

The Hindu Law as administered by the Courts of India is applied to Hindus in some matters only. Through out India, questions regarding succession, inheritance, marriage, and religious usages and institutions, are decided according to Hindu Law, except insofar as such law has been altered by legislative enactment. Besides the matters above referred to, there are certain additional matters in which the Hindu Law is applied to Hindus, in some cases by virtue of express legislation, and in others on the principle of justice, equity and good conscience. These matters are adoption, guardianship, family relations, wills, gifts and partitions. As to these matters also, the Hindu Law is to be applied subject to such alterations as have been made by legislative enactment<sup>15</sup>.

### **Conclusion**

The rule of Damdupat is a branch of the Hindu Law of Debts. According to this

rule, the amount of interest recoverable at any one time cannot exceed the principal due at that time. According to Hindu Law there is no period of limitation for recovery of debts. Every debt was binding upon the debtor irrespective of the period. It, thus, becomes necessary to impose restriction on the amount of interest recoverable at any one time by the creditor. The rule of Damdupat applies to secured as well as unsecured debts. It applies to the simple money bond as well as loans secured by mortgage of immovable properties or pledge of movable properties. The rule is applicable in the Bombay State, Town of Calcutta, Bearar and Santhal Parganas. The rule of Damdupat is not applicable to the province of Madras, Uttar Pradesh, State of Rajasthan. The rule is not applicable to the State of Andhra Pradesh to any money transactions including Bank loans. A judgment with regard to territorial applicability of rule of Damdupat is awaited from the Apex Court.

## **IS SURROGACY AN ALTERNATIVE TO ADOPTION IN THE WAKE OF SOCIAL CHANGE OF THE GLOBE**

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Inspite of the fact that parents construct the child biologically and the child constructs the parents socially, the problem mainly arises where the parents are unable to construct the child naturally (through the conventional biological means) mainly from infertility, which is faced by more than 15% couples all over the world. It is from the changing social norms and biomedical technologies, surrogacy now a days is in consideration as a large solace to the infertile by the Assisted Reproductive Technologies to achieve pregnancy by artificial or partially artificial

means, in contrast to the age old concept of adoption of child from a known family without intervention of Court or adoption of an orphan or destitute child through intervention of Court (in-country or inter-country) as a substitute to a childless parent/s.

The biomedical technologies & other scientific advances like Genetic Engineering, Assisted Reproductive Technologies-(ARTs), Human Cloning *etc.*, have opened new gates in unimagined dimensions in benefitting the mankind on practical side with phenomenal

15. Mulla's Principles of Hindu Law.

1. District Judge-cum-Chairman, A.P. Endowments Tribunal, Hyderabad.

growth and social change, particularly in the area of reproduction in responding to the desire of women/men to have children as Kinship and family ties are dependent on progeny. As social values and norms change, laws too have to be re-interpreted and re-casted, since social change is an inevitable phenomenon of every society because social conditions never remain static. Social change whether it comes through legislation or through judicial interpretation indicates the change in accepted modes of a better life. The changing patterns have an impact on the laws and life of a given society as law must keep pace with changing socio-economic trends and political movements of the society, while preserving balance between individual rights and public interest. Thus law and justice provide a potential force for attainment of a progressive social change in the larger public interest.

In this regard, it is noteworthy that a child has no role to play in his/her birth but for father and mother wanted the child. No child is born in the world without there being a father and a mother is different to such child is their aurasa or kritrima or dattaka/adopted child. It is a well known saying that, maternity admits of positive proof, but paternity is a matter of inferences to arrive as a conclusive proof from the legally constituted relation between a man and his wife to legitimate their child, unless it is shown with standard of proof above to the preponderance of probabilities of he had no access to the mother of child at the time when the child could have begotten as held by the Apex Court with reference to Section 112 read with Section 4 (third limb-conclusive proof) of the Indian Evidence Act<sup>2</sup>; which is based on the well known maxim “pater est quem nuptiae demonstrant”- (he is the father whom the marriage indicates). It is substantiated from

the settled expressions of the Apex Court<sup>3</sup> that said conclusive presumption could not even be rebutted by a DNA-(Deoxy Nucleic Acid)-test result, irrespective of the same may be scientifically accurate, as if the Court declares that the husband is not the real father of his wife’s child without tracing out its real father, the fall out on the child is ruinous and it is a sublime public policy supported by reason and based on the maxim that “Odiosa et inkonesta non sunt in lege prae sumenda” - (nothing odious or dishonourable will be presumed by the law). Because, children should not suffer social disability on account of the laches or lapses of parents, law cannot afford to allow such consequence befalling an innocent child on the strength of a mere tilting of probability since law presumes against vice and immorality that not only a marriage ceremony is valid or marital relation is inferred from long living together, but also every person is legitimate.

In fact, the above principle is given strength to a surrogate child of an impotent consented through his wife (child’s mother) with known donor’s sperm insemination for that the DNA test may yield positive result with the Donor’s blood sample, still the donor is not but the mother’s husband (commissioning father), is father of the child, for law to take care. It can be given example, though in a different context, the case of Michel Jackson, who it appears got children not with his sperm but of an intellectual and handsome donors sperm inseminated to his wife (by ARTs) and blessed with handsome and intelligent children<sup>4</sup>.

It is to say from the above that, at times not only the child, but also mother of such child may not know who was her/his real progenitor, particularly when an unknown donor’s sperm was artificially inseminated to

2. *Chilukuri Venkateswarlu v. C. Venkatnarayan*, AIR 1954 SC 176.

