

SURROGACY LAWS IN INDIA

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Abstract : The paper tries to identify the surrogacy laws in India. The paper also talks about the history of surrogacy moving on to the instances that happened in India which led to the need for legislation. Even though there is no law as such in India, the pending bill before the parliament is briefly explained i.e. the Surrogacy (Regulation) Bill and The Assisted Reproductive Technologies (Regulation) Bill.

IndexTerms – Surrogacy, Legislations, Surrogacy (Regulation) Bill, Assisted Reproductive Technologies (Regulation) Bill.

I. INTRODUCTION

Surrogacy is an arrangement in which one is renting her womb for another who is not capable of bearing a child. The child so born will be regarded as the child born out of the wed-lock. The term surrogate implies replacement or substitute. Hence the child is born from a substitute mother.¹ The history of surrogacy can be traced back in the story of Sarah and Abraham in "The Book of Genesis." Sarah and Abraham were married but were unable to conceive a child of their own, so Sarah turned to the mother of Abraham's child, Hagar, her servant. This is a traditional surrogacy case in which the surrogate uses its own egg in the child it carries for intended parents.² There are different kinds of surrogacy i.e. traditional vs. gestational surrogacy and commercial vs. altruistic surrogacy. Traditional surrogacy or "partial" surrogacy is where the surrogate supplies both the uterus and her egg in traditional typically the commissioning father (often the intended mother's husband) provides the sperm. With the advent of IVF, infertile couples now also have the option of "full" or gestational surrogacy. The surrogate supplies the uterus under these arrangements, but the mother intends to supply her own or anonymous donors own egg.³ While compensated or commercial surrogacy is when a surrogate is given the basic payment for carrying the child, i.e. the payment beyond reimbursement for pregnancy related expenses. If no additional payments are received by a surrogate, she will complete an altruistic surrogacy.⁴ The surrogacy is booming in developing countries, particularly in India, where market and individuals are cheaply available.⁵ Another factor in the demand for surrogacy is the lack of legislation in the area concerned. As the number of trends in surrogacy rises and becomes main stream, the global markets demand for surrogates will continue to rise. As a result, surrogacy programs will be expanded, cross - border surrogacy agreements will be raised, and national and international debate will be created.

II. BACKGROUND

India quickly became a hub for international commercial surrogacy due to its relatively low cost, lax regulations, and a population of willing surrogates. Together with the Indian National Academy of Medical Science, the Indian Ministry of Health and Family Welfare and the Indian Council for Medical Research ("ICMR") have all realized that regulations are needed as surrogacy is becoming increasingly prevalent in India. The above - mentioned organizations published Guidelines for Accreditation, Supervision and Regulation of ART Clinics in 2005. These Guidelines are non - binding as they have not been

¹ Amrita Pande, Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker, Signs, Vol. 35 No. 4, pp. 969-992 (2010).

² Surrogacy.com, (Mar. 15, 2019, 12:45pm), <https://surrogate.com/about-surrogacy/types-of-surrogacy/types-of-surrogacy/>.

³ Jennifer Rimm, Booming Baby Business: Regulating Commercial Surrogacy in India, 30 U. Pa. J. Int'l L. 1429 (2009).

⁴ Supra note 2.

⁵ Izabela Jargilo, Regulating the Trade of Commercial Surrogacy in India, 15 J. Int'l Bus. & L. 337, 360 (2016).

adopted by the Indian government in law. Although these guidelines were not adopted in law, sets of experts, Assisted Reproductive Technology ("ART") practitioners and the Indian public discussed them in an effort to provide safe and ethical ART services to infertile couples.

