

SURROGACY -A NEW HOPE FOR NEW ERA

Mehak Gupta*

*Student, B.A.LL.B., (5th semester)

G.H.G Institute of Law for Women, Sidhwan Khurd (Ludhiana).

ABSTRACT

Development, whether it is human development or country development, is linked to the proper growth and development of the technology in many ways. All the great scientific discoveries and technological achievement in our country have improve the Indian economic status. Several advances in medicine, social customs and legalities have led to the development of modern surrogacy. With this the childless couples are prone to the process of surrogate arrangement. Literally, the term surrogacy means a substitute, a state of being a surrogate. Now a days it is a well known method of reproduction whereby a woman carries and gives birth to a baby for the couple who intended to have a child. Surrogacy uses unnatural ways to produce younglings. Surrogacy uses both test tube technology as well scientific procedures. India's first surrogate baby was delivered on June 23rd; 1994. *India* has become a popular destination of fertility tourism. In India, *Gujarat* is emerging as hub of rent-a-womb industry in India. But *the Surrogacy [regulation] bill 2016 would ban the commercial surrogacy and allows only altruistic surrogacy*. Currently, surrogacy agreement is being regulated by ICMR [Indian Council of Medical Research] guidelines, 2015. Surrogacy is proved as the scientific boon for some unblessed couples.

KEY WORDS: Surrogacy, Commercial Surrogacy, Background, Legal Position in India and in other countries, ICMR guidelines, Surrogacy [Regulation] Bill 2016, Judicial Approach.

INTRODUCTION

Development, whether it is human development or country development, is linked to the proper growth and development of the technology in many ways. Technological advancement happens when there become new inventions in the science by highly skilled and professional scientists. Technology, science and

development are equally proportional to each other.¹

Development in the science and technology is very necessary for the people of any nation to go hand in hand together by the people of other countries. Technology development in any field enhances the economy of any nation. In order to improve the power of science and technology in

India, Indian government has made Council of Scientific and Industrial Research in the year 1942 and Board of scientific and industrial research in the year 1940. In order to emphasize the growth of science and technology in the country, Indian government has established a chain of national laboratories and research institute in various regions.

High level of scientific and technological advancement in the field of medicine has made easy the treatment of various lethal diseases which was earlier not possible. It has helped a lot to the doctors to find effective ways to cure diseases through medicine or operation as well as research vaccines to cure diseases such as cancer, AIDS, Diabetes, Alzheimer's leukaemia etc.

All the great scientific discoveries and technological achievement in our country have improved the Indian economic status and have created many new ways to the new generations to grow in the technologically advanced environment.²

So, several advances in medicine, social customs and legalities have led to the development of modern surrogacy. With this the childless couples are prone to the process of surrogate arrangement.

Surrogacy arrangement is motivated by a desire for genetically related child and the disincentive arising out of prolix adoption difficulty in finding suitable child for adoption. This is the main reason for diversion towards this arrangement.

Here the question arises what is surrogacy? How it helps to the Indian economic status. Literally the term surrogacy means '*a substitute, a state of being a surrogate*'. Now a days it is a well known method of reproduction whereby a woman carries and gives birth to a baby for

the couple who intended to have a child. . That another woman may be the child or gestational carrier. Simply, surrogate mother contributes with her womb. Surrogacy may be made independently. Surrogate may be a relative, a friend or any stranger. Agencies often help to manage the complex medical and legal aspects involved.³

SCIENCE BEHIND SURROGACY⁴

The science behind surrogacy is that a 'test tube' baby is created in a laboratory, then inserted into the womb of a surrogate mother. Surrogacy uses unnatural ways to produce younglings. Surrogacy uses both test tube technology as well scientific procedures to insert the fertilized egg into the uterus of the surrogate mother. This clearly shows that surrogacy is a reproductive technology. This is because surrogacy does not use or little of natural ways to conceive a child.³

BACKGROUND OF SURROGACY⁵

The concept of surrogacy is not new and has existed in the world since ages. In 1930s, U.S, pharmaceutical companies started the mass production of oestrogen. For the first time in 1944, Harvard Medical professor fertilized the human ova outside the uterus. In 1953, cryopreservation of sperm was performed successfully. A commercial sperm bank was first opened in New York in 1971, which turned into profitable business throughout the world.

In 1980, Noel Keane a lawyer from Michigan prepared the first surrogacy contract. The first successful gestational surrogate pregnancy in a woman was carried out in 1985.

Surrogate mother in 1986 in United States and in 1990 in California refused to give the custody of child against the surrogacy agreement. But in both the cases, the court upheld the parental rights

of the couple. Those verdicts legally defined the true mother as the woman who intends to create and raise a child.

India's first surrogate baby was delivered on June 23rd, 1994.

