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SURROGACY: LEGAL AND **ETHICAL ISSUES**

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ABSTRACT

The desire of the infertile couple to have a child of their own has led to the concept of surrogacy. Surrogacy is an arrangement where a woman who is, or is to become, pregnant agrees permanently to surrender the child (ren) born of that pregnancy to another person or couple (the desired parents). It involves conflict of various interests and would have an inscrutable impact on the primary unit of society viz. family. The present paper focuses particularly on the surrogate, while also discussing some issues relating to children born as a result of such arrangements. The author of the present paper will also try to find out the various issues (legal and ethical) involved in surrogacy contracts in the light of various judicial pronouncements. The paper would also be an analysis of the currently existing legal framework for surrogacy in India. In the end, the author will also give some suggestions in order to regulate the market of surrogacy both at the domestic and international levels.

Keywords- Surrogacy, ethical, infertile, legislation, couple

1. INTRODUCTION

The desire of infertile couple to have a child of their own has inter alia led to the concept of surrogacy. It has its own welcomes and flip side. It has given rise to many legal and ethical issues. These issues vary from jurisdiction to jurisdiction. In this research paper an attempt is made to analyze the legal and ethical issues surrounding surrogacy in some foreign jurisdiction and India.

1.1 Meaning of Surrogacy:

“The word surrogate is derived from a Latin word “surrogatus” which means substitute.”¹ It implies an arrangement where a woman who is, or is to become, pregnant agrees permanently to surrender the child (ren) born of that pregnancy to another person or couple (the desire parents).

“Surrogacy is an “arrangement in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, in which neither of the gametes belong to her or her husband, with the intention of carrying it to term and handing over the child to the person or persons for whom she is acting as surrogate; and a „surrogate mother“ is a woman who agrees to have an embryo generated from the sperm of a man who is not her husband, and the Oocyte for another woman implanted in her to carry the pregnancy to full term and deliver the child to its biological parents(s)”²

“Surrogacy’ has also been defined in the following manner: a contractual undertaking whereby the natural or surrogate mother, for a fee, agrees to conceive a child through artificial insemination with the sperm of the natural father, to bear and deliver the child to the natural father, and to terminate all of her parental rights subsequent to the child's birth.”³

¹ *Surrogacy from a feminist perspective* by Malini Karkal, published in Indian Journal of Medical Science (IJME), Oct.-Dec. 1997 – 5(4), link; <http://www.Issuesinmedicalethics.org/054mi15.html>. Also in *Nelson Hilde Lindemann, Nelson James Lindemann: Cutting motherhood in two: some suspicions concerning surrogacy. In: Holmes Helen Bequaert, Purdy Laura (Eds.): Feminist perspectives in medical ethics. New York: Hypatia Inc., 1992.*

² The Assisted Reproductive Technologies (Regulation) Bill-2014, Indian Council of Medical Research (ICMR), Ministry of Health & Family Welfare, Govt. of India, pg. 4 (aa).

³ American Law Reports, *Validity and Construction of Surrogate Parenting Agreement*, 77 A.L.R. 4 70. (1989) see also *Warnock Report of the Committee of Inquiry into Human Fertilisation and Embryology_1984* which defined surrogacy as the practice whereby one woman carries a child for another with the intention that the child should be handed over after birth. It implies a contract between a woman known as surrogate mother who undertakes to conceive and deliver a child on behalf of the intending parents styled as commissioning parents and handover the child after delivery to the latter

1.2 Types of Surrogacy

As per the Supreme Court judgment of *Baby Manji Yamda vs Union of India & other*⁴, surrogacy can be categorized in the following types:

- 1) “Traditional surrogacy is an arrangement where the surrogate is pregnant with her own biological child, but this child was conceived with the intention of relinquishing the child to be raised by others; by the biological father and possibly his spouse or partner, either male or female. The child may be conceived via home artificial insemination using fresh or frozen sperm or impregnated via IUI (Intrauterine Insemination), or ICI (Intra Cervical Insemination) which is performed at a fertility clinic.
- 2) Gestational Surrogacy is an arrangement where the surrogate becomes pregnant via embryo transfer with a child of which she is not biological mother. She may have made an arrangement to relinquish it to the biological mother or father to raise, or to a parent who is themselves unrelated to the child (e.g. because the child was conceived using egg donation, sperm donation or is the result of a donated embryo). The surrogate mother may call the gestational carrier.
- 3) Altruistic surrogacy is an arrangement where the surrogate receives no financial reward for her pregnancy or the relinquishment of the child (although usually all expenses related to the pregnancy and birth are paid by the intended parents such as medical expenses, maternity clothing, and other related expenses).
- 4) Commercial surrogacy is an arrangement where which a gestational carrier is paid to carry a child to maturity in her womb and is usually resorted to by well off infertile couples who can afford the cost involved or people who save and borrow in order to complete their dream of being parents. This medical procedure is legal in several countries including in India where due to excellent medical infrastructure, high international demand and ready availability of poor surrogates it is reaching industry proportions. Commercial surrogacy is sometimes referred to by the emotionally charged and potentially offensive terms "wombs for rent", "outsourced pregnancies" or baby farms.”⁵

1.3 Surrogacy Contract

India at present has no specific legislation for regulating the business of surrogacy. It is governed by the contract entered between the surrogate mother and intended parents. As contemplated in the Indian Contract Act 1872, all agreements are contracts, if they are made by free consent of parties competent

⁴ AIR2009 SC 84

⁵ Supra note 4

to contract, for a lawful consideration and with a lawful object unless they are expressly declared to be void.⁶ “A surrogacy agreement that satisfies the above conditions is an enforceable contract and hence, it can be the subject of a civil suit before a civil court for adjudication of all disputes relating to the surrogacy agreement and for a declaration / injunction as to the relief prayed for.⁷ It is obvious from the above provision that the surrogate mother and the commissioning parents must have attained the age of majority according to the law to which they are subject and be of sound mind. The consent of the above mentioned parties must be free that otherwise it vitiates the validity of the contract rendering an option to the party whose consent is not free to rescind the contract. Consideration may be pecuniary or otherwise. Detriment to the surrogate mother in carrying the pregnancy to term or benefit to any individual or commissioning parents being blessed with a child, is a valid consideration.”⁸

2. JUDICIAL RESPONSE TO SURROGACY IN INDIA

The judicial response is highly encouraging for surrogacy contract. Commercial surrogacy has also been affirmed by Supreme Court. As far as the legality of the concept of surrogacy is concerned it would be pertinent to mention that **Article 16.1 of the Universal Declaration of Human Rights 1948** says, inter alia, that “*men and women of full age without any limitation due to race, nationality or religion have the right to marry and found a family*”. The Judiciary in India too has recognized the reproductive right of humans as a basic right. For instance, in ***B. K. Parthasarathi v. Government of Andhra Pradesh***⁹, the Andhra Pradesh High Court upheld “the right of reproductive autonomy” of an individual as a facet of his “right to privacy” and agreed with the decision of the US Supreme Court in ***Jack T. Skinner v. State of Oklahoma***¹⁰, which characterised the right to reproduce as “one of the basic civil rights of man”. Even in ***Javed v. State of Haryana***¹¹, though the Supreme Court upheld the two living children norm to debar a person from contesting a Panchayati Raj election it refrained from stating that the right to procreation is not a basic human right.

⁶ Section 10 Indian Contract Act

⁷ See section 9 Civil Procedure Code 1908

⁸ Venugopal B. S. *Law And Surrogacy: A Critical Analysis Of Indian Experience*, Indian Streams Research Journal, Volume-3, Issue-6, July-2013

⁹ AIR 2000 A. P. 156

¹⁰ 316 US 535

¹¹ (2003) 8 SCC 369

In *Suchita Srivastava v. Chandigarh Admn.*,¹² the Supreme Court held: “There is no doubt that a woman’s right to make reproductive choices is also a dimension of “personal liberty” as understood under Article 21 of the Constitution of India. It is important to recognize that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman’s right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman’s right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods. Furthermore, women are also free to choose birth control methods such as undergoing sterilization procedures. Taken to their logical conclusion, reproductive rights include a woman’s entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children. However, in the case of pregnant women there is also a “compelling State interest” in protecting the life of the prospective child. Therefore, the termination of a pregnancy is only permitted when the conditions specified in the applicable statute have been fulfilled. Hence, the provisions of the MTP Act, 1971 can also be viewed as reasonable restrictions that have been placed on the exercise of reproductive choices.

