



PANACEA FOR SURROGACY MISCARRIAGE

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Today, world is engulfed in the modernisation and technical advancement. Evolution of technology can be witnessed from exploring the enormous universe to discovering the minute quark of atom. One of the advancements made by people is in the discipline of biology related to Assisted Reproductive Technology (ART) which was witnessed in 1978 when first test tube baby was created by British scientists¹. In 1978 World's second but India's first In Vitro fertile child named Durga was born in Kolkata. Medical definition of ART states "the use of technology to assist human reproduction in the treatment of infertility; especially: a procedure (such as in vitro fertilization or gamete intrafallopian transfer) that involves the removal of eggs from an ovary and fertilization by sperm in vitro."² Draft of Assisted Reproductive Technologies (Regulation) Bill, 2010 under Section 2 (c) defined ART as all techniques that attempt to obtain a pregnancy by handling or manipulating the sperm or the oocyte outside the human body, and transferring the gamete or the embryo into the reproductive tract." In simple words ART is a novice technique which proved to revolutionise infertility treatment of people which enabled them to have their own

biological child. ART technique also mitigates the risk of various genetic disorders and diseases such as AIDS, Tay Sachs disease, thalassaemia, sickle cell anaemia etc.

Primary means of initiating pregnancy through the process of ART are 1) Intrauterine Insemination (IUI) 2) In Vitro Fertilization, and 3) Third Party Assisted ART. Third Party Assisted ART includes (a) Sperm Donation (b) Egg Donation (c) Surrogates and Gestational Carriers. Surrogacy is a part of ART where pregnancy is achieved through the assistance of third party. "Surrogacy means a practice whereby one woman bears and gives birth to a child for an intending couple with the intention of handing over such child to the intending couple after the birth."³ In simple words surrogacy is a consensus between two parties where one party is of intended parent and other party is of surrogate mother in which surrogate mother agrees to bear the child of other party and after giving birth she gives the child born out of surrogacy to the intended parent(s).

There are 3 types of genetic surrogacy circumstances: 1) Genetic surrogacy or partial surrogacy: This is the most common type of surrogacy. Here the egg of the surrogate mother is fertilized by the commissioning male's sperm. In this way the surrogate mother is the biological mother of the child she carries. 2) Total surrogacy: Here the surrogate mother's egg is fertilized with the sperm of a donor - not the male part of the commissioning couple. 3) Gestatory surrogacy or full surrogacy: Here the

¹<https://www.thoughtco.com/first-test-tube-baby-louise-brown-1779783> (Apr 7; 01:50).

²<https://www.merriam-webster.com/medical/assisted%20reproductive%20technology> (Apr 5; 16:29).

³Surrogacy (Regulation) Bill, 2016; Sec 2 (ZB).



commissioning couple's egg and sperm have gone through in vitro fertilization and the surrogate mother is not genetically linked to the child.⁴

There are 2 types of consensus while conducting surrogacy or procedure of surrogacy which is needed to be entered between intended couple and surrogate mother 1) Altruistic surrogacy agreement where surrogate mother promises to bear child of intended parent without any intention of gaining personal profit or benefit out of surrogacy 2) commercial surrogacy agreement which deals with the situation where surrogate mother is provided some remuneration or compensation for bearing the child of intended couple.

Prior to 2002 there was no law governing surrogacy in India. In 2002, commercial surrogacy was allowed in India. In 2010 Assisted Reproduction Technology (Regulation) Bill was drafted but never got through the procedure of the parliament and never became a law. This bill gave green flag to commercial surrogacy and tried to make it legal but it succumbed as the bill was never passed. This bill also constituted a central board with the nomenclature of "National Advisory Board for Assisted Reproductive Technology" with total number of members not exceeding 21 under Chapter II, Section 3(i). The drafted bill constituted an ART bank for storing gametes and eggs of donors. The bill outlined all the offences which could be committed in surrogacy and its procedures. Till 2015 no step was taken on suppressing

commercial surrogacy but in 2016 Surrogacy (Regulation) Bill, 2016 was introduced in Lok Sabha and was approved by cabinet but was opposed by opposition. The bill also allowed single parents to have a biological child through commercial or altruist surrogacy.