3. *Kamti Devi v. Poshiram*, AIR 2001 SC 2226 and *Syamal v. Sandeep*, AIR 2009 SC 3115.

4. As per the news clipping of Eenadu Telugu Daily dated 7.5.2013 at page-2 left top.

the woman with consent of her husband, (who may be such a man that not in a position to erect his organ and discharge healthy semen containing living spermatozoa in the sexual intercourse with his wife or for collection of his semen otherwise, from a sort of impotency<sup>5</sup>), by the medical advances, including In Vitro Fertilization (IVF) or the like, to have a child, however, that does not mean the husband of his mother is not his father, as in such matters the sperm donor is only a donor to the intended parents and thus can no way legally liable to the child for any paternal obligations.

Having regard to the above, the importance lies in the child that was needed by the parents of such child, irrespective of the father or mother or both of the child are not biological parent/s, as the parents of the child that was needed, either by adoption or by any process of surrogacy, cannot dispute their parenthood responsibilities and duties legally, as it is an exception to the natural birth of child, irrespective of genetic aspects the contractual obligations that govern paternity.

Family bondage and other spiritual or secular purposes of having a child is primary and property sharing is secondary<sup>6</sup>, which in the sense that once there is family bondage and relationship, right to maintenance flows from it so also of succession to property of parents. It is to say biological or genetic parenthood alone is not the sole basis for maintenance claim and succession to property even under the customary/traditional laws.

It is to say a parent is a parent whether he is a parent by being or a parent by doing, once obliged of being a parent to all rights, liabilities and obligations flown from that, with no excuse or escape. Parenthood thus has to be understood not only in the

traditional contexts of natural or biological or genetic parenthood or known non-biological but legal parenthood from adoption recognized by custom and law from any observance of ceremonies and or by instrument or deed of adoption, but also by the new concept of contractual parenthood through several forms of surrogacy-part of Assisted Reproductive Technologies-(ARTs), where application of DNA technique or proof of non access does not arise but for law of estoppel as a rule of evidence to prohibit from disputing the parenthood; by express or implied contractual relationship and conduct or pais and waiver or acquiescence or silence; as in such a case truth is no source even to seek to probe who the real progenitor of such child is.

The importance of child is thereby not only in parents perspective; but also, in society perspective as children are society's most critical foundation and backbone who shape its future progress and that of all humanity. Though, it is an universal fact that investing in children is investing for the future of world and children are the essential segment of human society and the brightest treasures we bring forth into this world, too large a percentage of the population continues to treat them as inconveniences. In fact, no one in the earth got such right to show different attitude to the children and discrimination among them, but for the father and mother of child, that too before the child is conceived and begotten and not later much less to abort or terminate the pregnancy, for any extraneous reasons/causes.

The definition of child since includes child in mother's womb when from conceived; the right to have a child imposes a duty on the parents' right from conception and including in the period of gestation, with pre and post natal care, to bring up the child as future hope of the family in particular and society in general. It is to say in the case of surrogate child, right from

5. *Venkateswara Rao v. Nagamani*, AIR 1962 AP 151.

6. *Chandrasekhar Mudaliar v. Kulandaivelu Mudaliar*, AIR 1963 SC 185.

the process of surrogacy contract started. Thus, it is not only the duty of parents but also other members of the family and of the society, including surrogate contractual mother and her family members and for that matter of the State even as a whole. In the other way it can be said that, once the parents avail the right to have child, the duty of all the above starts to the child since conceived; which rights are not only moral and ethical as per our ancient dharma, but also legal and social, including on the society within the environment and the State, as per our constitution and the laws enacted; apart from such of those international conventions to which the nation is a party, to have the force of law as part of the constitutional conventions, to make law within its frame work where there is legislative vacuum to fill with its aid, no doubt within the Constitutional parameters and framework.

From this background, coming to different forms of surrogacy to have a child by childless parents in their family, as a substitute for adoption and foster-care, it is also needful to know what is meant by surrogacy and the legal implications of it.

**Surrogate**-is in fact derived from a Latin word Surrogare, to mean substitute, similar to alternative or replacement, it is especially a Surrogation *i.e.*, a person deputizing for another in a specific role *i.e.*, one that takes the place of another, as a substitute or to put one in another's position as a deputy or substitute.

**Surrogate pregnancy**-is an arrangement for a woman to carry and give birth to a child who will be raised by others *i.e.*, rent a womb for purpose of carrying for others-who are the legal parents. In this outsourcing pregnancy, the embryo is transferred to the womb of surrogate woman via in vitro fertilization/IVF method. The woman who carries the pregnancy is most often called the surrogate or surrogate mother and the intended parents are otherwise known as commissioning parents.

**Surrogate mother**-is a woman who has a child for another woman who is unable to have children. Women who bear children on behalf of other people, often for consideration, is a practice of Surrogacy, as altruistic or philanthropic surrogacy for no even reward is very-very rare. Surrogacy practically helps the people of all sexualities who want to have a child of their own but cannot conceive due to reasons out of control. As per Webster's New World Law Dictionary, the legal definition of surrogate mother is-A woman who bears a child for a couple that is unable to have children. Upon the child's birth, the surrogate mother gives up all rights and responsibilities towards the child. A surrogate mother is thus someone who gestates-(conceives & carries within the uterus) and then gives birth to a child for another, with the intention of handing over the child to that person/s after the birth.

