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A Discourse on the Concept of Surrogacy in India

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ABSTRACT

A nation like India where morality resides in the veins of society & is considered to be the supreme law a concept like surrogacy has not remained a new concept. There are diverse opinions, positive, negative & silent views as regards with. One view is that to promote enhance commercialization of human reproductive organs & to ruin the sanctity of parent child relationship. Another view is that it bring the parenthood to those couples who due to anyhow reason cannot have their own children. This Research paper focuses on these two sides of surrogacy in India and concerning law related to the surrogacy, tries to explain the actual situations which are prevailing in the country.

Roots of surrogacy in India

In Indian history the root of surrogacy can be traced long back in the decades of seventies (70^{ies}). It was on Oct 3, 1978 in Kolkata that baby Kanupriya alias Durga was born using the In Vitro Fertilization Technique (Here in after IVF Technique) just about two months after the world first IVF technique boy Louise jog Brown born in Great Britain on July 25, 1978. In this way it can be said that it was second time in the world when this technique was used since then the field of Assisted Reproductive Technology (ART) has developed rapidly. But legalize the laws related to surrogacy are still in has cent stage in India. The reason behind this is that Surrogate has the potential for various kinds of clash between Surrogate mother and intended parent's moral, social & legal issues. With the resent growth in the intended parents opting for surrogacy here India is one of the much sought Surrogacy destinations. A few others are U.S,

Russia, Thailand, Ukraine etc. While the other face of the same practice is that nation all across the globe are condemning commercial surrogacy as it is result in commercialization of human reproductive system for its various socio-ethical reasons, Surrogacy has become one of the topic of deep interest amongst the government of different nations, medico legal luminaries as well as public at large .

What is surrogacy

The word “surrogate “came from the Latin word “Subrogate” means “appointed to act in place of”. In general Surrogacy is a method or agreement whereby a woman agrees to carry a pregnancy for another personal person who will become the new born child’s parent (s) after birth. Therefore it is a method of reproduction whereby a woman gives birth as a substitute for the contracted party or parties.

An over view of “Surrogacy Process”

There are two types gestational and traditional, former is most common in United States legally called host or full surrogacy while traditional also known as partial genetic or straight surrogacy. The hon’ble Supreme Court in the case of Baby Manji kamada vs. Union of India¹ in paragraphs 10 to 13 &16 explained them .According to Supreme Court in traditional or straight or natural surrogacy the surrogate mother. The child may be conceived via sexual intercourse, home artificial insemination using fresh or frozen sperms or impregnated via IUI (intrauterine insemination) or ICI (*intra cervical insemination*) which is performed at a fertility clinic. Sperm from the male partner of the commissioning couple can be used. Donor sperm will for e.g.be used if the “commissioning couple” are both females or where the child is commissioned by a single woman.

Gestational surrogacy

In this a surrogate is only a carrier /female host & is not genetically or biologically related to the child .The Surrogate is implanted with an embryo that is not her own & becomes pregnant with a child to which she is not the biological mother. After birth, the Surrogate relinquishes the child to the biological mother and/or father to raise, or to the adoptive parent (S) in which case, the

embryo would have been a donated embryo. The Surrogate mother may be called a gestational carries.

Classification of Surrogacy may be classified into two parts

1. Commercial Surrogacy

2. Altruistic Surrogacy

1. Commercial Surrogacy

In this a gestational carrier is paid to carry a child to maturity in her womb & is usually resorted to by higher income infertile couples who can afford the cost involved people who save or borrow in order to complete their dream of being parents. This procedure is legal in several countries including India. Commercial Surrogacy is also known as ‘wombs for rent’ ‘outsourced pregnancies’ or ‘Baby farms’.

2. Altruistic surrogacy

Altruistic Surrogacy is a situation where the surrogate receives no financial reward for her pregnancy or the relinquishments of the child although usually all expenses related to the pregnancy & birth are paid by intended parent such as medical expenses, maternity clothing, accommodation diet & other related expenses.

