

SURROGACY ACT: THE NEED OF THE HOUR

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Nature has bestowed the beautiful capacity to procreate a life within women and every woman cherishes the experience of motherhood. Unfortunately, some women due to certain physiological conditions cannot give birth to their own off-spring. The desire for motherhood leads them to search for alternative solutions, and surrogacy presents itself as the most viable alternative. The first part of the paper will deal with the technical and common meaning of the term surrogate and the types of surrogacy whereas second part of the paper will discuss the evolution of the concept of surrogacy in India.

In the third part of the paper the author will try to be a critique to the status of surrogacy in India. In the fourth part of the bill authors will discuss upon the recent surrogacy bill, 2016 and lastly in the final part of the paper authors will conclude by giving suggestions.

KEYWORDS : Surrogacy, Commercialisation and Surrogacy Bill, 2016.

When money is exchanged for pregnancy, some believe, surrogacy comes close to organ selling or even baby selling.

-Thomas Frank

1. INTRODUCTION

Nature has granted the beautiful capacity to procreate a life within women and every woman reveres the experience of motherhood. Motherhood is the most beautiful and divine gift to a woman. Every woman has a dream and a natural instinct that she will become mother and

nurture a baby. Unfortunately, some women due to certain physiological conditions cannot procreate off - spring. But the urge of motherhood leads them to search for alternative solutions. In such situation surrogacy emerged as a boon and the most viable alternative. It is a ray of hope in the life of women who feels deprived of motherhood. The very word surrogate means substitute.¹ That means a surrogate mother is the substitute for the genetic-biological mother. In common language, a surrogate mother is the person who is hired to bear a child, which she hands over to the other party with whom she has entered into the agreement of surrogacy, at the time of birth and relinquishes all her rights over the baby. Black's Law Dictionary defines surrogacy as a process of carrying and delivering a child for another person.²

1.1 MEANING OF SURROGACY

“Surrogacy” means an arrangement in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, in which neither of the gametes belong to her or her husband, with the intention to carry it and hand over the child to the commissioning couple for whom she is acting as a surrogate.³

“Surrogate mother” means a woman who is a citizen of India and is resident of India, who agrees to have an embryo generated from the sperm of a man who is not her husband and the oocyte of another woman, implanted in her to carry the pregnancy to viability and deliver the child to the commissioning couple that had asked for surrogacy.⁴

1.2 TYPES OF SURROGACY

- Natural Surrogacy - It is also known as traditional or straight surrogacy. Here, the surrogate mother is pregnant with her own biological child but the child is conceived with the intention of being raised by the other party such as his biological father. The child born is genetically related to the surrogate mother and can be conceived through artificial insemination, sexual intercourse or intra cervical insemination at the fertility clinic.

¹ Available at <http://www.latindictionary.org/surrogatus>, <http://en.wiktionary.org/wiki/surrogatus>; last visited on 5th September 2016 at 10:00 A.M.

² Oliphant RE. New York: Aspen Publishers; 2007. Surrogacy in Black Law Dictionary, family law; pg. 349.

³ The Assisted Reproductive Technology (Regulation) Bill, 2014; section 2(zq).

⁴ Ibid; section 2(zr).

- Gestational Surrogacy - There is no biological relation between the surrogate and the child. Surrogate conceives through the implantation of an embryo which is not her own and has been donated to her by the intended mother of the child.
- Commercial Surrogacy - This involves a monetary consideration and is also known as 'wombs for rent'. This procedure is legal in several countries including India. But the recent proposed surrogacy bill tends to ban the commercialisation of surrogacy.
- Altruistic Surrogacy - No financial reward is given to the surrogate mother by the genetic parents of the new born except her necessary medical expenses.

2. EVOLUTION OF THE CONCEPT OF SURROGACY IN INDIA

One of the very prominent rationale behind the practice of surrogacy is to avoid infertility. Infertility is a social stigma not only in India but worldwide. According to Bible the purpose of a human life and relation is to procreate and any relation which does not leads to procreation is a sin in the eye of this holy book; solely relying upon this argument common laws did not recognise the same sex relationships or marriage till the year 2014.

Indian society has got a very stable family structure, strong desire for children and particularly son to carry forth the lineage or "Vansh" can easily be traced from the social practices.⁵

Traces of surrogacy can be found way back in Indian history and Indian Vedic literature. Surrogate mother is not a new concept. In ancient time it was practiced somewhat in a rudimentary form.

According to a survey done by the centre for social research in Delhi and Mumbai it was found that Poverty and unemployment are the most affecting factors which influences the surrogacy decision in India.

3. STATUS OF SURROGACY IN INDIA

Previously surrogacy arrangements were generally confined to kith and kin of close relatives, family and friends but the introduction of monetary consideration in the process has extended its network across the country. The natural process of giving birth to a child has now become

⁵ Available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC4345743/>; last visited on 5th September, 2016 at 1:00 P.M.

one of the survival options for women from poor economical background because they have started taking this as a profession as they derive monetary benefits out of it.

