and the Doctor. The donor of the egg / oocyte does not figure therein and has no legal or contractual right whatsoever. The ethos and genuineness of the said Agreement lies in the fact that the reference made therein is to the intended parent. The Agreement itself is endorsed and bears the signatures of both i.e. Petitioner and Respondent No.1 which cannot be disregarded or disallowed as consent of the spouse to enable Respondent No.1 to

enter into that Agreement is the *sine qua non* for such an Agreement. Though Ms. Kalra makes a grievance that on internal page No.5 of the Agreement, the signature of the Petitioner is not appended, I have perused the said Agreement and it is seen that the signature of the Petitioner is appended at each and every page of the Agreement including on page 5 (where the signature of Petitioner appears alongside the signature of Respondent No.1) and alongside the signature of the Doctor, who has executed the Surrogacy Agreement. Infact, the signature of both intended parents namely Petitioner and Respondent No.1 are appended in the Agreement on all its pages. In that view of the matter, a strong *prima facie* case is clearly made out by the Petitioner for setting aside and quashing of the impugned order which is passed with complete non-application of mind and is clearly unsustainable. Passing of such an order has benefitted the Respondent No.1 only.

**13.** As stated and delineated herein above, in so far as findings returned in paragraph Nos.5 and 6 are concerned, I have already dealt with them while addressing the submissions made by Ms. Kalra and hence it is held that those findings are on the face of record incorrect and deserve to be set aside. Resultantly, the impugned order which has been passed with complete non-application of mind deserves to be interfered with and is accordingly quashed and set aside. Interim Application for access and visitation is allowed but with the following

directions, checks and balances in the interregnum.

**14.** Merely setting aside of the said order, would not be of any consequence in the present case as during the interregnum, the access and visitation rights of the Petitioner – mother will have to be considered. This is so because even if this Court gives direction for expeditious disposal of the Custody Application pending before the Trial Court, it will have to be seen that appropriate directions are passed on two fronts namely; (i) for expeditious disposal of the Custody Petition and to ensure that Respondent No.1 does not take advantage of the delay in the legal system and keeps on protracting the trial in the Custody Application and (ii) during the aforesaid i.e. pendency of trial in the Custody Application to pass appropriate directions for access and visitation rights to the Petitioner so that she can visit her twin daughters as they grow up and her case is not prejudiced.

**15.** Incidentally, one of the reason as to why the aforesaid twin directions are required to be passed is only because Respondent No.1 has taken undue advantage of the fact that the Petition is filed in the year 2022 when the twin daughters were not even two years old, and they were taken away by him and thereafter Petitioner has had no access to them and today they are 5 years old and are recognising the younger sister of Petitioner who resides with them and Respondent

No.1 as their mother. One of the issue vehemently argued by Mr. Gole deserves immediate attention of the Court and that is the growing age of the twin daughters. They are 5 years old today and in the custody of Respondent No.1 and younger sister of Petitioner whom they consider to be their mother and call her their father and mother. This issue will have to be addressed in the interregnum so that balance of convenience is maintained until the Custody Application is determined. Admittedly, the younger sister of Petitioner being the gamete / oocyte donor has absolutely no legal right whatsoever in law to claim that she is the biological mother of the twin daughters even though she may be staying with the Respondent No.1 in any capacity. Marriage of Respondent No.1 with Petitioner is admittedly in subsistence. Law proceeds on the basis of Regulations, Rules, Guidelines and Statutes which are in place, rather than on emotional considerations of parties.

**16.** Though Ms. Kalra would submit that parents of the Petitioner have supported the decision of the younger sister of Petitioner to stay with Respondent No.1 and the twin daughters due to her state of depression after losing her husband and daughter in the accident on 20.04.2019, that cannot be a consideration for this Court to consider that the younger sister of the Petitioner is the biological mother of the twin daughters merely because she is the egg donor or be sympathetic to the situation. Case has to be decided on law, rather applicable laws no matter how disagreeable and painful the decision or

direction of the Court may be. Equally, in the case before hand the twin daughters' welfare will also have to be protected.

**17.** In a given situation and case and assuming for the sake of argument that if the younger sister would not have met with the life-threatening accident in April 2019 and would not have lost her husband and daughter in the said accident, then there would have been no reason for her to claim that she is the biological mother of the twin daughters of the Petitioner and Respondent No.1. In the present case, Petitioner and Respondent No.1 are admittedly the intending couple, they are intending father and intending mother as defined under the Guidelines and the Surrogacy Act which is taken cognizance of by the Trial Court while passing the impugned order and therefore it is they who qualify to be the biological father and the biological mother once the twin daughters are born, as also, they are the commissioning couple as contemplated and defined under the ART Act. The limited role of the younger sister of Petitioner is that of an oocyte donor, rather a voluntary donor and at the highest, she may qualify to be a genetic mother and nothing more, but by such qualification she would have no intending legal right whatsoever to claim to be the biological mother of the twin daughters as the law clearly does not recognise so. Hence, I am inclined to accept the submissions made by the learned *Amicus Curiae* in deciding this Petition.

