

Surrogacy transaction and its legal implications in India

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Abstract

The lack of research on surrogacy poses a problem for Government agencies when it comes to initiating legal provisions and taking substantive action against those found guilty. A number of surrogacy related questions remains unanswered, one of them is addressed in this paper: is it legal to become surrogate mother in India and what benefits are available to them through legislation and judiciary? Such questions need thorough analysis before any policy relating to surrogacy is designed and legal provisions are made. According to senior advocate Kirti Gupta, "At present, it is not difficult to have a baby through surrogacy in India because there is no law to control or regulate it. The technique is cheap, when compared to other countries, and surrogate mothers here charge comparatively less for the services. Therefore, the risks and the disadvantages involved in the surrogacy arrangements often prove detrimental to the interests of the surrogate mother, and the child. At times the commissioning parents also face legal hassles, which was demonstrated in the case of a Japanese couple and the child born to them, which brought out many issues related to surrogacy arrangements. In light of this case and several other issues arising out of the misuse of surrogacy arrangements, the Ministry of Women and Child Development, Government of India called a meeting-cum-workshop of Government agencies, NGOs, Doctors, and concerned Ministry personnel on the 25th June 2008, to discuss various aspects of this issue.

KEYWORDS: Surrogates, Gestate, Commissioning mother

1.1 Introduction

‘Surrogacy’ or ‘Surrogacy transaction’ is one of those changes; society and law are facing as a challenge in terms of its recognition & regulation. Surrogacy can be termed as ‘technique’ as well as a form of ‘transaction’ parties resorting, to establish and give rise to new relations towards each other. This is based on ‘necessity’ and ‘desire’ of the parties concerned to have their own genetically or biologically related child. Surrogacy is a ‘necessity’ for those who are economically weak and vulnerable and are not in a position to maintain themselves with the help of available resources and ‘desire’ of those who are otherwise unable to procreate or conceive the child of their own.

It is a well-known method of reproduction whereby a woman agrees to become pregnant for the purpose of gestating and giving birth to a child she will not raise but hand over to a contracted party. She may be the child’s genetic mother (the more traditional form of surrogacy) or she may be, as a gestational carrier, carry the pregnancy to deliver after having been implanted with an embryo. A contract between a surrogate mother and typically an infertile couple is entered into called the surrogate parenting agreement. Intended parents may arrange a surrogate pregnancy because a woman who intends to parent is unable to carry pregnancy to term due medical issues.

In most of the surrogacy arrangements the intended parents contribute the genetic material and the child is carried by the surrogate. In certain cases the surrogate woman may contribute the genetic material¹ and in very rare situations both the egg and sperm may be taken from donors and the resultant embryo is implanted in the surrogate.

1.2 Meaning

The word ‘surrogate’, comes from Latin ‘subrogate’ which means ‘applied to act in the place of’. The intended parents are the individual or couple who intends to rear the child after its birth. In two cases, surrogacy is brought into play:

- iii. Where the woman can produce eggs but she is unable to carry it to a term, the embryo is externally formed by in-vitro fertilization of husband's sperm and wife's ova, the embryo is implanted in surrogate mother's womb and she bears the child for them.

Indian Council for Medical Research defines 'Assisted Reproductive Technologies':

"For the purpose of these guidelines, ART would be taken to encompass all techniques that attempt to obtain a pregnancy by manipulating the sperm or/and acolyte outside the body, and transferring the gamete or embryo into the uterus."

ART is thus a general term used to refer methods employed to achieve pregnancy by artificial or partially artificial means. It is a technique which is routinely used presently for the treatment of infertility. It includes a range of techniques for manipulating eggs and sperms in order to overcome infertility. It encompasses drug treatments to stimulate ovulation; surgical methods for removing eggs and for reimplanting embryos; in-vitro and in-vivo fertilization; ex-utero and in- utero fetal surgery; as well as laboratory regimes for freezing and screening sperm and embryos, and micro manipulating and cloning embryos

As mentioned above ART's comprises of all techniques that attempts to obtain pregnancy by the sperm or/and oocyte outside the body, and transferring the gamete or embryo into the uterus, let's now see different forms or techniques recognized, in which it is to be carried out:

1. Artificial Insemination (AI): . Artificial Insemination is a process that does not involve sexual intercourse. It means introduction of semen into a woman's vagina, cervical canal or uterus through the use of instruments or other artificial means

2. In Vitro Fertilization (IVF)-Embryo Transfer (ET): In vitro Fertilization-Embryo Transfer (IVF-ET) is the fertilization of an ovum outside the body and the transfer of the fertilized ovum to the uterus of a woman.