**Surrogacy**-is thus a practice whereby a woman carries a pregnancy/child in womb for another with the intention and as a result of an agreement arrived prior to conception that the child should be handed over after birth, to the commissioning/legal parent/s. It is to say a method of reproduction, whereby a woman agrees to become pregnant and deliver a child for a contracted party; she may be the child's *genetic mother* or after having been implanted with an embryo, carry the pregnancy-as *gestational carrier* to deliver. Hence for impregnation, by the use of artificial insemination particularly from the recent development of in vitro fertilization, it eliminates the necessity of sexual intercourse in order to establish pregnancy and further in this process any major *i.e.*, a man with no wife and a woman with no husband or of gay sex, irrespective of their age, can even be a legal parent of a surrogate child, though for adoption, there are certain restrictions on age of adopted to the adoptee, in particular of opposite sex. *Hope that law may advance to cover the area to incorporate*

*similar or other more suitable provisions on age restrictions etc., of adoption to have a surrogate child.*

### **Surrogacy & Its Different Forms/Methods:**

Surrogacy through Assisted Reproductive Technologies (ARTs) is the process developed in which a woman (surrogate mother) agrees (must be a major to the contract and if married with consent of husband) to bear a child for another woman or man or couple (intended-parents) and surrenders such child at its birth. Generally commissioning mother may be the genetic mother, in that she provides the eggs or she may make no contribution to the establishment of pregnancy and the genetic father may be the husband of commissioning mother or the carrying donor, though there are exceptions to it. For many years, surrogate pregnancy was considered a somewhat risky method by which intended parents could attempt to have a child. The surrogate mother was always the biological mother-her pregnancy was the result of her own egg or donor's egg/s and the sperm of intended father. Fertilization took place via artificial insemination.

**Methods of surrogacy:** There are two methods of surrogacy:

(i) *Partial Surrogacy:* where the child shares the genetic features of the surrogate mother as egg donor or otherwise and of the commissioning father, the commissioning mother has thus no role at all, but for consent to the process in partial surrogacy.

(ii) *Total Surrogacy:* where in IVF (In vitro fertilization) method is used. The gametes of both (husband & wife) intended parents are implanted into the uterus of surrogate mother, as a result the child is the genetic child of intended/commissioning parents.

**Types of surrogacy:** There are four types of surrogacy:

(i). *Commercial surrogacy:* The surrogate mother is paid remuneration over and above medical expenses according to contract between surrogate and intended parents.

(ii). *Altruistic surrogacy:* Also known as gratuitous and philanthropic surrogacy is for no remuneration or reward, though it is very rare and that too among known or relative circles and in country. In this method, surrogate is paid at best only the necessary medical and other expenses for bearing the child by the commissioning parents.

(iii). *Traditional surrogacy:* A traditional surrogate is a woman who is artificially inseminated with the sperm. She then carries the baby and delivers it for the parents to raise. Surrogate mother is artificially inseminated either with the sperm of intended father or sperm from a donor-(known or unknown), where the intended father cannot contribute his sperm, where the sperm donation is to the intended/commissioning parent/s. In either case the surrogate's own eggs are used. A traditional surrogate is the baby's biological mother, because it was her egg that was fertilized by the sperm of intended father or of a donor to the intended parent. This often used when a woman is physically unable to carry a child, however, she and her husband still want a child. Before the medical advances of IVF-In Vitro Fertilization, the only option in third party reproduction was the traditional surrogacy, where the surrogate mother is artificially inseminated with the sperm from the Intended parent and the surrogate is the biological mother to the baby she is carrying, as an infertility option. In this case, a surrogate mother contributes half of the genetic tie to that child and got a legal right to the child unless relinquishes and for this reason most people who select surrogate mothers now a day's prefer to choose Gestational Surrogates.

(iv) *Gestational surrogacy:* Gestational Surrogacy allows the intended Parents to use



their own genetic makeup-(eggs and sperm) and the surrogate merely assists them by providing her uterus in which the child will grow to the term in 9 months. In gestational surrogacy, it most often involves in vitro fertilization (IVF), to harvest eggs from the mother, fertilize them with sperm from the father by mixing eggs and sperm outside the uterus, then implanting the fertilized eggs into the uterus, where the embryo will grow and develop into a baby in the uterus of a gestational surrogate, who then carries the baby until birth. The biological mother is still the woman whose egg was fertilized. In cases where intended mother cannot provide her own eggs to fertilize, she is able to select an egg donor. Then donor eggs are fertilized in a test tube and then implanted into the surrogate mother. The surrogate mother acts almost like an incubator carrying the surrogate child to a term for intended parent who is unable to do so. *Such gestational surrogate has no genetic ties to the child. That's because it wasn't her egg that was used.* With gestational surrogacy, the baby is not related to the surrogate mother-it is created in-vitro and can actually be the result of one or both of the intended parents' genetic material. A gestational surrogate is called as only the "birth mother" thus got no legal rights to the child, besides agreement covers only to carry and deliver with no right. Even an egg donor is used; the egg donor, whose donation is to the intended/commissioning parent/s, has no legal rights to the baby whatsoever. The inherent differences between gestational surrogacy and traditional surrogacy thus make it a much more feasible option for many intended parents.

As there is much more flexibility in gestational surrogacy, as well as the increased chances of success, the physician is able to place more than one embryo into the surrogate's uterus to increase the chances of a successful pregnancy. In gestational surrogacy, for a woman who has had her uterus removed, but whose ovaries are still

producing eggs, the procedure uses her eggs and a surrogate mother and results in a child who is her own genetic child. It may also be the best infertility option for a woman who has a medical condition that makes pregnancy risky for herself or her child. Through the gift of surrogacy, she will still have the joy of raising a child of her own. It may also be the option chosen by couples who have tried other infertility options, such as IVF, without success, as the pregnancy rate for IVF with a surrogate mother can vary considerably and there are many variables that can affect the success rate, including the age of the genetic mother.

