



COMMERCIAL SURROGACY IN INDIA: AN OVERVIEW

By Ashish Sharma.

From The Law School, University of Jammu

Abstract

The practice of surrogacy has been prevalent in India for a very long time especially, the 'commercial' type of surrogacy. This type of surrogacy had been practiced in India extensively and, therefore, India was considered as one of the major hubs for the practice of commercial surrogacy among other countries in the world. An important aspect to explore in this context is the preservation of the rights of women undergoing surrogacy and the legitimacy of the children born out of such practice. For the regulation of commercial surrogacy and to protect the rights and health of both the child and the surrogate mother, various governments in India have frequently endeavored to bring in such related legislations. In 2008, The Law commission of India also submitted its report suggesting ways to control and regulate 'surrogacy'. Till 2021 there were no rules, regulations or laws in the context of surrogacy. The Indian judiciary has played a vital role in legalizing the practice of commercial surrogacy and its role is very significant in the evolution of the 'surrogacy. The aspect of the role of judiciary is a major point of discussion in this paper. However, in 2021 by the Parliament of India declared the practice of 'commercial surrogacy' as illegal by way of an Act, and legalized altruistic type of surrogacy. In India, there has been a complete paradigm shift from illegalizing one kind of surrogacy, that is, commercial surrogacy, to legalizing the another, that is, altruistic surrogacy.

Introduction

Surrogacy as a practice has been followed in India for centuries and has been prevalent among the population, especially with childless parents. But this practice was in existence without any proper set of legislation governing or regulating it. The meaning of the term 'surrogacy' has its own connotation and significance. The word 'surrogate' comes from the Latin word 'surrogates' which means 'substitute' (in place of another). Surrogacy is the process by which a woman gives birth to a child and gives that child to another person (husband and wife). The person (woman) who gives birth to a child and gives it to another person is known as a 'surrogate mother'. Going by the definition in the Collins dictionary, surrogacy can be understood as 'an arrangement by which a woman gives birth to a baby on behalf of someone who is physically unable to have babies themselves, and then gives the baby to that person'. According to the Oxford dictionary, 'surrogacy' is the practice of giving birth to a baby for another woman who is unable to have babies herself. 'Surrogacy is also defined as the practice whereby one woman carries a child for another with the intention that the child should be handed over after the birth.

Commercial Surrogacy

Commercial surrogacy is that type of surrogacy in which a surrogate mother is entitled to get some money, reward or some valuable thing like remuneration for her services during the pregnancy for the expenses incurred for medical services.



Altruistic Surrogacy

Altruistic surrogacy may be defined as a surrogacy in which a woman on her own comes forward and carries the pregnancy for the other person without any remuneration. Only medical expenses are paid to her. This surrogacy is prevalent in the present time and is in practice to a large extent.

Emergence of Commercial Surrogacy

Commercial surrogacy means the commercialization of surrogacy services or procedures or its element services or element procedures together with marketing or shopping for/of human embryo or commercialism within the sale or purchase of human embryo or gametes or marketing or shopping or commercialism of the services of surrogate relationship by manner of giving payment, reward, benefit, fees, remuneration or financial incentive in money or kind, to the mother or her dependents or her representative, except the medical expenses and such different prescribed expenses incurred on the mother and also the amount for the mother. In commercial surrogacy agreements, the surrogate mother enters into an agreement with the commissioning couple or a single parent to bear the burden of pregnancy. In return of her agreeing to carry the term of the pregnancy, she is paid by the commissioning agent in return as a part of the transaction.¹ Commercial surrogacy has legally replaced the immoral and illegal trade of children. A Married couple hires women to produce a baby and in return gives her money or

something valuable. After endeavoring towards the constructive concept of surrogacy, it was in 2002 that commercial surrogacy was allowed. The Supreme Court of India in the case of *Babyji*² legalized surrogacy for the first time. When commercial surrogacy was legalized, there was a sharp increase in the curve of cases of surrogacy in India. It estimates that surrogacy practice generates nearly \$2.3 billion a year according to the report of the Confederation of Indian Industry. This is due to the reason that, in India, the cost of surrogacy is far less than the cost of surrogacy in America and other western countries and there was no law or regulation for regulating the whole process of surrogacy. Everything was done by mutual agreement and in ignorance. There was a huge exploitation of women's bodies especially their reproductive health. Due to unawareness and a high illiteracy rate in India, women easily entered into an agreement for surrogacy without knowing the consequences on their health as well as their psychological health and post-delivery complications. Even sometimes, surrogate mothers become infertile for producing children in future due to complications that they are unaware of. Foreign couples take advantage of their ignorance and enter into a false agreement with surrogates, who never want to enter into it. "Surrogacy without restrictions and the commercialization of an unregulated sector have led to ruining the lives of infertile couples and child-bearing mother," said Renee-Marie Stephano. In *Jan Balaz v. Anand Municipality and 6 Ors*³, Gujarat High Court reiterated the same judgment given by the Supreme Court in