Coming to prevalent condition of legal surrogacy in India, it is going to allow only altruistic surrogacy imposing ban on commercial surrogacy once Surrogacy (Regulation) Bill, 2016 passes through Lok Sabha, Rajya Sabha and receives assent of President and its Act is created after implementation of this act, the age restriction which is going to be imposed for surrogate mother will be between 25-35 years. Out of UK, South Africa, Russia, Greece, Netherland and India, India is the only country which makes it mandatory for the intended couple to be married and it is the only country which imposes restriction on number of times a surrogate mother can undergo surrogacy which is "only once" whereas other countries do not provide any restriction on the number of surrogacy which a surrogate mother can undergo. In India, Greece and South Africa legal guardianship of the child born out of surrogacy would get transferred to the intended parent whereas in UK transfer of guardianship is through adoption only if the intending couple are genetically related to the surrogate baby otherwise through a court order and in Russia legal guardianship goes to surrogate mother, if she has provided her egg otherwise to intending parent if surrogate mother has not provided her egg

⁴<http://www.positive-parenting-ally.com/ethics-of-surrogacy.html> (Apr 4,17:18).



for commercial or altruistic surrogacy⁵. After Comparing surrogacy laws of various countries, conclusion which can be derived is that there are four segments in which these countries can be divided which are 1) countries which allows only altruistic surrogacy legally, like Canada, United Kingdom, Hong Kong etc. 2) countries which allow both commercial and altruistic surrogacy legally Russia 3) countries which do not allow either altruistic or commercial surrogacy like Finland, France, Iceland, Japan, Pakistan etc, and 4) countries which do not have any legal law of surrogacy in their country like Ireland.

India has proved to become a surrogacy hub due to factors like huge population, poverty, low family income etc. Prior to the introduction of the Surrogacy (Regulation) bill, 2016 various unethical surrogacy practices were prevalent like exploitation of surrogate mother and surrogate baby, buying and selling of gametes and human embryo, encouraging commercial surrogacy. This bill imposes restrictions over all the unethical and fraudulent acts which were committed in the name of surrogacy such as commercial surrogacy. Under the bill commercial surrogacy has been defined as “commercialisation of surrogacy services or procedures or its component services or component procedures including selling or buying of human embryo or trading in the sale or purchase of human embryo or gametes or selling or buying or trading the services of surrogate motherhood by way of

giving payment, reward, benefit, fees, remuneration or monetary incentive in cash or kind, to the surrogate mother or her dependents or her representative, except the medical expenses incurred on the surrogate mother and the insurance coverage for the surrogate mother”⁶ In simple words if any person be it intended couple, surrogate mother, registered or unregistered surrogacy clinic, registered medical practitioner, gynaecologist, paediatrician, human embryologist or any other person gains any profit or undue advantage out of performing any unethical work while performing surrogacy or surrogacy procedure he is going to be guilty of commercial surrogacy.

Altruistic surrogacy has been defined as “the surrogacy in which no charges, expenses, fees, remuneration or monetary incentive of whatever nature, except the medical expenses incurred on surrogate mother and the insurance coverage for the surrogate mother, are given to the surrogate mother or her dependents or her representative.”⁷

Surrogacy (Regulation) Bill, 2016 has covered every possible aspect of surrogacy be it altruistic surrogacy, commercial surrogacy, surrogacy clinics, legislative authority, penalisation of violators of the bill, defining intended parent and surrogate mother etc. within its VIII chapters with 51 sections.

Chapter III deals with most important part of the act which is related to regulation of surrogacy and surrogacy procedure. Section 4 of the act establishes conditions and eligibility for conducting altruistic surrogacy and prohibiting unethical and commercial surrogacy. Conditions

⁵www.prsindia.org/uploads/media/Surrogacy/International%20comparison%20of%20surrogacy%20laws.pdf. (Apr 6; 16:05).

⁶Surrogacy (Regulation) Bill, 2016 ; Sec 2(f).

