

LEGAL RAMIFICATIONS OF REGULATING SURROGACY CONTRACTS UNDER INDIAN CONTRACT ACT

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Abstract: Commissioning parents and surrogate mothers enters into Surrogacy agreements, however as under Section 23 of the Indian Contract Act, their enforceability is questionable. Commercial surrogacy is legal in India. In *Jan Balaz v. Anand Municipality*, the court recognized the validity and enforceability of these contracts, however the matter is up for appeal at the Supreme Court. If such contracts were to be enforceable under the Contract Act, there would be a number of complications such as voidability under sections 19 and 19A if the element of forceful consent is established. If the agreement is voidable, the commissioning parents would lose the right to the child and the surrogate can abort the child depending upon the time since impregnation. The Artificial Reproductive Techniques Bill and The Surrogacy (Regulation) Bill do not address the issues of surrogacy contracts and their enforceability. Thus, there is a need to recognize and regulate commercial surrogacy under a new Law.

Keywords: Altruistic Surrogacy, Free Consent, In-vitro Fertilization, Public Policy, Voidability.

Introduction: One of the most joyful experiences among many others in someone's life is having a child and for someone incapable of having a child, surrogacy through Assisted Reproductive Technology [The Assisted Reproductive Technology (Regulation) Bill, 2014, Section 2(c) - "*assisted reproductive tech-nology*", with its grammatical variations and cognate expressions, means all techniques that attempt to obtain a pregnancy by handling or manipulating the sperm or the oocyte outside the human body and transfer-ring the gamete or the embryo into the reproductive tract of a woman] is preferable to adoption because of the genetic link between the parents and child born and bearing a close relation to the gestational process [1]. Surrogacy, as a substitute way to produce kids is an ancient practice. History shows how maids have been used to bear a child for the couple. In the book of Genesis, Rachel commands her husband Jacob to go consort with her maid to conceive a child[2]. The baby produced will be genetically linked with the father but not with the mother. In biblical times, coercion was used and the maids were forced to conceive babies for their masters irrespective of their willingness.

Since 2002, commercial surrogacy is permitted in India held in *Baby Manji Yamada v. Union of India & Anr* [Writ Petition (C) NO. 369 OF 2008], which is an industry with a turn over of twenty five thousand crore [reported in the 22⁸th Law Commsiion Report on Need For Legislation to Regulate Assisted Reproductive Clinics as Well as Rights and Obligations of Parties to A Surrogacy (August, 2009)]; however there is no Law regulating it. Currently, the National Guidelines for Accreditation Supervision & Regulation of ART Clinics in India promulgated by the Ministry of Health and Family Welfare, Government of India and The Indian Council of

Medical Research and National Academy of Medical Sciences in 2005 have been suggested to regulate the industry. But these suggestions are non-binding. The reason why the surrogate mother would want to enter into surrogacy arrangement maybe for commercial gain or out of affection or desire to carry a baby for the ones who are not able to carry. In India, some surrogates enter into such an arrangement out of economic oppression. There have been cases where they have been forced to do so to help support the family financially.

As far as the commissioning parents are concerned, such an arrangement has helped those couples who are not able to conceive due to medical reasons. The women who is suffering from infertility problems can help her husband have a baby which is genetically linked to him. If the women is unable to fall pregnant but can ovulate [Ovulation is when a mature egg is released from the ovary, pushed down the fallopian tube, and is available to be fertilized. Approximately every month an egg will mature within one of your ovaries] then through in-vitro fertilization, both of them can have a child which is genetically linked to them, this is known as 'Full Surrogacy' [4].

Surrogacy is practiced in two different ways. It is viewed in terms of 'Gift' or 'Contract' [5]. These views are different from each other by whether or not the intending parties exchange money and/or whether or not the intending parties bind themselves contractually. When the surrogate carries a baby for the other couple who is unable to carry their own child out of affection or desire to help them and without any economic compensation is viewed as Gift or Altruistic Surrogacy. And when the surrogate mother does it for exchange of money it's known as commercial surrogacy. Under this contractual surrogacy, unlike the altruistic surrogacy, there is no bond between the surrogate and intending party.

Each party performs its functions as per the contract laid and part away after the birth of the child. Some argue that paid surrogacy is equal to 'baby selling'. As compared to other countries, the cost of surrogacy in India is affordable thus making it a desired destination for surrogacy and entering into surrogacy contracts.

The problem is that though this market is growing surprisingly fast, the laws to regulate this market are growing notably slower. Given the number of cases that are reaching the courts regarding child citizenship and parental status arising out of cross border surrogacy arrangement, and also inadequate protection of surrogates who are getting exploited in the hands of these rich infertile couples, there's immediate need of enforceable laws. Indian courts are dealing with issues in Surrogacy contracts considering how the only law governing these arrangements is the law governing the Contracts, The Indian Contract Act, 1872.

There are many issues reported emerging out of surrogacy contracts between the commissioning parties from India itself. For example, In Bangalore, the commissioning father was threatened to pay the full amount in advance, contrary to the contract otherwise the clinic will forcefully end the agreement [3]. In 2009, Coimbatore, a surrogate mother died after giving birth to a baby, her husband forced her to become a surrogate [3]. There are many cases in India that have been found very disturbing. These women are pressurized by their family members to enter into this fertility business that leaves them behind with lot of physical pain, sufferings, excessive hormone injections and psychological brain damage.