¹ 228th Report of the Law Commission of India, Need For Legislation to Regulate Assisted Reproductive Technology Clinics as Well as Rights and Obligations of Parties to a Surrogacy.

² *Baby Manji Yamada v. Union of India & Anr*, Writ Petition (C) NO. 369 OF 2008

³ AIR 2010 GUJ 21



Manji Yamada v. Union of India that commercial surrogacy is legal in India. Due to extensive misuse of surrogacy in India, the Government of India has taken certain initiatives to regulate and control the practice of surrogacy, which include timely guidelines, bills, laws, amendments and reports of the concerned organizations.

ICMR (Indian Council of Medical Research) GUIDELINES 2005

ICMR Guidelines 2005, Indian Council of Medical Research has given various guidelines in 2005 for regulating the conduct of ART clinics and allowing surrogacy in India. The guidelines give the methods and procedures of assisted reproductive technique (ART) to fertility clinics and how they conduct their work. These guidelines are not enforceable by law and only recommendatory in nature. The guidelines are as follows:

1. Only those clinics are concerned with the surrogacy procedures which are registered and regulated by the State or any appropriate authority.
2. Staff of these clinics is well qualified and adequate equipment are used and genetic waste is properly disposed of.
3. All the information regarding treatment must be known to the patient (procedure, technique used, side effects).
4. All treatment is given only with the written consent of the couple.
5. A surrogate mother carries a child for another. She must give the information that she is a surrogate mother and other information while admitting the name of the genetic parents must be present on the birth certificate.

6. The intended parents should pay for the expenses to the surrogate mother in the period of pregnancy and also the post pregnancy period. Also, she is entitled to monetary compensation as agreed by both parties.

7. Any person who produces gametes before the age of 21 shall not be used. The tendered age issued in guidelines for sperm donor shall lie between 21 to 45 years and for women donors, the tendered age shall lie in between 18 to 35.

8. Selection of any particular sex is not allowed at any stage and abortion of any particular sex is also not allowed.

9. The age of a surrogate mother should not be more than 45 years.

10. Child born through surrogacy is considered as a legitimate child of the intended couple and the child has a complete right over his parental property.

11. ART done without the consent of the husband is a ground for judicial separation or divorce.

Assisted Reproductive Bill (ART Bill), 2008

This bill is the first to regulate surrogacy (commercial surrogacy) in India. This bill is based on the guidelines given by the ICMR in 2005 and also removes some of the vague guidelines (2005). This bill gives the National Advisory Board powers to make provisions relating to surrogacy and regulate it. It restricts the surrogate mother for donating her own oocyte, that is, traditional surrogacy, because in this, the surrogate mother is also the genetic mother of the child and creates a lot of disorder and confusing situation and it needs a straight forward law



to regulate it. The couple, whether foreigners or NRI's, has to appoint a guardian for a surrogate mother until the possession of the baby is taken by the couple. Additionally, if it is usually possible to carry a baby to term, no clinic should consider conception by surrogacy (s.20 (10)). The differential impact is clear: a single male, of course, is free to conceive as and when he pleases, but a woman wishing for a child would have to demonstrate that she is incapable of bearing one. The clinics are restricted to disclosing information about surrogate mothers or potential candidates. Unmarried couples have no bar to getting children through surrogacy. Unmarried couple means a male and a female who have not been married but living together by mutual consent. This draught bill received harsh criticism, with the idea that it was only intended to create a balance between the function of motherhood and commercialization. A close analysis of the bill suggests that it is not meant to protect the rights of Surrogates and the child. Moreover, the bill restricts the couple from having a surrogacy more than once.

Law Commission Report (228th)

The 18th law commission submitted its 228th report on August 2009 on "Need for Legislation to regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy."⁴ The report emphasized on the fact that there is an urgent need for surrogacy legislation in India to protect the competing interests of the intended parents, the offspring, and the surrogate mother. Regulations based on vague and immoral

reasons are not acceptable and needful. The law commission is in favor of legalizing and practicing altruistic surrogacy and illegalizing commercial surrogacy.