*Law on surrogacy in India:* It is needless to say that in all cultures of the world, motherhood is something which is considered to lie at the heart of the meaning of love, more so in the Indian inbuilt culture, to carry the child even by a surrogate mother rented the womb all with love and affection and emotional attachment and not with commercial mind, even the carrying is for consideration and it is a well known fact to the globe. Apart from it, the Indian women are generally away from free sex, alcohol, smoking and addiction to drugs *etc.* Those might be the reasons having the cumulative effect that are influencing the commissioning parents abroad to choose a surrogate mother from India. Surrogate mother is there from a growing trend in India, opting by the commissioning parents who are not able to have children, by natural means. For the Indian surrogates themselves, it's an experience often fraught with emotional conflict, even in most cases, the egg comes either from the woman who wants to become a mother but can't carry a child, or from an egg donor, then to fertilize with sperm from the intended father, or a sperm donor and implanted in the womb of a surrogate who bears the child. Surrogate mothers in India practically are women who get paid generally to become pregnant with children of couples-even inter-

country who cannot conceive on their own; as altruistic or philanthropic surrogacy, for no even reward, is very rare and that too among known or relative circles and in country.

In India, surrogacy started in the small township-Anand, with in the south of Gujarat State, which has now emerged as a major centre of inter country surrogacy, for intending or commissioning parents mostly from U.S. & U.K, besides from Germany, Taiwan, South Korea & Norway *etc.*; with highest successful surrogates in the world. It is from Anand, the girl child *Durga*, who is the India's first and world's second that was born in the year, 1978 with in no time after first surrogate child *Louise* was born.

The surrogacy through ARTs since include any fertilization involving manipulation of gametes/embryos outside the human body and transfer of the same into the body (uterus of the surrogate mother to carry and grow till birth of the child in the womb), they raise many new questions of law and ethics stimulating public interest of global concern, in particular the commissioning parents are of inter-country (foreigners to India). For example, with ARTs it is now possible for a child to have three biologically related parents-the man who provides sperm, the woman who provides egg and the woman who gestates the child and gives birth-and further, if the man who provides sperm and the woman who provides egg are donors to the commissioning parent/s who intend to have the child through them and the woman who rented the womb and gestates the child as per the surrogacy agreement, then additionally such social and commissioning parent/s who intend to raise the child after it is born and if they are not of same country where the child is born, the issues relating to citizenship, passport and visa to take the child abroad and if the gestational mother, who is not the legal mother, after birth of the child for any

reason refuses to give/part with the child to the commissioning parents or where the foreign commissioning parent/s of the child after birth of the child, not chosen to take the child from surrogate mother for any reasons like the surrogate child is born with any physical or psychological deformity or the commissioning parents got child of own begotten or adopted meantime or the commissioning parents got separated and not evinced interest to take the child or for any other reason, the commissioning parent/s earlier intention to have a surrogate child is ceased or frustrated and what is the effect and enforceability of the surrogacy contract entered in India there from.

A consolidated and systematic legislation is in dire need in India in this field for the accreditations, regulation and control of surrogacy, for recognition and grant of license to medical practitioner involved in surrogacy through assisted reproductive techniques to regulate and prevent any misuse and any exploitation of surrogate mothers and commissioning parents approach the ART clinics and for maintenance and preservation of record of the incidents of surrogacy and to prevent health hazards to surrogate mother and child and also to regulate the surrogacy contracts, particularly to protect the surrogate mothers and to ensure safe and ethical delivery of surrogate babies. However, such a legislation is not there in India either by a central legislation on the subjects covered by the Constitution of India-Seventh Schedule-List (Union List)-I, Items 17 and 19 read with List (Concurrent List)-III, items 5 and 26 or by a legislation in any state(including in the State of Gujarat) covered by Seventh Schedule-List (State List)-II, Items 6, 22 and 64 read with List (Concurrent List)-III, items 5 and 26 and under Article 246 or 248 or 253 of the Constitution of India or even under Article 249 or 252 of the Constitution of India, even surrogacy by ARTs, started in Gujarat State at Anand, in the year, 1977-78

and continuing progressively since then, mainly governed by the pre-conceived surrogacy agreements resulting exploitation of surrogates.

Since 2005, the practice of surrogacy in India has been operating under the National Guidelines for Accreditation, Supervision and Regulation of ART Clinics, evolved in the year 2005 by the Indian Council of Medical Research-(ICMR), a Government body as there is no statutory law in any part of India covering the field. Thus, laws meant to regulate surrogacy in India are still in nascent stages as the ICMR guidelines, which cover the area to regulate ART clinics mainly are more like normative principles that are required to be followed and not statutory instruments with any legal consequences to be flown there from.

As per the ICMR Guidelines-2005, a surrogate mother cannot be genetically related to the child and she is legally and psychologically counseled that she will not be having any rights over the child. Her rights and obligations towards the intended parents as well the child are to be formulated in the pre-gestational surrogacy agreement to be executed. Moreover, a child born through surrogacy shall be presumed to be the legitimate child of the intended-(commissioning) parent/s and shall have all the legal rights to parental support, inheritance and all other privileges which a child born naturally to the intended parents would have had. Further, the Guideline-1.2.33 states that surrogate mother should not be biologically connected to the child as the Intended mother only is the legal mother in surrogacy arrangements. The Guideline 3.5.5 provides that the surrogate mother shall relinquish in writing all the parental rights over the child and the Guideline 3.5.4 also states that the birth certificate shall be in the name of the intended parents. The Guidelines-3.10.1 & 3.16.1 make it clear that the intended parent/s only would be the legal parents of the child with all the attendance rights,

parental responsibility *etc.* The Indian law does not put any bar on opting for donor sperm or eggs. In cases where the child is biologically related to the intended father the intended father only would be the legal father; provided, the child so born should not be biologically connected to the surrogate mother. In such a scenario the donor egg should be used and the donor under guideline 3.5.5 shall be bound to relinquish all the parental rights over the child so born, thus making the intended father only as the legal father of the child. As per the Guidelines, a child born through ART has a right to seek information about his genetic parent/surrogate mother-(personal identity with name and address of the *gamete* donor) on reaching 18 years of age.