TYOLOGY OF SURROGACY

1. Traditional Surrogacy- Traditional surrogacy is also known as the partial, genetic or straight surrogacy⁶. When the resulting child is genetically related to the surrogate but this child should conceive with the intention of relinquishing the child to the intended parents is known as traditional surrogacy.

The child may be conceived via sexual intercourse, home artificial insemination using frozen sperm [performed at a fertility clinic⁷

2. Gestational Surrogacy - When the resulting child is unrelated to the surrogate is gestational, Full or Host surrogacy. Surrogate mother is not the biological mother of the child because the child is conceived by using egg donation or is the result of donated embryo. The surrogate mother may be called the gestational carrier.

3. Altruistic Surrogacy- It is a situation where the surrogate receives no financial reward for her pregnancy or the relinquishment of the child. Here the surrogate mother may be a relative, a friend, or any stranger.

4. Commercial Surrogacy- Most of the times commercial surrogacy is termed as "Wombs for rent" or "Baby farms" because surrogate is paid to a child to maturity in her womb.

Surrogate is given compensation higher than the medical reimbursement and other reasonable

expenses; otherwise it is referred to as altruistic or non-commercial surrogacy.⁸

India is emerging as a hub for commercial surrogacy due to ready availability of poor surrogates.

HUB OF SURROGACY

Since many nations do not recognize surrogacy agreements, *India* has become a popular destination of fertility tourism. An added attraction is the low cost of the whole procedure in India which is much less compared to other countries also the legal procedure is not that complicated.⁹

Due to last decades, India has become a popular destination for people looking for surrogate. It acts as the leader in International surrogacy and a destination in surrogacy related fertility tourism. Due to the ready availability of poor surrogates, it is reaching industry proportion.

In India, *Gujarat* is emerging as hub of rent-a-womb industry in India.

LEGAL POSITION OF SURROGACY IN OTHER COUNTRIES

Surrogacy is legal in several countries due to the high international demands and as it is reaching high industrial proportions. But at the same time not all the countries encourage surrogacy. Ethical and legal implications have been a deterrent for its worldwide acceptance. Surrogacy laws and costs differ significantly across jurisdictions in various nations.

- **Australia** - in Australia, the surrogate mother is deemed to be the legal mother of the child and surrogacy arrangement relinquishing the child to the other is void.¹⁰
- **France** - in France, any surrogacy arrangement whether commercial or altruistic is illegal

and banned. The highest court announced that “the human body is not lent out, is not rented out, and is not sold.”¹¹

- **Israel**-in Israel, Gestational surrogacy is legal. The state controls the surrogacy by approving the contract directly.
- **United Kingdom**- commercial surrogacy arrangement is illegal in U.K. Many legal hurdles exist.¹²
- **Canada and Newzeland**- here the commercial surrogacy is held to be illegal but altruistic surrogacy arrangement is allowed.
- **United States**- in U.S, rules and regulations on surrogacy differ among the states. California has legalised the commercial surrogacy while it is illegal in some states and in some others new rules and regulations are introduced.
- Although the laws in some other nations like **Japan, Netherlands, Belgium, Sweden, Spain do not support the surrogacy arrangement.** The laws in **Ukraine allow surrogacy.**

INDIAN POSITION AND JUDICIAL APPROACH TO SURROGACY IN PRESENT DAY CONTEXT

India permits commercial surrogacy to which a woman is said to carry a child to the term in her womb. Commercial surrogacy was made legal in India with the landmark judgment and later the Indian Council of Medical Research Guidelines and use of ART procedures or treatment by fertility clinics. *Now a day's renting a womb will soon be a crime in India as the new draft approved by the union cabinet has gone to another extreme. If enacted, the Surrogacy [Regulation] Bill 2016 would ban the commercial surrogacy and allows only altruistic surrogacy.* The draft of surrogacy Bill would be passed in the winter session of parliament.

The bill mandates the registration of surrogacy clinics.¹³

The proposals in the Surrogacy [Regulation] Bill 2016 are ¹⁴

- Only altruistic surrogacy permitted for married Indian couples
- The couples must be married for five years, the husband must be aged at 26, wife 23
- They must get an infertility certificate after failing to conceive for five years
- Get parentage order from district magistrate and health insurance for surrogate mother
- Sign a legal contract with the surrogate mother accepting terms of the new bill
- A close relative alone can be surrogate; single parents, the unwed and LGBT persons barred
- **Punishment:** the main provision in the bill is regarding punishment. Abandoning a child will be a crime punishable with a Rs 10-lakh fine and jail up to 10 years.