**18.** In view of the above observations and findings, in so far as the issue of access and custody of the twin daughters in the interregnum until the Custody Application is decided is concerned, I propose to pass the following order:-

(i) Respondent No.1 is directed to give physical access and visitation right to the Petitioner on every weekend i.e. Saturday and Sunday for 3 hours from 03:00 p.m. to 06:00 p.m. at Respondent No.1's residence at Kharghar to begin with for the first two months from the date of this judgment; That apart, Petitioner will be granted access to speak to the twin daughters twice every week on Tuesday and Thursday on phone on video call between 08:00 p.m. and 08:30 p.m. by Respondent No.1;

(ii) During the above access and visitation on weekends, Respondent No.1 shall ensure that even though Petitioner's younger sister may remain present at the outset, she will not interfere with the access and visitation rights granted to the Petitioner and rather cooperate in implementing this order;

(iii) The Petitioner is also warned and directed by this Court not to force herself on the twin daughters during the

first two months period of her access and visitation as the children are only 5 years old and will need some time to get acclimatised to her presence in their lives;

(iv) After the aforesaid period of 2 months is over, from the 3rd month onwards, Petitioner can apply to the Trial Court for appointment of and assistance of the Child Counsellor to speak to the twin daughters and, if any, such Application is made, the Trial Court shall pass appropriate orders thereon;

(v) Apart from the above, Petitioner will be given access to the School of the twin daughters, where they are attending School in Kharghar at present for the Parents Teachers Meeting Day alongwith Respondent No.1 and Respondent No.1 shall intimate to the Petitioner the date and time of PTM atleast three days in advance, so that it would enable the Petitioner to remain present;

(vi) In addition to the above access granted to the Petitioner, after the first two weekends, the Petitioner will be also be entitled to take the twin daughters outside during the said 3 hour window period to any mall or restaurant for entertaining the twin daughters to spend quality time with them. During that period,

Respondent No.1 may also go alongwith and accompany the Petitioner and the twin daughters, if he so desires;

(vii) Both, Petitioner and Respondent No.1 are directed and warned by this Court not to cause any emotional trauma to the twin daughters, who are 5 years old by quarrelling in their presence and not to express any opinion in their presence so that the purpose for which access and visitation is granted by the Court is achieved;

(viii) Petitioner alongwith twin daughters without the presence of the younger sister of the Petitioner shall visit the Child Counsellor in the Trial Court as directed after the first two months. If any Application is made to have a meeting with the Counsellor by abiding to the directions of the Trial Court for achieving the objective of access and visitation of the Petitioner and the said Counsellor is directed by this Court to give a report of their visit and interaction with the Petitioner, Respondent No.1 and both their twin daughters to the learned Trial Court hearing the Custody Application and the learned Trial Court shall take such reports into account and accordingly, pass any further directions, if

so required regarding visitation and access;

(ix) Both parties are at liberty to approach the Trial Court for seeking further directions or modifications of directions with respect to the issue of access and visitation to the twin daughters after three months from the date of this order;

(x) The aforesaid directions shall be in place, subject to any modifications by the Trial Court after three months until the Custody Application is decided finally by the Court;

(xi) That apart, Petitioner shall also be entitled to take the twin daughters to her residence in Ulwe, Navi Mumbai which is close proximity to Kharghar and if so required, Respondent No.1 can accompany the Petitioner but without the presence of the younger sister of the Petitioner during the visitation and access as directed herein above;

(xii) It is also directed by this Court that when the twin daughters will have their vacations from school, if Petitioner desires to take them on vacation, she is at liberty to approach the learned Trial Court for taking them for vacation and after hearing the Petitioner and

Respondent No.1, learned Trial Court shall pass appropriate directions for allowing the Petitioner and Respondent No.1 to take the twin daughters on vacation for achieving the purpose and objective of the present issue of visitation and access to the Petitioner and on the terms and conditions as deemed fit by the learned Trial Court;

(xiii) It is clarified that the younger sister of the Petitioner shall not obstruct the implementation of the present order in the interregnum in any manner and if at all there is any obstruction by her, Petitioner is at liberty to approach the Trial Court for seeking appropriate directions in the Custody Application and the learned Trial Court shall give the said directions after hearing the parties;

(xiv) At the time of visitation, Respondent No.1 and / or younger sister of Petitioner shall not remove the twin daughters from the residence of Respondent No.1;

(xv) Petitioner and Respondent No.1 shall be at liberty to make any appropriate Application, if either of them desire on any other issue for which they may require aid and assistance of the learned Trial Court in so far as

visitation and access of the Petitioner to the twin daughters is concerned and the learned Trial Court shall pass appropriate directions on the same after hearing the Petitioner including any issue of costs or expenses to be incurred or shared by the parties;

(xvi) To begin with on 25.08.2024, both Petitioner and Respondent No.1 are persuaded by the Court to celebrate the birthday of the twin daughters at the residence of Respondent No.1 by mutually deciding on the celebrations together without creating any issue or nuisance in presence of the daughters. The twin daughters shall be free to accept presents and gifts from Petitioner and Respondent No.1 shall not oppose or object to the same;

(xvii) Liberty to both parties to apply to the Trial Court;

(xviiii) In view of the above directions, it is directed that Custody Application shall be disposed of by the Trial Court as expeditiously as possible and in any event within a period of six (6) months from today positively as any delay would be prejudicial and detrimental to Petitioner's case; the above arrangement shall continue in the interregnum until the Custody Application is

decided subject to directions of the Trial Court. Parties shall thereafter be governed by the final order passed in the Custody Application;

(xix) These directions and arrangement are without prejudice to the rights and contentions of either of the parties;

(xx) Parties are directed to cooperate with the Trial Court for expeditious disposal of the Custody Application.

**19.** The above directions are passed in the interest and welfare of the twin daughters which both parties shall note.

**20.** This Court appreciates the effort put in by the learned *Amicus* in rendering valuable assistance to the Court in this matter, both on law and facts.

**21.** With the above directions, Writ Petition is allowed and disposed.

**[ MILIND N. JADHAV, J. ]**

**22.** After this judgment is pronounced in open Court, Ms. Kalra would submit that the above judgment be stayed for a period of four weeks. In view of my observations and findings rendered in the above judgment, I am not inclined to accept the application made by Ms. Kalra for stay of this judgment and the said application is rejected.

**[ MILIND N. JADHAV, J. ]**

Ajay