Position of Surrogacy laws in different countries

The legal aspects surrounding surrogacy are complex, diverse & mostly unsettled. In the most of the countries world over the woman giving birth to a child is considered as the child’s legal mother. India is one country amongst the few which recognize the intended /commissioning parents as the legal parents. Different law Prevails in different countries. Somewhere it is illegal & completely prohibited. Let us take a glance of it-

- Hungary (commercial surrogacy prohibited);
- France² (any surrogacy arrangement is illegal unlawful & prohibited by law since 1994);
- Canada (Commercial Surrogacy is illegal while altruistic remains legal); Same condition in Netherland³, Belgium⁴, Japan⁵, but Israel⁶ was the first country in the world to implement a form of state-controlled surrogacy in which each and every contract must be

approved directly by the state. Surrogacy arrangements there are permitted only to Israeli citizens who share same religion. Surrogates must be single, widowed or divorced & only infertile heterosexual couples are allowed to hire surrogates.

Altogether this in all states of Australia⁷, the surrogate mother is considered to be the legal mother by law of the child. In addition in all states & Australian Capital Region arranging commercial surrogacy is a criminal offence, although Northern Region has no legislation governing Surrogacy at all. In United Kingdom⁸ surrogacy have been legal since 2009. In United States⁹ because of being a federal country many states have their own state laws regarding the legality of Surrogate parenting eg. most common for surrogates to reside in Florida & California while in Newyork it is illegal etc.

Position of Surrogacy laws in India

The Indian Council for Medical Research (ICMR) had given National guidelines in the year 2005 regulating Assisted Reproductive Technology(ART) procedures, but these were only guidelines .In this the rights of a surrogate mother were not mentioned anywhere. Let we take brief look of those National Guidelines issued by the Indian Council for medical Research (ICMR).

Under these the age of surrogate mother should be over 45 years¹⁰. A relative as well as unknown may act as a surrogate mother for the couple .If it is relative, than it should belong to same generation as women desiring the surrogate. Before accepting a woman as a surrogate, the Assisted Reproductive Technology (ART) & put on record that the woman satisfies all the testable criteria to go through a successful full term pregnancy such as tested for HIV and must also provided a certificate that she has not had a drug intravenously administered into her though a shared syringe not undergone blood transfusion & if has husband to the best of her knowledge has had no extramarital relationship in last 6 month. Beside a woman may not act more them thrice as a surrogate in her lifetime.

The law commission of India affirming these guidelines submitted its228th report discussing the importance & need for surrogacy. The following observations had been made under 228th report¹¹ by the law commission-

1. Surrogacy arrangements will continue to be governed by contact amongst parties, which will contain all the terms requiring consent of surrogate mother, agreement of her husband & other family members, reimbursement, medical procedures for artificial insemination, willingness to handover child etc. But the purpose should not be commercial.;
2. A surrogacy contract should necessarily take care of life insurance cover for surrogate mother.;
3. The birth certificate of surrogate child should contain the name of the commissioning parent(s) only;
4. Rights of donor and surrogate mother's surrogacy should be protected.;
5. Sex selective surrogacy should be prohibited.;
6. Cases of abortion should be governed by Medical Termination of Pregnancy Act 1971 only.;
7. A surrogate arrangement should provide for financial support for surrogate child in the event of death of the commissioning couple or individual before delivery of the child or divorce between the intended parties & subsequently willingness of none to take child delivery.;
8. Legislation itself should recognize a surrogate child to be the legitimate child of the commissioning parent (s) without there being any need for adoption or even declaration of guardian etc.

There is much other observation given by law commission submitted in its 228th report on Assisted Reproductive Technology (ART) procedures. Not possible to mention here.

Except all these the view of Woman & Child Development Ministry (W.C.D) also cannot be neglected. According to its view it is a very sensitive issue. Because in absence of laws or regulations the Surrogacy has become a free playing field for unscrupulous intermediaries' who lure & push poor and illiterate women into this type motherhood. A WCD ministry official argued that there was every possibility for misuse of surrogate child for terrorism, prostitution or unethical genetic engineering research. In absence of any clear laws on the issue it will not be welfare step for a densely populated country where is abundance of poor illiterate people.