Though, there is no requirement to make a Court application for pre-birth order or post-birth order in India, in case the country of intended parents require obtaining of a Court order getting themselves declared as the legal parents, the same can be obtained by applying to Indian Courts-(Family Court/Matrimonial Court) under the Guardians and Wards Act, Family Courts Act-to the extent applicable and the Code of Civil Procedure. It is apart from Citizenship and passport and visa to take the child to the country of intended parents. As the surrogacy contract can be the savior, the contract must clearly state that the child/children born out of surrogacy shall be the legal children of the commissioning parents and that the surrogate shall have no rights over the child/children. The said contract can then become the basis of legal action against the surrogate mother as well as the intended parents as the legal parents of the child, to take responsibility of the child thus born and in case the intended parents refuse to take the responsibility of child then their refusal can be challenged in the Court on the basis of the surrogacy contract signed by them as it is mandatory for the intended parents to accept the child



irrespective of any abnormality and a refusal to do so would constitute an offence for penal recourse apart from tortious liability for damages/compensation. It is trite law that the purpose of award of damages in a tort is, as far as possible, to put the claimant in the position in which she would have been had the tort not taken place<sup>7</sup>.

The Law Commission of India in August, 2009, in its 228th Report<sup>8</sup> titled “Need for legislation to regulate assisted reproductive technology clinics as well as rights and obligations of parties to a Surrogacy” submitted to the Government of India, with the recommendations for prohibiting commercial Surrogacy arrangements, while legalising altruistic Surrogacy arrangements and also to regulate not only ART Clinics but rights and obligations of all the parties to a Surrogacy including rights of the Surrogate mother and child. The Law Commission’s Report very clearly puts down the issue of surrogacy facing in India today in its saying that the “non-intervention of law in this knotty issue will not be proper at a time when law is to act as ardent defender of human liberty and an instrument of distribution of positive entitlements. At the same time, prohibition on vague moral grounds without a proper assessment of social ends and purposes which surrogacy can serve would be irrational. Active legislative intervention is required to facilitate correct uses of the new technology *i.e.*, ART and relinquish the cocooned approach to legalisation of surrogacy adopted hitherto. The need of the hour is to adopt a pragmatic approach by legalising altruistic surrogacy arrangements and prohibit commercial ones.”

The draft Bill prepared in 2008 (proposed Assisted Reproductive Technology Act) by the Indian Council of Medical Research

(ICMR), is stated with lacunas and incomplete, thus for a future legislation there from, Law Commission of India made nine recommendations to incorporate, those in nutshell are the following:

1. Surrogacy arrangements should continue to be governed by contract amongst parties, which will contain all the terms requiring consent of surrogate mother to bear the child, agreement of her (surrogate’s) 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 handover the child born to the commissioning parent/s *etc.*, but such an arrangement should not be for commercial purposes.
2. Surrogacy arrangements should provide for financial support for the Surrogate child in the event of death of the Commissioning parent/s or divorce among the Commissioning parents (couple) or unwillingness of the Commissioning parent/s-couple/individual to take the child.
3. Surrogacy contract should necessarily take care of Life Insurance Cover for Surrogate mother.
4. One of the intended parents must be a donor in a Surrogacy arrangement, because the bond of love and affection with a child primarily emanates from biological relationship and also because, the chances of various kinds of child abuse, which have been noticed in cases of adoptions, will be reduced. In case the intended parent is single, he or she should be a donor to be able to have a surrogate child. Otherwise adoption is the way to have a child which is resorted to.
5. Legislation should recognize a Surrogate child as the legitimate child of the Commissioning parent/s, without there being any need for adoption or even declaration of guardianship.
6. The birth certificate of Surrogate child should contain the name/s of the Commissioning parent/s only.

7. Held by Lord Blackburn in *Livingstone v. Raw-yards Coal Company*, (1880) 5 App. Cases 25, at P 39.

8. <http://lawcommissionofindia.nic.in-228thReport>.

7. Right of privacy of donor as well as Surrogate mother should be protected.
8. Sex-selective Surrogacy should be prohibited.
9. Cases of abortions should be governed only by the Medical Termination of Pregnancy Act, 1971.

There from another draft legislation on the issue, termed the ‘The Assisted Reproductive Technologies (Regulation) Bill and Rules, 2010’<sup>9</sup>, consists of 9 Chapters with 50 Sections, is under finalisation and still not in sight as a legally enforceable statute. Some of the novel features of it are:

(i) *Surrogacy arrangement*: Is a three party agreement, governed by the agreement between surrogate mother, commissioning parents and the ART clinic as per Section 20 and Rule 15 and in the Form J; 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 and willingness to hand over the child born to the commissioning parents and other terms to protect the surrogate mother from exploitation.