Now, if reproductive right gets constitutional protection, surrogacy which allows infertile couple to exercise that right also gets the same constitutional protection. However, jurisdictions in various countries have held different views regarding the legalization of surrogacy.

Surrogacy is not new to India. However, before *Baby Manji Yamada v Union of India*¹³, Indian courts had not faced a case relating to surrogacy (a quick search shows that none are reported) and it was not an oft-discussed topic. While prevailing, the various facets of surrogacy had not yet been so strongly debated and examined against the Indian legal and social realities.

In *Baby Manji Yamada V Union of India*¹⁴, Supreme Court of India has given recognition to the concept commercial surrogacy. In this case a Japanese couple, Mr. Ikufumi Yamada and his wife Yuki Yamada entered into a surrogacy arrangement with a woman by name Mrs. Mehta, a resident of Anand, in the State of Gujarat. An embryo created by using the sperm of Yamada and egg of a

¹² (2009) 9 SCC 1

¹³ AIR 2009 SC 84

¹⁴ Ibid

donor was implanted into the womb of Mrs. Mehta. As mentioned in the agreement Mrs. Mehta for her services received a house worth Rs. 3,25,000/- a lump sum payment of Rs. 50,000/- and a monthly payment of Rs. 5,000/- during pregnancy. There was also a clause in the agreement which states that if the couple were to get separated, the husband (Yamada) would be responsible for the upbringing of the child. After the implantation of the embryo, Yamada left to Japan. Just one month before baby Manji was born, Yamada couple got separated by a decree of divorce. Subsequently, Manji was born in a private hospital at Ahmadabad. As Yamada's ex wife refused to go with him to take custody of the child, he alone flew to India. But the Japanese embassy in India refused to grant Manji a Japanese passport because of the reason that the Japanese Civil Code does not recognize surrogacy born children and it recognizes only a woman who has given birth to the child as the mother. Though Manji had a biological father in the form of Yamada, the question was who should be her mother. The woman who has given birth to her was an Indian woman and she was only a gestational carrier. The egg donor was unidentified and she was the biological mother who never intended to be a mother. Mrs. Yamada cannot be considered as the intending mother because of the special clause as mentioned above in the surrogacy agreement. There is no law in India to regulate surrogacy. The infertility clinic where the embryo was implanted issued a certificate stating that Yamada was the genetic father. Anand Municipality refused to issue a birth certificate because of the rule insisting mentioning of names of both father and mother. The hospital where Manji was born was not prepared to hand over the custody to the genetic father. Eventually the legal battle could witness a truce, when the Japanese Embassy issued a one year visa to the 3 months old baby Manji. Above all the decision is worth mentioning for the reason that commercial surrogacy received judicial recognition. In this regard Supreme Court observed:

“Commercial surrogacy is a form of surrogacy in which a gestational carrier is paid to carry a child to maturity in her womb and is usually resorted to by well off infertile couples who can afford the cost involved or people who save and borrow in order to complete their dream of being parents. This medical procedure is legal in many countries including in India where due to excellent medical infrastructure, high international demand and ready availability of poor surrogates it is reaching industry proportions. Commercial surrogacy is sometimes referred to by the emotionally charged and potentially offensive terms 'wombs for rent, outsourced pregnancies' or 'baby farms.’”

3. LEGAL AND ETHICAL DEBATE SURROUNDING SURROGACY

The entire construction of law does not rest on the ethical premises. But it should be acknowledged that certain ethical considerations cannot be divided from the sphere of law. Surrogacy has given rise to very complex ethical issues of greater dimension. It is inevitable for the courts and legislatures struggle with these issues to lay down a comprehensive and sensitive legal regime pertaining to surrogacy. The ethical issues can be discussed under the following heads.