3. Third Party ARTs: This is to be resorted in a case where use of traditional ARTs or infertility treatments fails to achieve the purpose of pregnancy. These include the help and assistance of third party to carry out, conceive and deliver a baby. These comprises of following:

- Sperm donation: Parties can get the help of donated sperm, when a male partner is unable to produce sperm or has a very low count of sperm, or if he has a genetic disease. Donated sperm can be used with intrauterine insemination or with IVF.
- Egg donation: This can be used when a woman is unable to produce healthy eggs that can be fertilized. An egg donor undergoes ovary stimulation and egg retrieval steps of IVF. The donated egg can then be fertilized by sperm from the woman's partner, and the resulting embryo is placed into the woman's uterus.
- Surrogate: In this case woman with no eggs or with unhealthy eggs might also want to consider surrogacy. A surrogate is a woman who agrees to become pregnant using the man's sperm and her own egg. The child will be genetically or biologically related to the surrogate and the male partner. However, after the birth, the surrogate will give up the baby for adoption by the parents.
- Gestational carrier: In this method woman with ovaries but not uterus may be able to use a gestational carrier. This may also be an option for woman who can't become pregnant because of serious medical issues and in a case where a woman produces healthy eggs but is unable to carry a pregnancy for the entire term. In such a scenario, woman uses her own egg. It is fertilized by the man's sperm and the embryo is placed inside the carrier's uterus. The carrier will not be related to the baby and gives him or her to the parents at birth. This alternative can be used when a woman produces healthy eggs but is unable to carry a pregnancy to term.

As it is generally stated that Surrogacy arrangement is an agreement whereby a woman agrees to become pregnant for the purpose of gestating and giving birth to a child she will not raise but hand over to a contracted party. Often it is being entered by the parties with intention of making it as a contract or

Hon'ble Supreme Court of India defined it as

"..a method of reproduction, whereby a woman agrees to become pregnant for the purpose of gestating and giving birth to a child she will not raise but hand over to a contracting party"

1.3 Indian Scenario with respect to Legal Perspective

India is considered to be the international market place for carrying out surrogacy transactions, making it "hub of surrogacy" giving boost for health tourism. Moreover, in India it is also being considered as the righteous place for 'surrogacy industry' which is regarded as the genetic pool banks of India. Indian is emerging as a leader in commercial surrogacy and the ultimate destination of the so-called fertility tourism. This is because of cheap of medical services, easy availability of surrogate wombs, abundant choices of donors with similar racial attributes and ineffective law to regulate these practices, are the major reasons for the growth of it. Specifically no Indian law governs or regulates or prohibits surrogacy till date. Surrogate arrangements in India are taking place in ignorance of law and taking place considering need of the parties involved in the surrogacy transaction.

Surrogacy in India is neither prohibited nor recognized specifically which makes it more complicated and complex transaction and thereby adding confusion to prevalent laws to deal with and it also gives rise to several issues and challenges: legal, moral and ethical, before Law and society to deal with it. Moreover due to no stringent legal and regulatory environment, foreigners who are in need of a child or who are looking for surrogate mother, considers India as the best place to find out surrogate mother and to carry out surrogate transaction.

From the point of view legality of surrogacy one may debate or take help of Article 21 of Indian Constitution which guarantees, right to life & personal liberty to all its citizens and State is not allowed to invade on rights recognized under this Article.

The Supreme Court of India in the case *of R. Rajgopal v/s. State of Tamil Nadu*² has held that the right to life includes 'right to privacy'. A citizen has a right to safeguard his private space, his family, marriage, procreation, motherhood, child bearing and education among other matters.

On the same line of UDHR, 1948, Andhra Pradesh High Court in *B.K. Parthasarathi v. Government of Andhra Pradesh*³ recognized reproductive rights of humans as a basic right and upheld 'the right to reproductive autonomy' of an individual as a facet of his right to privacy. In the matters of procreation, state's interference or restrictions on the same would be a direct encroachment on one's privacy.