Surrogacy according to Assisted Reproductive Technology (ART) Bill, 2010 hereinafter (ART Bill 2010)

In 2008 ART Regulation Bill was introduced in the Parliament though it could not become an Act. Again due to urgency to regulate surrogacy, was reintroduced in 2010 with certain changes & become Assisted Reproductive Technologies (ART) Regulation Bill, 2010. The bill confers the right to have children on unmarried couples & a single person also legalized commercial Surrogacy, single parenthood and lives in relationships & also entitled gays & lesbians to start families using surrogate mothers. The law commission in its report¹⁴ had recommended only altruistic Surrogacy & not commercial ones but the draft ART Regulation Bill, 2010 legalized Commercial Surrogacy as well. It specifically says that apart from all expenses involved, “the surrogate mother was also receive monetary compensation from the couple or individual, as the case may be, for agreeing to act such surrogate¹⁵”.

A brief glance on provisions of the Bill :

- i. Only an Indian Citizen can be considered for surrogacy with in India;
- ii. Women cannot be sent abroad for surrogacy;
- iii. Surrogate mothers are not allowed to undertake embryo transfer for the same parents over 3 times;
- iv. If surrogate mother is a married women, her spouse’s consent is obligatory/ mandatory;
- v. The donors as well as intended parents identity has to be strictly confidential;
- vi. Prospect surrogate mother should not engage in any act which may harm the fetus during pregnancy or after birth;
- vii. The baby’s birth certificate should bear the name of individuals who had commissioned the surrogacy;
- viii. In case of any abnormality, the commissioning parents would have to take the child’s custody;
- ix. Any ART clinic cannot mix the semen of 2 individuals before use;
- x. The bill also included the provision that foreigner couple will have to identify a local guardian to take case of surrogate mother during her gestation period. as well as after delivery, till the baby is handed over to commissioning parents.etc

Important observations made by the Indian courts:-

Beginning of the surrogacy market in India happened in year 2002. India since then has become so famous that it is being called as “Baby factories”. Supreme Court has legalized it in 2002 itself but no separate laws were given by legislation. It is estimated that If market to grow by 20% between 2015-2020. As per the 2009 Law Commission Report, the artificial reproduction treatment industry is above Rs. 25,000 Crore industry.

The famous case regarding with surrogacy is Baby Manjhi¹⁶ case, in which in Nov 2015 Govt. imposed some restrictions on surrogacy.

Facts of the case

A baby girl was born on 25-07-2008, under a surrogacy agreement. The parties of the executed agreement were Japanese biological genetic parents and an Indian surrogate mother, M/S Satya (An NGO) filed a writ Petition in High Court of Gujarat. The High Court passed certain directions on issues relating to custody of the baby girl. The writ jurisdiction of the S.C. under Art. 32 of India Constitution was invoked there against by the grandmother of the child regarding issuance of visa and passport for the child & herself.

As per the grandmother of the baby, the genetic father had to return to Japan due to expiration of his visa. The grandmother also claimed that the municipality concerned in Gujarat, India has issued a birth certificate to the baby indicating the name of the genetic father. The grievance of the grandmother was related to matters concerning issuance of her visa & passport & for the visa & passport of the child.

The Hon'ble Supreme Court made observations in paragraphs 8, 9, 13, 14, 15, 16 of the judgment as regards with Surrogacy, intended parents, Surrogacy type, parties of surrogacy etc. given in this case the Apex court dealt with issue of Commercial Surrogacy in India. In another subsequent case¹⁷ the Gujarat H.C have also showed the urgency of having a proper legislation so as to govern surrogacy as many legal & ethical questions arise out of agreements of surrogacy which need to be answered.

In this case the main issue was whether a child born in India to a surrogate mother who is a citizen of India & a biological father who is a foreign national, would get citizenship in India by

birth? In this case the Gujarat High Court held that a child born in India would get the citizenship in India by birth. Therefore the court declared twin babies whose biological father & mother were German national & the surrogate mother the Indian National, would to be regarded as citizens of India & that passport to travel abroad cannot be denied to such child as it would be the violation of Art. 21 of Indian Constitution¹⁸.