Rights and obligations of the surrogate mother, the child and the intended couples:

1. The contract of surrogacy between the parties, i.e., surrogate women and the intended couple is governed by their mutual agreement which requires the consent of the surrogate mother to bear the child, the consent of her husband and also her family members. All the expenses spent by the surrogate mother on bearing the child should be paid back by the intended couple.
2. There should be financial security for the surrogate child in case of death of the intended couple or individual or divorce before delivery of the child or further refusing to accept the delivery of the child.
3. One of the intended parents should be a donor: The intended parents opted for surrogacy is required that one of them is a donor. Either a male is a sperm donor or a female is an egg donor. This is due to the reason that the love and affection with the child comes or develops due to biological connections and this also reduces the child harassment and child trafficking cases.
4. In case of a single individual or divorced woman, he needs to be a donor to avail the benefit of surrogacy, otherwise adoption of a child is the best alternative.
5. Legitimacy of the children: The child born through surrogacy is presumed to be the

⁴ 228th Report of the Law Commission of India, Need For Legislation to Regulate Assisted Reproductive Technology Clinics as Well as Rights and Obligations of Parties to a Surrogacy.



legitimate child of the commissioned parent/s.

6. Sex selective surrogacy: Similar to guidelines given in 2005 by ICMR on surrogacy, reiterated by the law commission that sex selective surrogacy is not permissible.

7. Privacy of parties: The information related to the surrogate mother and the donor should not be disclosed.

8. Birth certificate of the child: The name of the commissioned parents should be registered on the birth certificate of the child.

9. Insurance of surrogate mother: There should be a provision in the surrogacy contract related to the coverage of the life insurance of the surrogate mother.

10. Abortion cases: Only the Medical Termination of Pregnancy Act 1971 should be taken into consideration in abortion cases.

Assisted Reproductive Technique (ART) Draft Bill, 2010

The ART BILL 2008 was remained pending with the government of India for a long time and there were only ICMR 2005 guidelines for regulating surrogacy. To overcome the demand and increasing cases of surrogacy, the government of India revised the “ART BILL 2008”.

Revised features of the 2010 bill are as follows:

1. Age of the parties: The age limit for a surrogate is between 21 to 35 years and should not indulge in the surrogacy if she already possesses more than 5 pregnancies, including her own children.

2. Medical examination of surrogate women: The surrogate women shall be examined with

proper facilities for sexually transmitted disease or any other hazardous disease which is dangerous or life threatening for child.

3. Who is surrogate mother?

According to this bill, any woman on her own will act as a surrogate mother.

4. Maximum three embryo transfers: If there is a failure of embryo transfer for first time, then the surrogate another on their own desire by mutually agreeing with other party on financial condition but embryo transfer cannot be more than three times for same couple.

5. Legally bound to accept child: The intended couple in the agreement is legally bound to accept the custody of the children irrespective of any disability or abnormality in the child and denial of custody will amount to an offence.

6. The consent of surrogate mother and the husband: The consent of the husband of the surrogate is necessary for surrogacy in case the surrogate is married.

7. It is the duty of the surrogate women not to consider her in an activity that is harmful for foetus during pregnancy or affects the child after delivery until the child is handed over to the agreed party.

8. Status of the child: The child born is considered legitimate and if the intended parents are unmarried, then the child is also considered as legitimate.

If foreign couples opt for surrogacy and the child is born in India, then the child is not considered as an Indian citizen.

This Bill also laid down punishment and all offences under this bill are cognizable. ART



Bill 2013 is the revised version of ART bill, 2010.

The Surrogacy Bill, 2014

This bill was introduced by a Member of Parliament from Gujarat state. This bill is closely related to surrogacy agreements. This bill allows gay couples to use surrogates after same-sex relationships are legalized in India. Until 2016, various guidelines and bills permitted commercial surrogacy, but in 2016 with the coming of the Surrogacy (Regulation) Bill prohibited commercial surrogacy in India. **SURROGACY REGULATION BILL 2016** was introduced in the parliament but lapsed because of the adjournment of the Parliament. This bill allows only heterosexual Indian married couples who suffered at least five years from infertility to have a child from surrogacy. It permits only altruistic surrogacy and prohibits commercial surrogacy. In 2019, this bill was introduced again in the Parliament. The 2019 bill was referred to the select committee and was passed by the Rajya Sabha in December 2021.