⁷Surrogacy (Regulation) Bill, 2016 ; Sec 2(b).



which is highlighted in section 4 is that 1) intended couple should possess a certificate of proof of satisfying their condition of being infertile which is to be obtained from District Medical Forum 2) intended couple should possess an order from a magistrate of a first class or above concerning the parentage and judicial custody 3) there should be insurance against surrogate mother. Section 4(b)(i),(ii),(iii) and (iv) provides eligibility criteria for surrogate mother who has been defined as “woman bearing a child who is genetically related to the intending couple, through surrogacy from the implantation of embryo in her womb and fulfils the conditions as provided in sub-clause (b) of clause (iii) of section 4”⁸. Criteria for being a surrogate mother is that the woman should have an age of between 25-35 years on the day of implantation and should be married and should have a child of her own. Surrogate mother is to be physically and psychologically fit and should possess the certificate of the same and cannot be anyone else but a close relative of the intended couple. It prohibits the surrogate mother from providing gametes or carrying pregnancy more than once. Section 4 (c) (i), (ii), (iii) and (IV) provide eligibility criteria for intended couple who have been defined as “a couple who have been medically certified to be an infertile couple and who intend to become parents through surrogacy”⁹. The criteria which is to be fulfilled by the intended couple is that the age of the intending couple is between 23 to 50 years in case of female and between 26 to 55 years in case of male on the day

of certification; they should be Indian citizens prohibiting foreigners from exploiting Indian females for commercial surrogacy; they should be married for not less than 5 years; the intending couple have not had any surviving child biologically or through adoption or through surrogacy earlier with a condition that if the surviving biological child is of physically and/ or mentally unsound then there can be another altruist surrogacy. Section 5 prohibits any person from encouraging or forcing surrogate mother to undergo surrogacy or surrogacy procedure. Section 6 provides the requirement of a written consent by surrogate mother after acquainting her of all the possible outcomes and side effects of surrogacy. Section 7 deals with one of the crucial ideologies of people where people often abandon their surrogate or biological child due to sex, deformity, twins or triplets etc and it prohibits any such act which is in relation to the abandoning or exploiting the child. Section 9 prohibits abortion during surrogacy period except in condition prescribed or necessary.

Chapter IV deals with the main organ which conducts surrogacy known as “surrogacy clinic” which is defined as a “centre or laboratory, conducting assisted reproductive technology services, in vitro fertilisation services, genetic counselling centre, genetic laboratory, Assisted Reproductive Technology Banks conducting surrogacy procedure or any clinical establishment, by whatsoever name called conducting surrogacy procedures in any form.”¹⁰. Chapter V aims to establish a

⁸Surrogacy (Regulation) Bill, 2016; Sec 2 (ze).

⁹Surrogacy (Regulation) Bill, 2016; Sec 2(r).

¹⁰Surrogacy (Regulation) Bill, 2016; Sec 2(zc).



National Surrogacy Board under Section 14 of this Act.

Chapter VII renders justice to the violators of this act for practicing unethical surrogacy. It deals various offences which complicit people who could be intended couple, surrogate mother, any registered medical practitioner, gynaecologists, paediatrician, human embryologists or any person who owns a surrogacy clinic or employed with such a clinic or centre or laboratory and renders his professional or technical services to or at such clinic or centre or laboratory, whether on an honorary basis or otherwise, commit by violating provisions of this act such as advertisement of commercial surrogacy, abandoning, disowning or exploiting the surrogate child, dealing in human embryo and gametes by importing-exporting and buying and selling of it. Penalisation policy of this act provides imprisonment of 10 years and fine of 10 lakh when the complicit violates provision of the Section 35 (1) (a to f). In case a person commits any folly for which no specific punishment is mentioned in the act then imprisonment of not less than 3 years with the fine of 5 lakhs is awarded. Any registered medical practitioner, gynaecologists, paediatrician, human embryologists or any person who owns a surrogacy clinic or employed with such a clinic violates any provision of this act and supports commercial or unethical surrogacy or procedure of surrogacy then he may be imprisoned for a period for not less than 5 years with the fine of 10 lakhs. If the person or the clinic continues to commit offence then his registration is suspended for a period of 5 years. Punishment which has been prescribed against a person who

initiates commercial surrogacy is imprisonment for not less than 5 years with the fine of 5 lakhs initially and if he continues to do it then the fine may increase up to 10 lakh rupees. Surrogate mother has been provided an advantage in this act where if any kind of commercial surrogacy will take place it would be presumed by the court of law that the surrogate mother was forced by her husband, close relative or intended couple against her will for performing the surrogacy unless it can be proved otherwise. Chapter VIII deals with maintenance of the surrogacy records, power to search/seize records, protection of action taken in good faith, vesting power in central government to make laws and legislature regarding surrogacy and etc.