Keeping in view this interpretation one may also interpret Article 21 of the Indian constitution as an obligation⁴ on the part of State to recognize this right by making suitable arrangement or making suitable arrangement or to recognize those techniques or system which can provide an opportunity to infertile couple and to those who are otherwise unable to have their own genetically or biologically related child. In this connection best example would be of 'adoption'. Adoption law⁵ provides an opportunity to both child (destitute or abandoned) and also to childless couple, through which they can fulfil the wish of having their own child.

² (1994) 6 SCC 632.

³ AIR 2000-AP, 156

⁴ Positive

⁵⁵ Unfortunately, adoption law is still the domain of personal law and specifically, legally and formally allowed only to Hindus to practice or to take in adoption. This is by Hindu Adoption & Maintenance Act, 1956

In a similar way one may also hold that State is under obligation to recognize surrogacy transaction or techniques or methods with the help of which surrogacy transaction may be carried out, so that childless couple can fulfil their wish of having their own child through surrogacy.

Hon'ble Supreme Court of India in the case of ***Baby Manji Yamada vs. Union of India and Anr.***, legalized commercial surrogacy as legal decision with a direction the legislature to pass an appropriate Law governing Surrogacy in India. At present Surrogacy contract between the parties and Assisted Reproductive Technique (ART) Clinics guidelines are the guiding directive for governing this transaction and there is no legal framework recognizing or regulating the same.

“Surrogacy contract” and “National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India 2005 are not enough to deal with the regulatory aspect of surrogacy as it gives rise to some unanswered questions of law and issues & situations, which can only be dealt with by a proper and effective regulatory framework covering, governing, defining and regulating relationships and allied matter arising out of surrogacy transaction. Moreover, technically speaking surrogacy arrangement can never be a contract as it involves ‘human being’ as subject matter so legality of which can be challenged on the basis of provisions of Indian Contract Act, 1872 and Indian Constitution.

But these guidelines can be taken into consideration only for medical operations involving in surrogacy and not otherwise. These guidelines cannot govern cannot regulate relationship arising out of surrogacy. So to this extent guidelines are of no use to the parties to abide by or to govern their relationship arising out of surrogacy.

In the wake of such state of affair of law relating to surrogacy, judicial response or judicial intervention was sine qua non for settling the certainty and clarity in the existing laws to accommodate the surrogacy transaction. In the landmark case of *Baby Manji Yamda v. Union of India*³⁹ as mentioned above, Baby Manji, a surrogate child of a Japanese couple who were having legal difficulties getting a visa for the child born in Gujarat, the Supreme Court of India came to the rescue by giving custody of the child to the surrogate grandmother and held that commercial surrogacy is permitted in India.

In yet another case in the matter of *Jan Balaz v. Anand Municipality* a German couple entered into a contract with a surrogate mother. Twin children were born. The question was whether a child born in India to surrogate mother, an Indian national, whose biological father is a foreign national, would get citizenship in India, by virtue of birth. This was unprecedented in the legal history of India.

The High Court of Gujarat keeping in view the findings of Supreme Court in *Baby Mani's* case held that this case is primarily concerned with the relationship of the child with the gestational surrogate mother, and with the donor of the ova. In the absence of any legislation to the contrary, the High Court is more inclined to recognize the gestational surrogate who has given birth to the child.

In the both the cases discussed above, the Indian Courts have taken a very pro-surrogacy contract stand, possibly as a way of encouraging commercial surrogacy, thereby recognizing “commercial surrogacy”.

Law Commission of India in its 228th Report, 2009⁴¹ made certain recommendations to legalize surrogacy by effective legislation which can cover all the aspects of Surrogacy and relationships arising out of surrogacy. Some of the important recommendations of Law Commission of India are:

- Surrogacy agreement will continue to be governed by contract between the respective parties and the contract will deal conclusively with all the rights and liabilities of the parties thereto. But such an arrangement should not be for commercial purposes.
- A Surrogate arrangement should provide for financial assistance for surrogate child in the event of death of intended parents or individual before delivery of the child or divorce between the intended parents and as a consequence none of the parent takes delivery of the child.
- One of the intended parents should be donor as well, because the bond of love and affection with a child primarily originates from the biological relationship.