Besides above the Gujrat H.C also made some important observations as regards with Legal, moral & ethical issues¹⁹, commercial surrogacy²⁰, legality of surrogacy in India²¹, various problems relating to a mother- child relationship which conflict with the clauses of surrogacy agreements²² and need of a proper legislation as soon as possible.

Therefore, the above cases shows that there are many more social, legal, ethical issues that certainly will arise out of surrogacy arrangements. It also shows the urgent need to have laws to regulate such agreements. Although the courts generally be in favour of genetic relations whether it was Baby case²³ or Johnson v. Calvect²⁴ or In re the Marriage of Moschetta²⁵ or it was In re Marriage of Buzzanaca²⁶ In all these cases courts have given more importance to genetic connection & commissioning couple. There is long list of other cases where courts for couple & the genetic connection²².

The surrogate Regulation Bill, 2016 was introduced by Minister of Health & family Welfare Mr. J.P. Nadda in Lok Sabha on November 21, 2016. The Bill defines Surrogacy as a practice where a women gives birth to a child for an intending couple & agrees to handover the child after the birth to the intending couple.

Regulation of Surrogacy

The Bill prohibits commercial surrogacy, but allows altruistic surrogacy. Altruistic surrogacy involves no monetary compensation to the surrogate mother other than the medical expenses and insurance coverage during the pregnancy. Commercial Surrogacy includes surrogacy or its related procedures undertaken or a monetary benefir or reward (in cash or kind) exceeding the basic medical expenses and insurance coverage.

Purpose for which surrogacy is permitted

Surrogacy is permitted when it is

- i. For intending couples who suffer from proven infertility;
- ii. Altruistic;
- iii. Not for commercial purposes; and
- iv. Not for producing children for sale, prostitution or other forms of exploitation.

Eligibility criteria for intending couple

The intending couple should have a certificate of 'essentiality, & a 'certificate of eligibility' issued by the appropriate authority. A certificate of essentiality will be issued upon fulfillment of the following conditions:

- i. A proved infertility certificate of one or both members of the intending couple issued from a Distt. Medical Board;
- ii. An order of parentage and custody of the surrogate child passed by a Magistrate's court; and
- iii. Insurance coverage for the Surrogate mother etc.

It is be noted here that the certificate of eligibility is issued upon fulfillment of the following conditions by the intending couple:

- i) Indian citizens and are married at least five years;
- ii) Between 23-50 years old female and 26-55 years old male;
- iii) They do not have any surviving child (Biological, adopted or surrogate). This would not include a child who is mentally or physically challenged or suffers from life threatening disorder or total illness.

Eligibility criteria for Surrogate mother

To obtain a certificate of eligibility from the appropriate authority the surrogate mother has to-

- i) Be a close relative of the intending couple;
- ii) be an ever married female having a child of her own;
- iii) be 25 to 35 year old;
- iv) be a surrogate only once in her lifetime; and
- v) Possess a certificate of medical and psychological fitness for surrogacy. Etc.

Appropriate Authority

The Central and State government shall appoint one or more appropriate authorities within 90 days of the Bill becoming an Act. The functions of the appropriate authority include:

- i) granting, suspending or cancelling registration of surrogacy clinics;
- ii) informing standards for surrogacy clinics;
- iii) investigating and taking action against breach of the provision of the bill;
- iv) recommending modifications to the rules & regulations.

Registration of Surrogacy clinics

Surrogacy clinics cannot undertake surrogacy related procedures unless they are registered by the appropriate authority, Clinics must apply for registration with in a period of 60 days from the date of appointment of appropriate authority.

National & State surrogacy Boards

The Central and the State govts. Shall constitute the National Surrogacy Board (NSB) & the State Surrogacy Boards (SSB) respectively Functions of the NSB include –

- i) advising the Central government on policy matters relating to surrogacy;
- ii) laying down the code of content of Surrogacy clinics; and
- iii) Supervising the functioning of SSBs.