In 2008 the case of Manji baby came into existence, the man Ikufumi Yamada and his wife wanted a baby using a surrogate mother and approached Dr. Nayna in India, at the Akansha Infertility Clinic. On July 25, 2007, the child was conceived with Japanese man gametes and an anonymous Indian egg donor. The couple divorced earlier that month and the wife chose not to make any claim about the baby and that's what led to the case. There was initially a delay in obtaining the baby's birth certificate as to how to mention the mothers address. A provisional certificate was issued, indicating only the name of the father, according to the chief registrar's direction. The Ministry of Foreign Affairs of Japan asked Yamada to adopt the child in accordance with Japanese and Indian laws and obtain an Indian passport to bring the child to Japan. Subsequently, it was difficult to obtain Indian passports and Japanese visa. A NGO called Satya filed a petition in Jaipur to stop baby manji from leaving India. They asserted that the child's legitimacy could not be claimed in the absence of surrogacy laws and also challenged the legality of commercial surrogacy. The court held that commercial surrogacy is legal in several countries, including India, where poor surrogates are available due to excellent medical infrastructure, high international demand and ready availability. With regard to the case of baby Manji, the Jaipur passport office issued a special dispensation and issued an identity certificate and her one - year visa was issued for humanitarian reasons by the Japanese embassy in Delhi.⁶

Another case is Jan Balaz v Anand Municipality.⁷ A German couple Jan Balaz commissioned surrogacy with donor eggs and surrogate mother, resulting in the birth of two surrogate twins, the child was biologically associated with Mr Balaz through donated sperm. Subsequently, however, the German Embassy refused to issue passports to the surrogate child on the basis of German law, which strictly prohibits surrogacy and does not recognize surrogacy as a means of establishing parenthood. Eventually, the matter reached the supreme court that requested Central Adoption Resource Agency (CARA) an autonomous body under the government of India's Ministry of Women & Child Development which deals with inter country adoptions in accordance with the provisions of the 1993 Hague Convention on Inter country Adoption, ratified by the Government of India in 2003, in order to make a onetime exception on humanitarian grounds with regard to child welfare and facilitate adoption for these twins. Accordingly, the German couple adopted these surrogate twins and they were taken back to Germany.

III. SURROGACY (REGULATION) BILL 2016

Based on the note received from the health research department, the Surrogacy (Regulation) Bill, 2016 was introduced in Lok Sabha. It was designed using the following parameters. The Bill regulates altruistic surrogacy involving a surrogacy arrangement where the monetary reward involves only the surrogate mother's medical expenses and insurance coverage. The Bill defines surrogacy as a practice in which a woman for an eligible couple gives birth to a child and agrees to hand over the child to them after birth. The Bill prohibits commercial surrogacy. Infertile married couples are expected to be between 23 - 50 years of age for women and 26 - 55 years for men. They should be married for at least for five years as well as should be Indian citizens. Unless they have a child who is mentally or physically or challenged, they should not have a surviving child by birth or adoption or by earlier surrogacy. The surrogate mother should be a close relative between 25 - 35 years of age gap. However, the proposed bill

⁶ Baby Manji Yamada vs. Union of India and Another (2008) 13 SCC 518.

⁷ Jan Balaz v Anand Municipality, No 3020, Special Civil Application (Gujarat HC 2008).

did not define the term close relative. The first class magistrate shall pass an order concerning the parentage and custody of the child to be born through surrogacy. Adequate and reasonable insurance cover is provided in favour of the surrogate mother.⁸

The National Surrogacy Board and the State Surrogacy Board shall be established to exercise all the powers and functions entrusted to them by the proposed law. The National Board shall consist of the Minister in charge for Health and Family Welfare as Chairperson, the Secretary to the Government of India in charge of the Department dealing with the issue of surrogacy as Vice - Chairperson and three women parliamentarians, two of whom shall be elected by the People's House and one by the Council of State for a total of 24 members of the Board. The proposed bill further states that no person, organization, surrogacy clinic, laboratory or clinical establishment of any kind shall engage in commercial surrogacy, leave a child born of surrogacy, take advantage of a surrogate mother, sell a human embryo or import an embryo surrogate. Violation of the provision results in imprisonment up to 5 years and a fine up to 10 lakhs.⁹

IV. ASSISTED REPRODUCTIVE TECHNOLOGIES (REGULATION) BILL 2017

The bill proposes in setting up the National Board, the State Boards and the National Registry for the Regulation and Supervision of Assisted Reproductive Technology Clinics and Assisted Reproductive Technology Banks, for the prevention of misuse and for the safe and ethical practice of Assisted Reproductive Technology Services and related or incidental matters. These ART banks and research organization are required to register with the registration authority. Clinics performing certain ART function have to receive a certificate of accreditation issued by the state board.