- Legislation should recognize a surrogate child to be the legitimate child of the commissioning parents without there being need for adoption or even declaration of guardian.
- The birth certificate of the surrogate child should contain the name of the commissioning parents only.
- Right of privacy of donor as well as surrogate mother should be protected.
- Gender selective surrogacy should be prohibited.
- Cases of abortion should be governed by Medical Termination of Pregnancy Act only.

Surrogacy arrangement involves different application on different set of law or branches of law which are relevant for our consideration so far as the validity of the surrogacy is concerned. ARTs have transformed the way we see reproduction and have come up with tractable solutions but controversial options to procreation through the unconventional means As per the provisions of Indian Contract Act, 1872, for a valid contract both the consideration and object must be lawful. At the same time every agreement of which the object or consideration is unlawful is forbidden by law, or if it contravenes the provisions of any law or the court regards it immoral, or against the public policy. In this context even though Surrogacy transactions meets the basic requirements of “an Agreement” the same may not be converted into a “Contract” since an agreement enforceable by law is contract. To this extent it is very difficult to term “Surrogacy Agreement” as “Surrogacy Contract” and this is due to the above mentioned prohibitions on the Surrogacy agreement.

So in order to give rise to claims, obligations, liabilities of Surrogate parties towards each other, it is vital that this very arrangement must be recognized by law whether as a contract or as a statutory transaction. Since a contract/agreement made by the parties cannot violate law of the land, it is necessary that Surrogacy (which often violates law of the land) in order to recognize it must be given & govern by a special statute. Else law cannot accord protection to the parties. Though the current and related legislations are against the formation of surrogacy agreement, nevertheless the practice is to make surrogacy agreement and thereby giving rise to rights and obligations in relation to surrogacy transaction. Basically three parties are involved in surrogacy agreement. In this context a pertinent question comes before us is whether a surrogacy arrangement by which a woman undertakes to bear a child for a childless couple and agrees to give up all parental rights at the birth of the child for a payment or other consideration is void for its contravention of statutory enactments, since the contract involves bartering of human lives and also whether it infringes the public policy are problems of that perplex the law enforcing machineries.

So far as Indian Constitution is concerned, Article 23 says that traffic in human beings and beggar and other similar forms of forced labour are prohibited and any contravention of this provision shall be a punishable offence in accordance with law. Therefore, baby bearing contracts on economic necessities definitely raises concerns regarding the constitutional provisions.

The commercialization of surrogacy bring in fear of black market and baby selling, breeding farms, turning poor women into baby producers and the possibility of selective breeding for a price and it degrades pregnancy to a service and a baby to a commodity. Moreover, provisions of personal law/family laws too, does not support the surrogacy arrangement as it goes against existing personal laws of the country, relating to: Parentage & legitimacy, maintenance, succession & inheritance etc. Basically, personal laws in India are based on religion and as such different communities prescribed different set of laws pertaining to personal or family sphere which are completely in contradiction with surrogacy arrangement.

There is a possibility of surrogate mother to develop feelings for or emotional attachment towards the child and may refuse to hand over the child and as such it may go against surrogacy contract between the parties. The question here is also who all can choose to utilize such technologies. Whether a married couple can resort or ones who are in live-in relationship or gay couple or lesbian couple or homosexuals or single or unmarried man or woman can resort, is not clear and not specified anywhere. These are bound to give rise to several issues arising out of existing family laws or personal laws. Other questions like what will be the status and position of the child/baby? Whom it belongs: commissioning parents or surrogate mother? What

about maintenance of the child, custody, guardianship and succession or inheritance rights? Who will be the legal mother? What happens if surrogate mother decides to keep the child?

These questions can only be answered when we have specific laws governing surrogacy. Personal laws/Family laws are clear on above mentioned questions or points and these things are available only in cases of “legal wedlock”. Legitimacy, parentage, custody or guardianship, maintenance, succession or inheritance rights are available only out of or through or to legally wedded couple or child born out of legally wedded couple. ARTs has the also changed the way view parentage. It has changed the traditional concept of parenthood.

These issues need legal attention and it is possible only through an effective legislation covering family law issues or questions or relationships arising out of surrogacy.