Offence & penalties

The Bill states the following offences:

- i) Undertaking or advertising commercial surrogacy;
- ii) Exploiting the surrogate mother;
- iii) Abandoning, exploiting or disowning a surrogate child; and
- iv) Selling or importing human embryo or gametes for surrogacy.

These offences will attract a minimum penalty of 10 years and a fine up to 10 lakh rupees. In this was it can be said that the Bill specifies a range of offences and penalties for other

contraventions of the provisions of the bill & initiating commercial surrogacy. Besides above following measures can also be taken for improvement for such legislation-

For surrogate birth the rates must be strict. For this the interest of the infertile parents should be checked properly. Moreover, it is also a source of income for those women who are excessively needed but never it should not become an exploitative business.

The genetic constitution of the surrogate baby must be established & recorded with authenticity with the help DNA tests & other scientific technologies. In case the child is deformed due to biological complications & the legal parents adopting the child, then their liability should also be defined clearly.

- ❖ The rights of the surrogate mother in any condition should not be neglected. The provisions should not only be proper but their implementation also in the statute as the rights of the surrogate mother so as to avoid the exploitation of poor & needy women by means of surrogacy;
- ❖ Surrogacy also should be for single, gay/ lesbian to be considered as legal parents because also gives them the opportunity to experience parenthood;
- ❖ Also the law should be proper if the biological parents of the surrogate child get divorced;
- ❖ Right to privacy of donor as well as that of the surrogate mother and surrogate child protected should be under the statute.

In the end it can be said besides pros & cons the recommendations & rules have been given in the Surrogacy (Regulation) Bill, 2016 are the result of conscious efforts. The surrogacy is not a small theme. In this backdrop the Supreme Court of India if its all encompassing activism has tried to interpret its almost all the components of civil, political, economic, social & cultural rights as essential components of Art.21 under part II of Indian constitution and all legal, ethical issues that are obviously connected with surrogacy arrangements. The bill tries to address the concerns of two important stake holders in the surrogacy industry i.e. surrogate mother & surrogate child. Banning it at this stage may create implementation challenges extortion by state authorities & pushing the business underground. On the other hand it is also a very small part of assisted reproductive

technologies. There are numerous experiments in this field are taking place. Therefore lots of advancement of sciences may be adopted. Also the bill will be a revolutionary step in the direction of women reform. India is a socialist country & it has promised itself to secure all its citizens. Therefore as a nation no lacunae should be there who exploit its poor and down trodden class. Its is surprising & regretting that even better several years of this system functioning in this country the ART is still unregulated.

Foot Notes

- 1) (2008) B SCC 518;
- 2) <http://surrogavylowsindia.com>;
- 3) *ibid*;
- 4) *ibid*;
- 5) *ibid*;
- 6) *ibid*;
- 7) *ibid*;
- 8) *ibid*;
- 9) *ibid*;
- 10) Chapter3,The Indian council of Medical Research (ICMR) National Guidelines (2005)
- 11) <http://www.mightylows.in/548/surrogacylaws-india>;
- 12) <http://timesofindia.indiatimes.com>
- 13) <http://www.lawisgreek.com>
- 14) Suprra F.n.11;
- 15) cl. 34(3) of Assisted Reproductive Technology (ART) Bill, 2010;
- 16) Baby Manji Kamanda vs Union of India (2008) 13 SCC 518;
- 17) Jan Balaz vs Anand Municipality & other AIR 2010 Gujrat 21;
- 18) Protection of life and personal liberty.
- 19) Para 9 of life Judgment given in Jan Balaz vs Anand Municipality & others;
- 20) Para 10 of the Judgment
- 21) Para 14 of the Judgment
- 22) Para 15 & 16 Judgment given
- 23) 537 A. 2d 1227;
- 24) 5 cal. 4th 84, 851 p.2d 776 (1993);
- 25) 25 cal. App. 4th 1218 (1994);
- 26) Cal. Rptr. 2d 280 29 3 – 94 act App. 1998)
- 27) Leslie Bender Genes, Parents & Assisted Reproductive Technologies: Technological mistakes, Sex, Race, & law Columbia Journal of Gender & law (vol. 12) 2003 pp. 1-78, at pp-38-39.