

SURROGACY LAWS

Leena Latwal *

Abstract

Surrogacy provides an option to the childless parents for having their own genetic child through this method. As according to The Black's Law Dictionary, defines surrogacy as "the process of carrying and delivering a child for another person". This mode fulfils the desires of the childless parents to have their own child and the desires of the surrogate mother who are poor and needy. As everything has pros and cons, in the same way Surrogacy too involves the pros and cons with it. Where on one hand it fulfils the desires of both the intending parents and the surrogate mother, then on the hand it also has resulted into exploitation of the surrogate mothers and even of the parents. Surrogacy is being widely used as commercial surrogacy, therefore, in order to regulate the laws relating to surrogacy, and to prevent the surrogate mothers to be exploited, there is an urgent need of legislation to be enacted and followed. Such legislation must not be in violation of the Indian Constitution and must have the aim to prevent the women's from being exploited.

Keywords: *Surrogacy, Intending Parents, Commercial, Exploitation, Legislation etc.*

* Student-BBALLB(H)@ Ramswaroop Memorial University, Lucknow (U.P.)

INTRODUCTION

According to Jeremy Bentham, “*law is used as an instrument for securing the greatest good of the greatest number*”. Surrogacy involves the process of begetting a child from another woman for the intending parents. Such woman is called to be the surrogate mother. Surrogate Mother in other meaning is a substitute mother, where she carries pregnancy for another couple. Therefore, the simple meaning of surrogate is ‘deputy or substitute’. In general, the term “surrogate mother” talks about a woman who decides to bear a child for the couple incapable of having a child. There are different categories under which a surrogate mother can be divided. *Firstly*, where the wife is sterile, there the child can be sought through either natural or artificial insemination of the women with the sperm of the male couple. And after the birth of child born out of the woman, the impregnated woman gives the child to the infertile couple. This type of surrogate mother is called as ‘half surrogate mother’. *Secondly*, where both the husband and wife are impotent but are not sterile, then the couple can have seek a child by impregnating baby-bearer woman by means of artificial devise with both the sperm and the ova of the such couple. In this case the baby-bearer mother is known to be the ‘whole surrogate mother’. And *thirdly*, where both the husband and wife are sterile and impose there is need to find a sperm donor. In such the baby bearer woman would be artificially inseminated with donor semen. And after the birth of the child, the mother would hand over the child to the intending parents as per the agreement between them. The baby-bearer mother in this case is known as ‘AID surrogate mother’. So, in order to opt for surrogacy as a method to become parents, the surrogate mother and the intending parents enter into a contract with favourable terms and conditions.

There are cases where some women are not capable to conceive and bring a child for various reasons such as, the failure of the embryo to implant, repetitive miscarriages, pelvic disorder, hysterectomy, high blood pressure, liver and heart diseases. So in such cases, the couples are only left with two ways that is to either opt for adoption or ART.

Surrogacy provides right to be parents to such parents who cannot have a child through natural means. This procedure to have a child is the right of such parents. This right of parenthood is ensured under Article 21 of the Constitution of India. Therefore, there is an urgent need of such regulation that protects the right of the intending couples to become parents. Such laws should also focus at protecting the surrogate mother and prevent her from being exploited.

Meaning of Surrogacy

The word 'surrogate' has originated from a Latin word called 'surrogatus', that means a substitute, that is, a person appointed who is being appointed to act in the place of another. So a surrogate mother is such woman who carries a child on behalf of another woman, either from her ovum or from the implantation.

The Britannica defines 'surrogate motherhood' as "*the practice in which a woman bears a child for a couple unable to produce children in the usual way*".

The Report of the Committee of Inquiry into Human Fertilization and Embryology or the Warnock Report (1984) termed 'surrogacy' as "*the practice whereby one woman carries a child for another with the intention that the child should be handed over after birth*".

A standard definition of 'surrogacy' is given by the American Law Reports¹ as following: "*...a contractual undertaking whereby the natural or surrogate mother, for a fee, agrees to conceive a child through artificial insemination with the sperm of the natural father, to bear and deliver the child to the natural father, and to terminate all of her parental rights subsequent to the child's birth.*"

SURROGACY IN INDIA

Past Scenario of laws relating to Surrogacy

The use of surrogacy method to have children has been in use since the time of Mahabharata, when Kaurav had his hundred sons through this method. But that method was not recognized at that period. This method of begetting a child through Surrogacy came in limelight through the leading case of *Baby Manji Yamada v. Union of India*.²

This was the leading case relating to the development of surrogacy laws in India. It had also attracted the world-wide attention and has exposed multifaceted legal issues concerning surrogacy that had been prevailing in India since a very long time. Mr. Ikufumi Yamada (husband) and Miss Yuki Yamada (wife) were the infertile couple who were unable to conceive child. They came to India in the year of 2007 for having a child through surrogacy and had chosen a baby-bearer woman from Gujarat to act as surrogate mother. Then a