Prior to the introduction of this bill people used to conduct surrogacy and surrogacy procedure in an unethical manner which would pose harm to surrogate mother, surrogate child and even society. India was considered to be a hub for surrogacy where foreigners would come and commercialise the surrogacy for their own benefit leaving the poor surrogate mother into adversity. They used to enter India on a medical visa provided to them for commercial surrogacy and if the surrogacy child was not as per their desire they would abandon and disown it. In 2008 need for surrogacy law arose in the case of Baby Manji Yamada vs. Union Of India¹¹ where a Japanese couple came to Gujarat for commercial surrogacy as intended couple and after surrogacy a baby girl was born but by the time she was born the couple had

¹¹ Baby Manji Yamada vs. Union of India and Another (2008) 13 SCC 518



split up and the baby was both parentless and stateless. The Apex Court directed that the National Commission for Protection of Child Rights was the apt body to deal with this issue. The Supreme Court of India held that the father was the genetic father of the child and he was given custodial rights of the child. Thus, the child was returned back to her grandmother in Japan.¹² To cease such instances from happening again foreigners have been barred from entering India on the medical visa for commercial surrogacy and legally only altruist surrogacy has been allowed in India that too only for Indian citizens. Various problems were outlined during the introduction of this bill like

- 1) abandoning or disowning surrogate baby because of its physical or mental deformity, sex, or for some other reason
- 2) commercialisation of surrogacy
- 3) surrogate mother would be forced by husband, close relative, intended couple or any other person to enter into surrogacy agreement
- 4) buying and selling of gametes or embryo of human being
- 5) no particular guidelines were established while performing surrogacy or surrogacy procedure
- 6) no authority to look over various crimes committed under the pretext of commercial surrogacy.

Once the Surrogacy (Regulation) Act, 2016 comes into force then all the above mentioned adversities would fade away as the problem regarding the abandoning of surrogate child, buying and selling, importing exporting of embryo and gamete and commercial surrogacy would be made illegal under chapter III and justice would be imparted according to the sections under chapter VII which the judicial body

would deem fit to be applied in the respective case. Constituting a National body as well as state body for regulating surrogacy laws in India. Constituting an appropriate authority which would look into the regulation and proper functioning of the registered surrogacy clinic and would penalise all the other unregistered surrogacy clinics which would conduct any kind of surrogacy be it altruistic or commercial under this particular act.

A change in the existing surrogacy bill that should be considered is to allow single parents to enter into altruist surrogacy agreement otherwise their legacy will come to an end. For instance if a person A who is the only son of his parents, gets married to a woman B and within 1 year of their marriage his wife dies without any child and A does not want to remarry because of emotional and sentimental attachment to his wife but he wants his family's legacy to continue by reproducing his own biological child through surrogacy but this act of Surrogacy (Regulation) Act, 2016 would not permit him just because he is single parent and ultimately his legacy will end.

The bill was criticised by the opposition in Lok Sabha and women who were involved in commercial surrogacy business because of the fact that many of the families were earning money out of the surrogacy and this bill curbs their activity leaving them indigent. As per the miscarriage of surrogacy law is concerned there could be none if all the provisions and clauses of the Surrogacy (Regulation) Act, 2016 are followed wisely as the act has tried to overcome and suppress all kinds of malfunctions of surrogacy giving permission



to only altruistic surrogacy and banning commercial surrogacy. Surrogacy has given the new hope to the intended couple who cannot reproduce their own biological child due to their infertility and Surrogacy law has given trust and confidence to everyone in society who will feel free to undertake altruist surrogacy.