Commercial surrogacy has been legal in India since 2002. This legalization of commercial surrogacy has led to black market and baby selling. This has also led to the exploitation of children as well as the surrogates. It has shown a very adverse effect on the health of the women. Lack of laws in this field has led to abuse of women's health. In the absence of laws relating to surrogacy the rights of the surrogate mothers and child born out of surrogacy stands unprotected. India has emerged as a popular tourist destination for the purpose of surrogacy. Cheap medical facilities, advanced technology and lack of regulatory laws has made India one of the most viable option. The process of renting a womb and getting a child is similar to outsourcing pregnancy.

It is very unacceptable and unnatural for a woman to surrender a child which she has bore for nine months. Women who become surrogates in India are mostly from lower class to lower middle class backgrounds and are in a need of money. So out of necessity they get ready to rental their womb. But this practice has made child a 'saleable commodity'.

3.1 AGREEMENT OF SURROGACY A VALID CONTRACT

Commercial surrogacy is legal in India. Surrogacy in India is unregulated as they yet do not have legislations controlling surrogacy although the Indian Council of Medical Research (ICMR) has set “National Guidelines” to regulate surrogacy, these are simply guidelines. This means that surrogate mothers need to sign a “contract” with the childless couple. Moreover there are no stipulations as to what will happen if this “contract” is violated. Whether these contracts are enforceable is debatable.⁶

Under Section 10 of the Indian Contract Act, 1872, all agreements are contracts, if they are made by free consent of parties competent to contract, for a lawful consideration and with a lawful object, and or not expressly declared to be void. Therefore if any surrogacy agreements satisfies this conditions, it is an enforceable contract.

⁶ Monika Banode, Critical appraisal of legal spectrum regulating surrogacy contract: a comparative study with special reference to India, South Asian Journal of Multidisciplinary Studies (SAJMS) ISSN:2349-7858 :SJIF 2.246:Volume 2 Issue 2.

Thereafter under section 9 of Civil Procedural Code, 1908, it can be the subject of a civil court for adjudication of all disputes relating to the surrogacy agreement and for a declaration/injunction as to the relief paid for.⁷

Surrogacy is a boon in the life of persons who have lost hope to procreate because of infertility and thus it also serves a moral cause. But this is not the scene always, nowadays there is a growing demand for fair skin and thus many women get ready to become the surrogate for foreign couples. Such surrogacy does not serve any social or moral purpose rather encourages the practice of racism which is morally as well as legally recognized offence in India and any such discrimination made against the person based on his/her complexion will result in the violation of his Fundamental Right conferred upon him by Article 14 of the Constitution of India, 1949. In such Surrogacy contracts where the motive is of such immoral nature and is opposing public policy, the contract will stand void as per section 23 of Indian Contract Act.⁸

3.2 JUDICIAL INTERPRETATION

For the first time in the case of *Baby Manji Yamada v/s UOI*⁹ the apex court of the country recognised commercial surrogacy to be legal in India.

In this case Baby Manji was born to a surrogate mother through in vitro fertilization using a Japanese man's sperm and an egg from an unknown donor at Anand. In less than a month, 'Baby Manji' has already seen fierce legal battles in two constitutional courts, Rajasthan High Court and now in Supreme Court, where an NGO has raised questions on legal propriety of surrogacy and the child's nationality. Anxious for the outcome are her Japanese father and grandmother. Therefore the writ of Habeas Corpus has been filed claiming that money making racket is perpetuated in the name of the surrogacy. Therefore, Apex Court held that commercial surrogacy is permitted in India.

In the case of *P Geetha Nagar V/s Kerela Live stock development Board*¹⁰ the Kerela High Court held that 'even in the absence of statutory frame work, surrogacy in India is not illegal.'

⁷ Available at <http://lawcommissionofindia.nic.in/reports/report228.pdf>; last visited on 6th September, at 2016 at 9:00 A.M.

⁸ Section 23 of Indian Contract Act, 1872, Universal Publication.

⁹ JT 2008 (11) SC 150.

¹⁰ WP(C).No. 20680 of 2014 (H).

3.3 NEED FOR THE SURROGACY ACT

Indian Baby Manji case triggered the debate on the sensitive issue of surrogacy. This incident highlighted the total disregard for the rights of the surrogate mother and child and have resulted in a number of public interest litigation in the Supreme court to control commercial surrogacy.

The 228th Law Commission Of India also recommended prohibiting commercial surrogacy and allowing ethical altruistic surrogacy to needy Indian citizens by enacting a suitable legislation.¹¹

The law commission of India has submitted the 228th report on “need for legislation to regulate assisted reproductive technology clinics as well as rights and obligations of parties to a surrogacy.” The Report has come largely in support of the Surrogacy in India, highlighting a proper way of operating surrogacy in Indian conditions. Exploitation of the women through surrogacy is another worrying factor, which the law has to address. The Law Commission has strongly recommended against Commercial Surrogacy.¹² The report has also recognised the exploitation of surrogate mothers due to the absence of laws and thus have strongly recommended for the regulating laws on surrogacy.