The surrogacy debate started with the **Baby Manji Yamada case**.¹⁵ Through this case Supreme Court in 2008 held that commercial surrogacy is permissible in India. In this case **baby Manji** was commissioned by Japanese parents and was born to a surrogate mother in Gujarat. The parents divorced before the baby was born. The genetic father wanted the child's custody, but Indian law barred single men from it and Japanese law didn't recognise surrogacy. The court finally granted custody to the baby's grandmother.

In the case of **Balaz v. Union of India**, the honourable supreme court of India has given the verdict that the citizenship of the child born through this process will have the citizenship of its surrogate mother.

It is India's first attempt at regulating the surrogacy industry which was earlier guided by National Guidelines for Accreditation, Supervision and Regulation of ART clinics in India, 2005, and subsequently amended in 2008, 2010 and 2013.

Currently, surrogacy agreement is being regulated by ICMR [Indian Council of Medical Research] Guidelines, 2015.

The Assisted Reproductive Technologies [Regulation] Bill, 2013 was tabled in the parliament but not passed it is yet to get parliaments nod.

The bill states that the no woman less than 21 or over 35 years of age shall be eligible to act as the surrogate mother. No woman shall act as a surrogate for more than 5 successful live births in her life including of her own children.¹⁶

Medical and legal experts advise that the surrogate mother should have children of her own so that it is easier for her to give up the child she is wearing for the intended parents.

Under the Maternity Benefit Act a provision has to be made for 12 week leave to a 'commissioning mother' who uses surrogate to bear a child.¹⁷

VIEWS OF SURROGATES REGARDING THE NEW BILL¹⁸

According to surrogates, this stamp on bill banning commercial surrogacy "is foul play". There is nothing wrong in this. They believe they are doing a "noble job".

The couple of the child a surrogate carrying has been trying to have kids for 15years, 20 years or more.

Another surrogate, 'X', said she did this for her child's future. "What is wrong in this?" 'X' has a seven-year-old biological son who she hopes to

send to a good school and away from the rigours of city life. "After this delivery and sending my child to hostel, if my husband and I work, we will be able to ensure that my child becomes a doctor and escapes this life of struggle", she explains. "After all, we have no pension or government security in our old age. Who knows if our children will take care of us? It's only prudent to save for the future. Motherhood and the ability to have children is a gift that nature has given to lucky women..... I don't think there is anything wrong in 'gifting' and 'sharing' this divine power and engaging in something that is mutually beneficially to all the parties involved," she adds.

Also poor mothers may make ideal surrogate mothers as due to their financial need, they are more likely to alienate themselves from the children.

GREY AREA

Commercial surrogacy is largely an unregulated **GREY AREA** that has been allowed in India. So while drafting an agreement on surrogacy the following points are to be taken care of.

Details about the surrogate mother

- Type of surrogacy is to be mentioned.
- The question of motherhood must be finalized.
- The agreement should mention about paternity.
- Each and every clauses of the agreement should not contravene the provisions of Indian law in force.
- Specifying the jurisdiction of the court in case of future disputes arises.
- The intention of the parties should be clearly spelt out in the agreement.

- Compensation clause should be drafted.

There should be clear and open communication between the parties. Risk factors should be minimized by having stable mental and physical health, a positive life situation and a supportive partner. Discussion between all parties regarding fair and reasonable payment of the expenses of the surrogate [including what expenses will be covered]. The agreement will clearly state the surrogate does not intend on parenting any resulting children and does not wish to have physical or legal custody of any resulting child. The agreement will also define the rights and responsibilities of assisted parents. *These factors contribute to a positive outcome from a surrogacy arrangement.*¹⁹

CONCLUDING REMARKS AND SOME SUGGESTIONS

As the medical science is developing day by day people in India are practising surrogacy when several children are orphans. Surrogacy is proved as the scientific boon for some unblessed couples using borrowed eggs, sperms or womb for child bearing. But the proposed bill deals an unkind blow to the infertile couples. It would hard for needy couples to find a relative who has one healthy child and is willing to bear another one whom she can't claim, as her own. Adoption of child in India is a complicated and lengthy procedure for those childless couples who want to give a home to these children. Even 70 years of Independence have not given a comprehensive adoption laws.

There is strong need to modify and to make the complex adoption procedure simple for all. Moreover it is not only the duty of unblessed couples to adopt children; blessed couples should also come forward. Surrogacy arrangement should be encouraged. A legal guardian should

be appointed to manage the whole procedure of surrogacy arrangement. This all can be done through framing of laws and by implementing them which will cover the present loopholes and grey area and also the protection of rights of commissioning parents, surrogate mother and child. The new bill tends to stigmatise a large section of society and ignores the changing ground reality. Steps should be taken to regulate the commercial surrogacy instead of banning it as imposing a ban is a simple option; regulating the ban is the real challenge.²⁰ If commercial surrogacy would prevail then truly a surrogacy would be A NEW HOPE FOR NEW ERA.

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