¹ American Law Reports, *Validity And Construction Of Surrogate Parenting Agreement*, 77 A.L.R. 470. (1989)

² (2008) 13 SCC 518

surrogacy agreement was also entered into between commissioned parents and the surrogate mother. It is to be noted that the sperm of husband Mr. Ikufumi Yamada and a donor egg were used for the fertilization process to beget the child. Then the embryo was implanted in the surrogate mother's womb and thereafter the commissioned parents of baby Manji left India for Japan. Later, it was found that the commissioned parents got separated due to some matrimonial issues. Even the custody of Baby Manji, who was born on 25th July, 2008 was refused by both Miss. Yuki Yamada and the surrogate mother. Mr. Ikufumi Yamada had the interest in the custody of the baby Manji. He then came to India along with his mother Emiko Yamada to take Baby Manji with him and consequently the child was kept in their custody. But, in the process of carrying the baby Manji to Japan, the Japanese embassy refused to issue a passport to Manji saying that she has been born in Indian and so she became an Indian citizen and thus an Indian passport and a no-objection certificate is needed to leave the country. But according to Indian laws, an infant child's passport needed to be linked to the mother's passport and this was not possible as both the Yuki and the surrogate mother refused to take custody of the baby. Then on 3rd August, 2008 the Manji was moved to a hospital in Jaipur because of the law and order situation in Gujarat. There the baby was given Proper care and protection that was provided to her with much needed care including breast-feeding by a woman. Mr. Yamada had to return to Japan as his visa got expired. Then later the Birth Certificate also got issued indicating the name of the genetic father, Mr. Ikufumi Yamada. To this an NGO named 'SATYA' filed a writ petition to issue a Writ of Habeas Corpus and to produce the child before the Rajasthan High Court. This contention of the NGO was brought before the Court in the name of the surrogacy where a lot of irregularities are being committed. At present there is no law regulating surrogacy in India so this mode to produce child is being generally misused and turned into money making racket resulting in exploitation of Women. Therefore, it was then prayed that the Government of India should enact appropriate laws relating to surrogacy and prohibit the exploitation of surrogate mother and the infertile couple. Later, the Rajasthan High Court issued direction to the Rajasthan Police for demanding the baby to be produced before it within four weeks and also sent show-cause notices to the Federal and State Governments. Then later On August 13, 2008 Emiko Yamada, the mother of Mr. Ikufumi Yamada moved before the Supreme Court of India praying it to intervene and maintain justice for the Baby.

The Apex Court on the basis of the petition filed by Emiko Yamada granted the custody of baby Manji to her and also issued a notice to the Government of India. It also sought the

response from the Indian Council for Medical Research (ICMR), since Yamada's lawyer contended that National Guidelines for Accreditation Supervision and Regulation of ART Clinics in India, 2005 directs the baby as a legitimate child of the biological father. On this the court also issued a notice to SATYA and made it as the third party.

The Supreme Court of India observed that 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 handover to a contracted party. She may be the child's genetic mother 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.³ The case was disposed of with a direction that the victim may produce his/her before the Commission constituted under the Commissions for Protection of Children Rights Act, 2005. So, Emiko Yamada then approached before the Commission for demanding the permission to take baby Manji to Japan. This issue got resolved after the Japanese Government, on humanitarian grounds, issued a one-year visa to her. Baby Manji finally went Japan with her Grandmother Emkio Yamada ending months of ambiguity over her fate. According to the Japanese authorities, it is possible for baby Manji to become a citizen of Japan once a parent- child relationship was established, either by Mr. Yamada recognizing his paternity or through adoption.

In Baby Manji's case the Court did recognize the concept of surrogacy but could not give any specific guidelines to regulate the Surrogate laws. In fact, the court underlined the significance and the requisite of the institution of surrogacy in the interest of childless parents. This situation would only change when the surrogacy bill would take the form of an Act.

Current Position relating to Surrogacy Laws

India has been emerging as a frontrunner in international surrogacy and homes for many intending parents. Indian surrogates have been progressively more famous with fertile couples in developed nations because of the comparatively low cost. At the same time, Indian clinics are becoming more competitive both in the pricing, hiring and retention of Indian females as surrogates.

Though, in 2008, the Supreme Court of India has permitted the commercial surrogacy in

³ Id.

India in the Baby Manji case with a direction to the Union Government to pass an appropriate Law governing Surrogacy in India but till date no such law has been enacted. At present the Surrogacy Contract between surrogate mother and intending parents is guided by the Indian Contract Act, 1872 and also with the guidelines of the Assisted Reproductive Technique (ART) Clinics. The Legislature has even drafted ART BILL, 2008 which is still pending and looking at the present scenario of Indian Parliament it is not possible to say when we should the said bill to become law.