(ii) *Right to physical-integrity and bodily-autonomy of Surrogate-mother*: According to Section 34 and Rule 10, the surrogate cannot be forced to abort the foetus, go through foetal reduction or made to follow a certain diet. The surrogate got right to make decisions concerning reproduction free of discrimination, coercion and violence; right to receive monetary compensation from the commissioning parent/s to act as surrogate; right to seek all medical treatments and procedures for her health and in relation to the child; right to receive certificate by the person or persons who have availed her services, stating that she has acted as a

surrogate for them and right not to disclose the confidential and private information about the surrogacy to anyone other than the central database of Indian Council of Medical Research, except by an order of competent Court.

(iii) *Right to integrity, autonomy and welfare of Surrogate child*: According to Section 35 “A child born to a married couple through the use of assisted reproductive technology shall be presumed to be the legitimate child of the couple, having been born in Wedlock, with the consent of both the spouses and shall have identical legal rights as a legitimate child born through sexual intercourse”. Section 35 provides further that the child got right to seek information about donors and surrogates on attaining 18 years of age. Section 36 also states that “A child may upon reaching the age of 18, apply for any information excluding personal identification, relating to his/her genetic parents or surrogate mother”. Further, from no right of sex selection of child; no ante-natal testing can be made to know sex of the child, even with the consent of surrogate mother. Further for health of the child and surrogate mother, needful medical treatments and procedures are to be adopted.

(iv) *Right of Commissioning parent/s*: According to Sections 35(7) and 34(10), the birth certificate of a child born through the use of assisted reproductive technology shall contain only the name or names of the commissioning parent/s. As per Section 2(dd), not only married couple but also such of the unmarried couple of marriageable age, living together with mutual consent as man and woman without getting married are eligible for ART’s as commissioning parents, but does not include within its ambit persons who are not hetero-sexual-(i.e. no scope for homosexuals, even earlier homosexuals/gay couple entered surrogacy agreements as commissioning parents with donated sperm/eggs and through Indian surrogate mothers

9. icmr.nic.in-draft assisted Reproductive Technology (Regulation) Bill, 2010.

and one of the reported case in this regard is of the gay couple *Yonathan* and *Omer* of Israel, blessed with Baby *Evyatar*, with donated sperm of one *Yonathan* and through the surrogate mother of Mumbai). Local guardian can be appointed by the commissioning foreign couple seeking surrogacy in India for taking care of the surrogate during and after the pregnancy.

(v). *Duty of Commissioning foreign parent/s*: According to Section 34(19), such of the foreign couple eligible for seeking surrogacy in India have to submit two certificates *i.e.*, first a letter from the embassy of their country in India or from the foreign ministry of their country that their country permits surrogacy and second that the child born through surrogacy in India will be permitted entry in their country as their biological child so that the child can get the citizenship of commissioning couple.

Further, any violation of or for protection of rights of children are governed by the special law under the Commissions for Protection of Child Rights Act, 2005-No.4/2006<sup>10</sup>, which provides for the Constitution of a National Commission and State Commissions for Protection of Child Rights and Children's Courts of the cadre of sessions Court for each district, for providing speedy trial of offences against children or of violation of child rights and for matters connected therewith or incidental thereto as per which child rights are those defined in the Convention on the Rights of the Child (CRC) adopted on 11th December, 1992 as per the declaration on survival, protection and development of children as per the United Nations (UN) General Assembly Summit, 1990 to which India is a party to invoke, even the violation of child rights emanated from surrogacy contracts or any other law on surrogacy. It is also from the fact that the Hon'ble Supreme Court of

India<sup>11</sup> relegated the writ petitioner-Ms. *Emiko Yamada*, the grandmother of child born at Anand of Gujarat State by name-Baby *Manji Yamada* from the matrimonial discards between the child's commissioning parents Dr. *Yuki Yamada* and Dr. *Ikuji Yamada* of Japan, after the surrogacy agreement and by the time the child born and thereby neglected, filed for custody of the child to take, to approach first the National Commission for Protection of Child Rights constituted under the Commissions for Protection of Child Rights Act, 4/2006, to have the remedies there under and ultimately Baby *Manji* was taken to Japan in the care of her genetic father and grand-mother, pursuant to the remedial orders.

The Assisted Reproductive Technologies (Regulation) Draft Bill and Rules, 2010, at somewhere requires to incorporate some more additional safeguards like (a) the semen banks, the ART clinics and the central database of the ICMR will keep the records of the names and addresses of the donors of eggs and sperm respectively and also the surrogate mothers, so that upon reaching the age of 18 the child if wants as per her right safeguarded, as per Sections 35 and 36 can get information from the ICMR about her genetic parents, the donors if any and of the surrogate mother, other than personal identification of the surrogate mother; (b) the Indian Council of Medical Research (ICMR) in permitting surrogate contracts of commissioning parents abroad through Indian surrogate mother, relegate to the role of CARA (central adoption resource agency- an autonomous body) and provision be made for getting actual information of the Commissioning parents abroad, like home study and scrutiny reports of inter country adoption in CARA Guidelines, 1995, as a special measure need to be taken from the commissioning parent/s before permitting the surrogacy contract by a Government or