A typical objection is made to surrogacy by comparing it with prostitution. In both the situation women body is used for the purpose of financial benefits. Surrogacy also turns babies into commodities.

Before the draft Surrogacy (Regulation) Bill 2016 was cleared by the union cabinet, there were guidelines governing surrogacy in India. The Indian Council for Medical Research (ICMR) set guidelines that did not permit traditional surrogacy (where the surrogate’s own eggs were used; done to prevent an emotional link being formed between mother and child and to disallow all legal claims in the future). The guidelines, which were not legally binding, also stipulated that the surrogate should be between 21 and 36 years old, married, and have a child of her own.¹³

¹¹ Available at <http://www.thehindu.com/opinion/op-ed/why-the-surrogacy-bill-is-necessary/article9040755.ece>, last visited on 7th September 2016 at 7:00 P.M.

¹² Available at http://surrogacylawsindia.com/legality.php?id=%207&menu_id=71, last visited on 7th September 2016 at 9:00 P.M.

¹³ Available at <http://www.livemint.com/Opinion/Ie8H1Cp09ZjEeNPU5UwwyH/Surrogacy-bill-Modi-govt-sets-new-terms.html>, Source cited on 7th September 1:00 A.M.

Law commission report has declared the ICMR Guidelines with full of loop holes. Hence it is a beacon to move forward in the direction of preparing legislation to regulate not only ART clinics but rights and obligations of all the parties to a surrogacy including rights of the surrogate children.¹⁴

4. THE SURROGACY BILL, 2016

The Union Cabinet has passed the Surrogacy Bill, 2016 which if gets passed by the parliament will then regulate surrogacy in India by establishing National Surrogacy Board at the central level, chaired by the health minister, and State Surrogacy Boards and Appropriate Authorities in the State and Union Territories. These boards will entertain all the matters dealing with surrogacy and will also keep a check on the hospitals and clinics that offers surrogacy in India.

The Surrogacy (Regulation) Bill, 2016 proposes to regulate surrogacy in India by permitting it as an option for couples who cannot naturally have children, have a lack of other assisted reproductive technology options, are keen to have a biological child, and can find a surrogate mother among their relatives. Altruistic surrogacy, which means an arrangement without transfer of funds as inducement, is currently practised in some centres in India, though the majority of surrogacy centres use women who are paid for their services. The child born through surrogacy will have all the rights of a biological child. Indian infertile couples between the ages of 23-50 years (woman) and 26-55 (man) who have been married for five years and who do not have a surviving child will be eligible for surrogacy. The surrogate mother should be a close relative of the intending couple and between the ages of 25-35 years and shall act as a surrogate mother only once in her lifetime. Implementation will be through the national and State surrogacy boards. Any establishment found undertaking commercial surrogacy, abandoning the child, exploiting the surrogate mother, selling or importing a human embryo shall be punishable with imprisonment for a term not be less than 10 years and with a fine up to Rs.10 lakh. Registered surrogacy clinics will have to maintain all records for a minimum period of 25 years.¹⁵

4.1 PROPOSED CHANGES IN THE BILL

¹⁴ Supra 7.

¹⁵ Supra 11.

- First and foremost it bans commercial surrogacy, so once the bill gets passed by the parliament commercial surrogacy in India will not be legal any more.
- Foreign nationals including N.R.I's cannot get an Indian surrogate mother.
- Homosexuals, unmarried couples and live-in-couples cannot go for surrogacy.
- Surrogacy has been legalised for the Indian infertile couples.
- Before going for surrogacy one has to be married for at least five years.
- No monetary or financial benefits is to be given to the surrogate mother. Only medical expenses are to be paid by the intending parents.
- If one already has his/her own child then the person is banned to go for surrogacy under the bill.
- Bill also bans a person to go for second time surrogacy if he already has a surrogate child. Same applies for the surrogate mother, if a women has been a surrogate mother in the past then she cannot be a surrogate for the second time.
- Only close relatives, not necessarily related by blood will be able to provide for altruistic surrogacy.
- Surrogate child will have the same right as of the biological child.
- All Assisted Reproductive Technology Clinics i.e. ART needs to be registered and will be looked after by the state and the central regulatory bodies.

5. CONCLUSION

Surrogacy is a very sensitive issue in the society. Due to lack of proper legislation many surrogate mothers have been exploited and many surrogate children have been denied their rights. Thus a proper law is required to stop such incidents. The law must be enacted in such a manner that it ultimately benefits the child, intended parents and the surrogate mother.

5.1 SUGGESTIONS

Rights and obligations of the surrogate mother, child and the intended parents must be determined in the statute. Proper medical check up of the surrogate mother should be done before she conceives the child in order to determine whether she is physically prepared to bear the child for nine months or not as most of the surrogate mothers are from the lower economical background and may not be having a proper intake of nutrition. It is very unnatural for a women

to give away her own child to another person thus a proper counselling by a counsellor should be done to understand the state of mind of the surrogate mother. Adoption as an alternative of surrogacy should also be taken into consideration by the childless couple as it will serve even more to the society as it will provide a bright future to an orphan child.