Surrogacy Regulation Act, 2021

This Act is the first in India which regulates surrogacy and has binding effects. From 2002 to 2021 there was no law which controlled or kept a strict watch on surrogacy matters and related issues. The Act of 2021 prohibits commercial surrogacy and allows altruistic surrogacy. This act defines altruistic surrogacy as the ‘surrogacy in which no charges, expenses, fees, remuneration or monetary incentive of whatever nature, except the medical insurance coverage for the surrogate mother, are given to the surrogate

mother or her dependents or her representative.’⁵ According to Section 4 of this bill, any women can act as a surrogate mother on her own will as it is not mandated that only close relatives of the couple can act as surrogate mother.

Effect of the ‘Ban on Commercial Surrogacy’ on Women

As we all know, India is still a developing country and the problem of unemployment is very intense and the illiteracy rate is also very high. There is insecurity of food among poor people. Women, on the other hand, take commercial surrogacy as a means of livelihood and a good source of income. Many women support their families, children and dependent parents by practicing surrogacy as a means of generating income to manage economic expenses just like any other ordinary profession. Women, because of surrogacy as a ‘profession’, have been able to repay the debt of their family and live a dignified life.

Role of Judicial Decisions in the Evolution of ‘Commercial Surrogacy’ in India

In the case of Baby Manji Yamada v. Union of India⁶, the Supreme Court of India has taken a dynamic approach towards surrogacy and has defined traditional, altruistic, gestational and commercial types of surrogacies. Surrogacy may be opted by the single female who is fertile though she is unwilling or pregnancy. The Court also said that surrogacy may be for a single male or male homosexual couple. It was examined that court has taken a liberal view on surrogacy. Another case relating to surrogacy

⁵ THE SURROGACY (REGULATION) ACT, 2021

⁶ Baby Manji Yamada v. Union of India & Anr, Writ Petition (C) NO. 369 OF 2008



is *K. Kalaiselvi v. Chennai Port Trust*⁷; in this case, the question was whether a woman is entitled to maternity leave if she gets her children through surrogacy. The court held that women are entitled to get maternity leave if they take their child through surrogacy. It has been seen that women who have a child through surrogacy have all the rights and liabilities which a natural mother has gotten towards her children.

One more case is *Justice K.S. Puttaswamy v. Union of India*⁸. In this case it was held that the certificate of infertility produced or shown as a requirement for taking the benefit of surrogacy is violative of the right to privacy, a fundamental right. The court in various judgments reiterated that article 21 includes women's right to produce children, continue or discontinue pregnancy, and adopt preventive methods for pregnancy. It is a woman's own body and she has a right of choice and no one can curtail this right by any means.

In the case of *Suchita Srivastava v. Chandigarh Administration*⁹ the Supreme Court, in a three-Judge Bench commanded by the Honorable Chief Justice of India, held that woman's right to make reproductive choices is an integral part of personal liberty in the ambit of Article 21 of the Indian Constitution, and it is highly important to recognize that reproductive choices could be exercised only by the women to procreate as well as refrain herself from procreation. However, cases relating to pregnant women, the life of child should also be taken into consideration and at this stage; the termination of pregnancy is governed only

with accordance to Medical Termination of Pregnancy Act, 1971.

Conclusion

At present, commercial surrogacy is completely illegal and altruistic surrogacy takes new dimensions to fulfill the needs of the infertile couple. Till 2021 commercial surrogacy had been practicing in a drastic speed. The guidelines issued in 2005 by the ICMR have been altered, modified and new provisions have been added in the form of bills and have finally taken the shape of the Act. Although, complete ban on commercial surrogacy led to the violation of the rights of women, as it is the basic right of every woman to take decisions on her reproductive matters. Alternatively, strict regulations or rules regarding the conduct of commercial surrogacy can be introduced instead of blanket ban on it. There is also a limitation that only once in the lifetime; women can act as a surrogate. This goes against the personal liberty of the women. A bigger and liberal perspective on 'surrogacy' is needed to be encouraged which protects the reproductive choices of the women and does not have any possibility of illegal consequences arising out of it.

⁷ *Chennai Port Trust*(2013) 3 Mad LJ 493

⁸ (2019) 1 SCC 1

⁹ AIR 2010 SC 235