10. Visit-wcd.nic.in-for the Gazette Notification of the Commissions for Protection of Child Rights Act 4/2006.

11. In the case of *Baby Manji Yamada v. Union of India*, (2008) 13 SCC 518.

other recognised authority like the ICCW (Indian Council for Child Welfare) or ICSW (Indian Council for Social Welfare) or State Commission of each state constituted under the Commissions for Protection of Child Rights Act, 4/2006 to ensure the welfare and future of the child till he/she reaches majority in the hands of the Commission parents abroad to assess by take into account the age and health and ensure that the intended parents are of appropriate age and would be able to raise the surrogate child and in case of any breach of contract detrimental to the surrogate mother of India and surrogate child born in India to in-force against the Commission parents to compensate and for assuring future of the child to be under the guardianship of the surrogate mother. It is because the revised CARA guidelines of 1995 for inter country adoption of Indian children-stressed on the fact that adoption serves as the most reliable means of preventing situations associated with the abuse, exploitation and social maladjustments of the children and as an avenue for care and protection and for that one should understand the cultural, sociological and institutional changes that occur due to adoption. CARA maintains list of Indian foreign agencies working for adoptions and supplies the list to High Courts, State Governments, Indian adoption agencies, Scrutinizing agencies and also Indian Missions abroad *etc.*, and maintains liaison with Indian Diplomatic Missions abroad to safeguard the child given in adoption. CARA accepts application of foreigners in need of adoption along with the requisite documents [like home study report attested by the officer of Ministry of External Affairs of the Country of the Foreigner or by Ministry of Justice or Social Welfare of that Country] through a recognized social or child welfare agency in that foreign country or through an organization owned or operated by Government in that country. When CARA receives an application, it will send it to the placement agency *i.e.*, one of the Indian social

or child welfare agencies recognized by it for processing it bearing in mind the operational relationship. There from CARA receives the names/particulars or children ready for or given in adoption for further process. CARA issues no objection certificate within 5 weeks of such receipt of application. If it rejects the same, reasons for rejection should be stated. The recognized placement agencies should provide to the CARA a list of enlisted foreign agencies with which they are working or proposing to work. State Government shall also maintain the list of adoption agencies and inspect & monitor their working at least once in a year. Thus, no inter country adoption application should be directly entertained by social and child welfare agency in India.

Likewise, safeguards be made in permitting surrogacy contracts of the commissioning parents abroad, so that checks, balances and safeguards be provided through the proposed legislation and the rules there under to curb malpractices in the field of Surrogacy through ARTs and exploitation of surrogate mothers and to safeguard the wellbeing of surrogate children. Further the local guardian to be appointed by the Commissioning parents must be a party to the surrogate agreement so that from the time the surrogate mother conceived till the surrogate child taken by the commission parents to take care of all responsibilities of commissioning parents abroad as their agent in India. It is in need to prevent misuse and exploitation of the Surrogate as also to monitor her health, well being and to ensure the safety of the surrogate child to be born. Without the above safeguards, any self serving statement of the foreign commissioning parents coming to India for surrogacy while submit documents from their home country certifying that they permit surrogacy and the child born will be granted citizenship in the country of their nationality, no way serves the purpose of safeguarding future

of the child that is paramount. Thus, in addition to it, the Indian Laws on inter country adoptions be suitably incorporated to the inter country surrogacy. Further the Guidelines of CARA for intercountry adoption also from the stage of taken custody of the child concerned for adoption equally be applied, to know progress of such surrogate minor child at the commissioning parents outside India.

It is pertinent to note that, adoption either under traditional law of inter-religious in India is not involving cumbersome procedure and as generally from the relative circle and known families, there could be an assurance regarding the welfare of the child and also assurance to the adopted parents of their old age care by the adopted child as good as an aurasa/natural/biological child. In fact, adoption is one of those fictions of law which have been marshalled for furtherance of the individual interest, that enables a childless person to make somebody else's child as his own. Hindus foresaw this at the drawn of their civilization and their ideal was not just to have a son but adopted son must bear a reflection of the natural son and further he is not merely related to the adoptive parents, but all relations on the paternal and maternal side in the adoptive family.

Even now, the intended parents can adopt the *traditional surrogate* child under personnel law as in the case of normal law of adoption of one's biological child by the other and for that no intervention of Court is required. It was also held by the Apex Court of India<sup>12</sup> that, if the adoption of a minor child given by natural parents in the interests of the child and taken by even a foreign couple, when known to them, the CARA guidelines prescribed for "Adoption of Indian Children" issued by

Ministry of Welfare, Government of India, need not be followed and for that no application need be filed under Guardians and Wards Act, by a foreign couple for their custody by appointment of them as guardians of an Indian child. It was held that the CARA guidelines prescribed for "Adoption of Indian Children" issued by Ministry of Welfare, Government of India are applicable only to children who are orphans and destitute or whose biological parents are not traceable or have relinquished or surrendered their children for adoption, for where the Court should deal with the application under Section 7 of the Indian Guardians and Wards Act, 1890 and dispose it off on being satisfied about voluntariness of the adoption, suitability of adoptive parents and best interest of the child.

Further, when religion and culture are immaterial and paramount consideration is only the welfare of child given in adoption, whether in-country or inter-country as held by the Apex Court of India<sup>13</sup> that, "if a child without biological parents is able to get family environment somewhere in the world, petty contentions like change of a religion or culture of the child can hardly stand in the way of the Court in sanctioning inter-country adoption, as per CARA guidelines in this regard". Apart from it, as per the Provisions of Guardians & Wards Act, 1890, the adoptive parent is only the guardian of the child until the child attains 18 years of age. Foreign citizens and NRIs are supposed to formally adopt their child according to the adoption laws and procedures in the country of their residence. This must be carried out within two years of the individual becoming a child's guardian. But as per Indian Laws pertaining to adoption the parents can't chose a specific child for adoption. Also the ICMR guidelines under Guideline 3.10.1 require the intended

12. *Anokha (Smt) v. State of Rajasthan*, 2004 (1) SCC 382- referring to the Indian Guardians and Wards Act, 1890 – Sections 7, 10 and 17.