Commodification arguments are related to commercial surrogacy. Indeed, one of the strongest and most emotive arguments against permitting commercial surrogacy arrangements is that they create a market in children (result in child selling). According to this argument, the baby or child becomes a product to be bought and sold, reducing it to a commodity. Applying the argument to women, it is claimed that a surrogate's reproductive labour becomes the commodity. While commodification and exploitation often go hand in hand, this is not necessarily always the case. Accordingly, it might be useful to first clarify the plain English meaning of the two terms.

According to the Oxford Dictionary, to *commodify* or *commoditize* something is to 'turn [it] into or treat it as a mere commodity.'¹⁵ The word *commodity* is defined as 'a raw material or primary agricultural product that can be bought and sold, such as copper or coffee' or 'a useful or valuable thing'.¹⁶

It has also been referred to as an 'article of trade'.¹⁷ The word *exploit*, on the other hand, has two ordinary meanings. First, to exploit a resource means to 'make full use of and derive benefit from [it]'. However, exploit can also mean to 'make use of (a situation) in a way considered unfair or underhand'¹⁸ or to 'benefit unfairly from the work of (someone), typically by overworking or underpaying them'.¹⁹ It is the second meaning of *exploit* which is relevant where it concerns surrogacy arrangements. Thus, in this context, *exploitation* is 'the action or fact of treating someone unfairly in

¹⁵ <http://oxforddictionaries.com> (last accessed on 5 April 2022)

¹⁶ <http://oxforddictionaries.com> (last accessed on 5 April 2022). Water is given as an example of a precious commodity

¹⁷ The Australian Pocket Oxford Dictionary, first Australian edition (1976).

¹⁸ Such as, eg, a company exploiting a legal loophole, <http://oxforddictionaries.com> (last accessed on 10 July 2022)

¹⁹ For example, women exploited in the workplace, <http://oxforddictionaries.com> (last accessed on 30 July 2022).

3.1 Commodification of the child

It is said that the position of surrogacy born children are pathetically relegated to property which can be sold and purchased in open markets. The whole biological process of pregnancy and reproduction is regarded as baby farming or a baby manufacturing and selling activity, wombs for lease or rent a womb. There are many instances where a baby born with abnormalities was rejected by the commissioning parents, like a commodity with a defect which gets rejected by a potential customer.

3.2 Commodification of Women

Surrogacy makes women breeder machines demeaning the mother – child relationship. “In India a woman is respected as a wife only if she is mother of a child, so that her husband's masculinity and sexual potency is proved and the lineage continues. Married women may be compelled by the in-laws for economic reasons or it may be a suo-moto decision to see a better life ahead. The supporters of surrogacy profess that surrogacy signifies exercise of reproductive right by a woman as a part of her freedom to contract. Consequently it promotes the constitutional right of woman to privacy and procreation by conferring economic autonomy to her. It is true that surrogacy upholds the constitutional right of procreation of an intending or commissioning woman. But it is a myth that it endows economic independence to the surrogate as surrogacy cannot be made perennial source of livelihood.”²¹

²⁰ <http://oxforddictionaries.com> (last accessed on 30 July 2022). Here, the example given is the exploitation of migrant workers.

²¹ Christine L. Kerian , *Surrogacy: A Last Resort Alternative for Infertile Women or a Commodification of Women's Bodies and Children*, 12 Wis. Women's L.J. 113 (1997)

4. CONCLUSION

From the above discussion it can be said that the right to reproduce is a fundamental right. Surrogacy is the only way to overcome both biological and social infertility. It provides medically infertile couples as well as socially infertile individuals who are unwilling to get married with a chance to have a child of their own. Moreover, the purpose behind legalization of surrogacy is to protect the surrogate's interests as well as those of the intended parents (infertile couple) and the baby born after the surrogacy.

It is also asserted that not allowing same sex parents, single parents and live in couple to enter into such agreements may be correct when viewed from the context of the social conditions prevalent in India. As highlighted earlier in this paper, it is necessary to provide the right conditions for the growth and development to a child, such conditions can only be provided in case the child is handed over to normal heterosexual couples. There is also need to provide for a post- surrogacy enforcement mechanism in the bill itself, especially when the parents are foreigners.

Further proper measures should be taken in order to protect the interest of child and the legislation should in its truest sense positively deal with the surrogacy arrangements, so that the interest of either party cannot be compromised.

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