In this connection one pertinent question comes for the discussion as to what it is that we are looking for “regulatory framework” and what it is that lacking in “surrogacy arrangement “and “National Guidelines on ART” that it cannot effectively regulate surrogacy arrangement or surrogacy transaction , parties to surrogacy and relations arising out of surrogacy.

Surrogacy in India, as discussed earlier, is not governed by statutory law. There are guidelines provided by Indian Council of Medical Research (ICMR) which are famously known as “National Guidelines on Surrogacy” regulating surrogacy but these are simply “guidelines” and are not binding or enforceable. Taking account of such circumstances, Law Commission of India, as discussed above, in its 228th Report, so as to formalize the law on surrogacy, recommended an exhaustive legislation by making some vital recommendations discussed above.

Keeping in view such scenario, the Union Health Ministry has finalized the Assisted Reproductive Technologies (ART) Regulation Bill, 2010 which has been sent for Law Ministry’s approval. Some of the silent features of this Assisted Reproductive Technology (Regulation) Bill, 2010:

1. ART Bill allows ART to be undertaken by singly person also, so logically it covers those relationships which are functional .The Bill details the procedures for accreditation and supervision of infertility clinics (and related organizations such as semen banks) handling spermatozoa or oocytes outside of the body, or dealing with gamete donors and surrogacy, ensuring that the legitimate rights of all concerned are protected, with maximum benefit to the infertile couples/individuals within a recognized framework of ethics and good medical practice.
2. The Bill allows only 21 to 35 year-olds to be surrogate mothers and says no woman would act as a surrogate for more than five successful live births in her life, including those of her own children.
3. The draft Bill prohibits In-vitro fertilization clinics from advertising for surrogates on behalf of infertile couples and seeks to create ART Banks to do the advertising for commissioning parents.
4. These banks will screen surrogate mothers and donated sperm and oocytes for infections while ART clinics will simply offer ART services.
5. The bill guarantees legal protection to parents, surrogate mothers and children and mandates legally enforceable agreements between the stakeholders. Any violation would be a cognizable offence punishable with imprisonment and fine.
6. Foreigners from countries that don’t recognize commercial surrogacy will be barred from hiring surrogate mothers in India. Foreigners and NRIs can hire surrogacy service only if they give an undertaking that their country permits surrogacy and the child born will get citizenship of the foreign country.
7. It will become binding for surrogate mother to give up rights over the baby. And, the birth certificate of the baby born through surrogacy will bear the name of the intended parents. The commissioning parents could be a single man or woman, a married couple or an unmarried couple, who are in live-in relationship. Outside the purview of marriage and which are in the nature of marriage: live-in partners, gay couple or lesbians or homosexuals, unmarried, divorcee, widower, bachelor or single person.

8. This Bill has legitimized children born out of surrogacy or through different ARTs as the children of commissioning father and mother and as such shall be presumed to be legitimate child of the couple. So the case with respect to unmarried couple or party or singular party. When it becomes law, the surrogate mother will have to enter into a legally enforceable surrogacy agreement.

1.4 Conclusion

‘Surrogacy’ is one of those vital issues and transactions, which requires an urgent attention of legislature to respond positively, since it is about certain basic rights: human & fundamental and ‘need’ & ‘desire’ of the parties involved in it. Absence of concrete and exhaustive legislation on surrogacy transaction, it is for the courts to decide the matters by considering facts and circumstances of each case. Surrogacy because of its very peculiar nature, it would be difficult to amend any provisions of existing laws and thereby to cover the cases of surrogacy. Only an exhaustive, separate, and sui juris surrogacy law/legislation can cover and can regulate complex and complicated issues surrounding surrogacy, ranging from Medical science, technology, contractual, human trafficking, commercial, human rights, and family law issues to certain questions involving foreign element. Any proposed law/legislation dealing with surrogacy must be effective, clear and must define rights & obligations of the necessary parties. Need and desire of the parties involved must be respected and backed by an effective legislation covering all the facets of surrogacy: contractual, paternity, legitimacy, custody & guardianship, constitutional, and medico operations including rights, liabilities, duties and regulation of relations arising out of it. Let the proposed deal with the surrogacy from its entirety which shall ensure certainty and clarity which are the best attributes of any law.