13. In the case of *Jayanthilal v. Asha*, 2004 (1) SCC.X- referring to the Indian Guardians and Wards Act, 1890 – Sections 7, 10 and 17.



parents to adopt the child if through genetic fingerprinting they can't establish the biological link between the child and the intended parents.

Despite the above, there is hardly the required encouragement to look at adoption as a viable alternative to surrogacy to parents willing to consider this as an option to add to their family. Till recently the inter country adoption procedures in India were cumbersome and it is only after the Apex Court of India expressions in the series of cases filed by one Lakshmikanth Pandey right from the year, 1984 laying the procedures to safeguard the welfare of the children abroad and from the Task Force constituted under the Chairman of Hon'ble Justice Bhagwati submitted report in standardising the procedure and the central adoption resourcing agency was constituted and later made an autonomous body which made guidelines and it is there from with the coming into being of the CARA, or the Central Resource Adoption Agency, though this position has eased somewhat and adoption can now be a secular process; nevertheless, the process suffers from delays and does not always provide confidence to couples that it might be a viable method to add to the family.

Further, some couples who are unable to bear a child in the natural manner, despite a strong desire to have a child of their own, do not go for adoption as an option when there is a better option to have a child of own through surrogate technology by use of sperm and eggs of the spouse or by getting donation of either sperm or eggs and by use of sperm or eggs of one of the couple to overcome the problem of infertility or the like and with satisfaction of their biological child even partially, rather going for guardianship and adoption inter country of a total stranger child with no possibility of knowing the child's biological background satisfactorily. In that way, Surrogacy serves

as a better substitute and alternative to Adoption in the social change of the Globe.

The endeavour of the Government in bringing a suitable legislation early is also reflecting from the words of the Central Health Minister, Sri *Ghulam Nabi Azad*<sup>14</sup> that the Government of India proposes to bring an Assisted Reproductive Technology (Regulation) Bill, to monitor the services of Assisted Reproductive Technology (ART) clinics and semen banks to regulate surrogacy (ARTs) in the country and the same is pending with Ministry of Law and Justice for concurrence, that the bill describes the procedure for accreditation and supervision of Assisted Reproductive Technology Clinics and Banks and also ensures that medical, social and legal rights of all concerned were protected with maximum benefit to infertile couples or individuals within the recognised framework of ethics and good medical practices, that the bill will also ensure the constitution of national advisory board and to maintain a national registry of ART clinics and banks, State boards and registration authorities and fix their responsibilities and duties, that the bill also prescribes rights and duties of patients, donors, surrogates and children, procedure for registration of complaints and that the bill also seeks to regulate research on embryos, gametes or other human reproductive material and will regulate sourcing, handling, record-keeping for gametes, embryos and surrogate mother.

Dr. R.S. Sharma, Deputy Director General (Senior Grade) in the Indian Council of Medical Research & Member Secretary, Drafting Committee, ART (Regulation) Bill, 2010-12, in his interview to *Aloke Tikku* of Hindustan Times, dated 25th March, 2013 spoke that it involves wide range of issues and steps are taking by the ICMR to finalize the draft bill to regulate the surrogacy soon and there is no delay in this regard at their end.

14. PTI : New Delhi, Thu April 11, 2013, 16:07 hrs- Surrogacy bill in the offing.

Hope that in view of the changing socio-economic trends and political movements of the society, the legislative will bring soon an effective legislation to serve the real purpose of surrogacy through ARTs particularly to safeguard the surrogates and also the well-being of children born through ARTs of the commissioning parents, particularly of those abroad.

#### *Other references:*

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2. [www.surrogate\\_motherhood.com](http://www.surrogate_motherhood.com)
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### **GENEROUS ADJOURNMENTS IN CRIMINAL TRIAL : DILATORY TACTICS TO DEFEAT ENDS OF JUSTICE.**

*(A study of provisions and pronouncements on adjournments in criminal trial).*

By

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#### ***Introduction :***

Speedy justice is the constitutional mandate within the sweep and content of Article 21 of the Indian Constitution<sup>1</sup>. The Apex Court acknowledged that the Courts have been generously granting adjournments, regardless of the fact that it results in delayed disposal of cases. Frequent adjournments involve loss of public time, increase the financial burden of the litigant, and tarnish the image of the Judiciary<sup>2</sup>. The Supreme Court of India in series of cases opined that lavishness with which adjournments are granted is an ailment and the Courts at every level suffer from this predicament<sup>3</sup>. With this background this articles is aimed to study the provisions and

the guiding precedents to cure the menace of frequent adjournments in criminal administration.

#### ***Section 309 of Criminal Procedure Code***

Section 309 of the Code of Criminal Procedure<sup>4</sup> confers power on the trial Court

4. Section 309 in the Code of Criminal Procedure, 1973 : Power to postpone or adjourn proceedings:

- (1) In every inquiry or trial, the proceedings shall be held as expeditiously as possible, and in particular, when the examination of witnesses has once begun, the same shall be continued from day-to-day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded.

- (2) If the Court, after taking cognizance of an offence, or commencement of trial, finds it necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody :

Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time.

1. *Surinder Singh v. State of Punjab*, (2005) 7 SCC 387, AIR 2005 SC 3669; *Hussainara Khatoon and others v. Home Secretary, State of Bihar*, (1980) 1 SCC 81 = AIR 1979 SC 1360; *Abdul Rehman Antulay v. R.S. Nayak*, (1992) 1 SCC 225 = AIR 1992 SC 1701.
2. *Sujata Aggarwal v. Ravi Shankar Agarwal*, CM(M) 1146/2007 dated 16.10.2008
3. *Thana Singh v. Central Bureau of Narcotics*, 2013 Cri. LJ 1262 at 1264