A woman called Sheikh lost her uterus after becoming pregnant thrice. She developed health complications and lastly to save her life her uterus had to be removed. Her husband divorced her because of this [5].

There are many cases reported when these agents take advantage of these poor illiterate women. They agree to the contract without knowing what it says. They are played at the hands of agents and doctors. The surrogate signed the contract written in English without knowing the contents of it. Many a times, there are failed transfers of embryo in the uterus of a surrogate for which they are paid very less. These agents also take their commission out of that paid money. Sheikh faced multiple health problems. Her spinal cord was filled with pus after several pregnancies. Doctors after knowing also that she was bleeding in her third month didn't ask her to abort but rather ignored it knowingly it is dangerous for her health [5].

There have been cases where surrogate mothers have blackmailed the commissioning parents for additional sum of money before delivery otherwise

she will abort the baby. In another case, where the surrogate demanded an additional sum of Rs.100, 000 from the commissioning couple otherwise she will keep one of the twins she is carrying in her womb [3]. In another case, a doctor illegally issued fake certificates and incorrect birth certificates for the greed of earning more money [3]. Many a times, commissioning parents have refused to take the baby/babies born leaving them behind legal orphanage.

The main issues that demands attention is the issue of what happens to the child, the couple and the surrogate mother is the contract's validity is questioned in a court of law. There are several cases of surrogates entering into such agreements for the purpose of sustenance, under a lot of psychological pressure from their family [7].

In the case of *Jan Balaz v Anand Municipality* (No.3020, Special Civil Application, CA/6719/2008 (Gujarat), Radhakrishnan, J. observed that surrogacy contracts were valid under the Indian Contract Act, 1872. Many couples who enter into such agreements do this only because of the pressure from society and their families [6]. If such pressure is tried in the court, as per Section 15 [*'Coercion' is the committing, or threatening to commit, any act forbidden by the Indian Penal Code (45 of 1860) or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.*] and Section 16 [(1) *A contract is said to be induced by "under influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other*] which speak about contracts entered into under coercion or undue influence and Sections 19 [When consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused. A party to contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put on the position in which he would have been if the representations made had been true] and 19A [When consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused. Any such contract may be set aside either absolutely or, if the party who was entitled to avoid it has received any benefit thereunder, upon such terms and conditions as to the Court may seem just], the contracts become voidable as per the wishes of the aggrieved party. In case such a contract is declared void by the aggrieved party who can be either the parents or the surrogate mother and the surrogate mother is already pregnant, and considering the pace

at which judicial matters are decided, if the surrogate mother pregnant for longer than the twenty weeks, as per Section 3(2)(a) and Section 3(2)(b) of the Medical Termination of Pregnancy Act, 1971, she can't abort the child; or if the child has already been conceived, which of the parties is liable to take care of the child? Considering how most surrogate mothers enter into such agreements mainly to strengthen themselves economically [6], if she is liable, the child is bound to suffer. The surrogate mother and her family will also suffer economically and psychologically [11].

Section 23 of the Indian Contract Act reads: "*The consideration or object of an agreement is lawful, unless it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies, injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy. In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void*". In *Re: Baby M* case of New Jersey [109 N.J. 396 (N.J. 1988)], the court observed that commercial surrogacy is 'baby selling', and thus a breach of public policy. Once this is further analyzed, commercial surrogacy contracts would essentially be void due to the opposition to public policy, especially in cases where the surrogate mother 'donates' her ovum.

Conclusion: To address the lack of regulation, India has promulgated a legislation termed the Assisted Reproductive Technologies (Regulation) Bill 2014. The bill regulates ART clinics, embryo research, the rights of the donors, and penalties involved with the violation of the act. The bill elaborates the procedures for accreditation and supervision of

infertility clinics dealing with surrogacy, as well as the rights and duties of patients, surrogates and donor. However, the Bill fails to address the issues with surrogacy agreements and contracts.

The government passed the Surrogacy (Regulation) Bill, 2016 that imposes a blanket ban on commercial surrogacy. Economic theory suggests that bans do not actually stop the practicing of the act, in fact serves the purpose of black marketeering [8], which will indefinitely lead to the conditions of the surrogacy market being worsened, quite contrary to what the government sought to protect. The Bill requires qualifications like being married for 5 years with one of them being infertile; the surrogate must a close relative of the couple and must be married with 1 child that seem very arbitrary. It is true that a child needs responsible parents, but it is not necessary to be married to be responsible [10].

Any arbitrary action is the antithesis to equality held in *E.P. Royappa v. State of Tamil Nadu* [(1974) 4 SCC 3] and goes against the principle of Rule of Law under Article 14 of the Indian Constitution as held in *Maneka Gandhi v. Union of India* [1978 SCR (2) 621]. If the altruistic surrogate mother is a close relative to fertile commissioning parent, it will lead to a lot of genetic complications and there is no guarantee that there will be no force or coercion [1].

However, surrogacy contracts and their enforcement is not addressed even here. There is a need for a legislation to deal with due to the reasons mentioned in the paper and the Legislature should meticulously regulate these contracts and clarify the enforceability in these legislations regulating Artificial Reproductive Techniques.

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