By giving due regard to the interest of both the parties to the surrogacy contract and in order to avoid the commercialization of the human reproductive system, abuse of women and the commodification of Children, the Law Commission of India has submitted its 228th report on *“Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy”* with the following relevant suggestions⁴:

- Surrogacy arrangement will continue to be administered by contract between parties, which will encompass all the terms wanting consent of surrogate mother to bear child, medical techniques of artificial insemination, contract of her husband and other family members for the same, indemnification of all reasonable expenses for carrying child, agreement to hand over the child born to the commissioning parent(s), etc.
- The surrogacy arrangement mentioned in the contract should not be for commercial purposes.
- The surrogacy agreement should include financial support for surrogate child in the occasion of death of the commissioning couple before delivery of the child, or divorce between the commissioning parents and subsequent willingness of none to take custody of the child.
- A surrogacy agreement must take care of life insurance cover for surrogate mother.
- One of the commissioning parents should be a donor as well, in order to bring the bond of love and affection with the child and also to avoid the chances of various kinds of child- abuse, which have been noticed in cases of adoptions. In case the commissioning parent is single, he/she should be a donor in order to have a surrogate child. Otherwise, adoption is the only way to have a child.

⁴ Law Commission 288th Report, Available at: <http://lawcommissionofindia.nic.in/reports/report228.pdf>

- Surrogacy law itself should recognize a surrogate child to be the legitimate child of the intended parent(s) without there being any need for any declaration of guardian or adoption
- The birth certificate of the child should contain the name(s) of the intended parent(s) only. It is required in order to avoid any future ambiguity.
- Right to privacy of donor as well as surrogate mother should be essentially maintained.
- Sex-selective surrogacy should be strictly restricted.
- All the cases of abortions of surrogate child should be administered by the Medical Termination of Pregnancy Act 1971.

This Report has come largely in the support of legalizing Surrogacy in India and emphasizing on the proper way of operating surrogacy in India. Preventing exploitation of the women through surrogacy is one of the major worrying factors, which the law will have to address. The Law Commission through this report has strongly recommended law against Commercialization of Surrogacy. Therefore, this is a great step forwarded to the present situation, but it is still not enough to control the irregularities of the present day. We can only strongly expect an appropriate legislation to come in the coming year or next, aiming to control the surrogacy business in India.

RIGHT TO REPRODUCTION- A CONSTITUTIONAL RIGHT

This right to reproduction is linked with the right to parenthood and is further linked with the Right to life and personal liberty under Article 21 of the Indian Constitution. The Judiciary in the case of *B. K. Parthasarathi v. Government of Andhra Pradesh*⁵, the Andhra Pradesh High Court upheld “the right of reproductive autonomy” of an individual as an aspect of his “right to privacy” and agreed with the decision of the US Supreme Court in *Jack T. Skinner v. State of Oklahoma*⁶, which characterized the right to reproduce as “one of the basic civil rights of man”.

Even Article 16(1) of the Universal Declaration of Human Rights 1948 says, “*men and women of full age without any limitation due to race, nationality or religion have the right to*

⁵ AIR 2000 AP 156

⁶ 316 U.S. 535(1942)

marry and start a family". So, if reproductive right gets under the constitutional umbrella, then the surrogacy that allows an infertile couple to exercise that right also gets the same constitutional protection.

SUGGESTIONS

- There is need that the Surrogacy agreements are to be treated like other contracts and the principles of the Indian Contract Act 1872 and other laws will be made applicable to these kinds of agreements.
- The commissioning parents or parent should be made legally bound to accept the custody of the child irrespective of any abnormality to the child, and if the refusal to do so then it shall constitute an offence.
- The 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.
- Any person who wants to have a child through surrogacy, irrespective of the nationalism, caste or sex should be allowed to opt for surrogacy.
- There should be equality that must be maintained between the commissioning age of the male and female couple who want to opt for surrogacy.
- 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.
- A surrogate mother shall relinquish all parental rights over the child. The birth certificate in respect of a baby born through surrogacy should always bear the name(s) of genetic or intended parents/parent of the baby.

CONCLUSION

Surrogacy is mode that provides any couple to become parents who are unable to have children due to some or the other reasons. This mode of getting to be the parents provides the intending parents a glimpse of hope to become parents. But it also seems sarcastic that

people are engaging in the practice of surrogacy when there are a million of Indian children that are orphans and without any parent. It is because adoption of a child in India is a complex and a lengthy procedure and the childless couples who want to give a home to orphans are left with no option but other than surrogacy. So there is a strong need to modify and make the adoption procedure simple for all. And this will bring down the rates of surrogacy. According to the present situation only altruistic surrogacy must be legalized and the commercial surrogacy should be strictly prohibited and marked as crime. There should be laws enacted to cover the grey areas of surrogacy and to protect the rights of vulnerable women and children. The need of the hour is to adopt a pragmatic approach by legalizing altruistic surrogacy arrangements and prohibit commercial ones.