It prescribes to the parties certain requirements. The men who donate sperm must be between 21 and 45 years of age and 23 – 35 years of age for females. No restriction for male as to the number of donation, but a total of 6 times for females is prescribed. Females cannot serve as a surrogate for more than 5 successful live births in her life, including her biological children, and may not undergo an embryo transfer for the same couple more than three times. The bill defines couples as 'two people living together and having a legal sexual relationship in India. It is therefore forbidden for lesbians and gays to engage in surrogacy. A woman under the age of eighteen and above the age of forty-five and a man under the age of twenty-one and above the age of fifty shall not have access to the assisted reproductive technology services. The commissioning parties must provide a certificate clearly stating that she has acted as a surrogate for them. Predetermined sex is forbidden and is considered an offense punishable.

The other aspect is the surrogacy arrangement's enforceability. The Indian contract act and the Indian constitution deals with the same. According to the contract act, the arrangement is only valid when it is done with the free consent of the competent parties with legitimate consideration and object and not explicitly prohibited by law.¹⁰ Article 23 of the constitution prohibits forced labour and trafficking in human beings.¹¹ The commissioning parties must ensure that the surrogate mother is adequately insured in surrogacy payments. The ART clinic can compensate the gamete donors and surrogates financially. However, surrogate mother compensation is usually an issue between the surrogate mother and the commissioning parties. The child born in the ART clinic through surrogacy is presumed to be the couple's legitimate child born out of the wedlock. The child will enjoy all the rights as that of the legitimate child. The child's birth certificate will bear the names of the commissioning parties as the parents of the child. Refusal to take the child is an offense punishable for a period of up to three years, or fine or both. The ART clinic will keep the identities of gamete donor's and the surrogate mother confidential. It can only be released in the event of life-threatening medical conditions requiring gamete donor or surrogate mothers physical testing or samples. The commissioning parties have the

⁸ Mandira Kala & Nivedita Rao, The Surrogacy (Regulation) Bill, 2016: All you need to know, PRS Legislative Research, (Mar. 11th 2019, 3:31pm), <https://www.prsindia.org/theprsblog/surrogacy-regulation-bill-2016-all-you-need-know>.

⁹ THE SURROGACY (REGULATION) BILL 2016, Bill No. 257 of 2016.

¹⁰ The Indian Contract Act, 1872, Act no. 9 of 1872 (India).

¹¹ INDIA CONST. art. 23.

right to donor information including the height, weight, ethnicity, skin colour, educational qualification, medical history of the donor. When the child reaches the age of 18, with the exception of personal identity, he or she may request donor information or surrogate mother information. Once the baby comes out, donors and surrogate mothers are required to waive all parental rights over the child.¹²

IV. CONCLUSION

Cheap but confident medical techniques and services, availability of poor women willing to rent their wombs etc are some of the factors that led to the booming of surrogacy industry. There are currently no laws in India to regulate surrogacy other than the non-binding guidelines of the ICMR. For proper regulation of the same, it is necessary to pass the surrogacy (regulation) bill and the assisted reproductive technologies (regulation) bill. It will protect and promote the dignity of motherhood with a very sacrosanct status in Indian ethos and culture. There is no mistake in doing surrogacy as such, but during the process no one should be exploited.



¹² The Assisted Reproductive Technologies (Regulation) Bill 2017, <https://dhr.gov.in/circulars/assisted-reproductive-technology-regulation-bill-2017>.