

A WOMB FOR LEASE: AN ANALYSIS

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Abstract

It is an eternal feeling to have a child of one's own, but some couples are not able to procure child in the biological order of their own, despite having a strong desire to have a child. Hence to fulfill the dream of issueless couples the advance science has discovered the system of host mother who conceive the baby in her womb by way of artificial insemination, for the intended parents, which is known as surrogacy. Regarding surrogacy all the countries in the world are lacking to have uniformity in the legal provisions, which creates hindrances in the borderless concepts of surrogacy. In India we do not have appropriate and available legal provision which will facilitate to deal with the matter of assisted reproductive technology as well as rights and obligation of parties to a surrogacy. India is considered as a favourable destination for the foreigners to come for surrogacy. Due to the cheap rate in comparison to other foreign countries, surrogacy is increasing at galloping rate and able to attract foreigners in bulk and accordingly accumulating foreign currency. Though surrogacy is a blessing of modern science and technological advancement, however it is not free from weaknesses. Many stumbling blocks are there in the path of smooth functioning of surrogacy, such as surrogate mother, if they are poor and illiterate, maybe misled by brokers, citizenship matter of the new born baby etc., are highlighted in the paper.

Key words: *Surrogacy, artificial insemination, assisted reproductive technology*

Introduction

To have a baby after marriage is an indispensable dream for each couple. Every person has the urge to continue their family line after him by having a child. Non fulfillment of such urge led to the disturbance in the family. Under old Hindu law it was considered that the prime objective of marriage is procurement of child. The alternative in absence of one's biological child is to have a child by way of adoption from other family. But some issue less couples prefers to have their own biological child. The development of science and technology has made such preference in reality, by means of taking womb for rent. Giving the womb for lease is known as surrogacy.¹ The word surrogacy is derived from the Latin word 'surrogatus' which means substitution that is a person appointed to act in the place of another. In surrogacy, a woman bears a child in her womb with an agreement to hand over the child after successful delivery of the same to the intended parents by relinquishing her right over the baby. So it is such an instrument that can bring the smile on the face of issueless couples. The methodology applied for this paper is doctrinal. The source of data for the paper is collected from Books, Journals, Newspapers, Decided cases, materials from internet etc.

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¹ 1.Dr. Krishna Pal Malik, "Women and the Law", First Edition, Allahabad Law Agency, Haryana pp. no.359

People who do not have sufficient information about surrogacy consider it as a dirty play where immoral act has to be performed to get pregnant. But the rapid development of science and technology has converted such dirty play to blessed play, by way of assisted reproductive technology, where a woman get pregnant by artificial insemination done in health care clinic, instead of natural course. There are various means to be a surrogate mother. viz.

Traditional surrogacy

In Traditional surrogacy a surrogate mother is artificially inseminated, either by the intended father or an anonymous donor, and carries the baby until the expiry of the lease. Hence the baby is genetically related to both the surrogate mother, who provides the egg and the intended father or anonymous donor.

Gestational surrogacy

In Gestational surrogacy, an egg is removed from the intended mother or an anonymous donor and fertilized with the sperm of the intended father or anonymous donor. The fertilized egg, or embryo, is then implanted in the womb of the surrogate mother who carries the baby until delivery. Genetically, thereby the child is related to the woman who donated the egg and the intended father or the sperm donor, but not the surrogate.

Commercial surrogacy

In commercial surrogacy, the surrogate woman agrees to carry the baby only in return of monetary benefit.

Altruistic surrogacy

In altruistic surrogacy, the surrogate mother receives no financial benefit for bearing and relinquishing all kinds of rights over the child after birth. However the intended parents have to bear all the medical expenses for procuring the child by the surrogate mother. In India Dr. Nayna Patel, the director of Akansha Infertility Clinic in Anand, Gujarat, have made the effort to put Anand on the map when, in 2003, she orchestrated the surrogacy of a local woman who wanted to “lend” her womb to her U.K. based daughter². The woman gave birth to test-tube twins, her own genetic grandchildren and the event made headlines worldwide. Among the childless couple in foreign countries, the eagerness for Indian women for surrogacy is increasing speedily. There are some reasons which attract the issueless couple of foreign countries for Indian women as surrogate. Some of them are mentioned below.

² Supra, footnote 1, pg

1. In India the cost for surrogate mother is low, in comparison with other foreign countries. Besides, the availability of surrogate mother also attracts the huge number of issueless couple to India.

2. In most of the foreign countries surrogacy is banned by the Government. In 1990 China, France, Italy, Canada, Australia, Germany, banned the provision of surrogate mothers. Non availability of such alternative also compels the couple to move to India for existence of such provision.

3. Among the poverty stricken people in India it is the easiest way to make money within a short span of time. They do not want to lost the chance to be surrogate, even they are not hesitated to have a child directly by the unknown foreigner and not by artificial insemination. For them money is more attractive factor than personal sanctity as women in the life.

4. Because of non- availability of concrete law to regulate surrogacy also is a cause to attract the issueless couples from abroad to India. According to the current medical guidelines one surrogate mother can breed three foetus if the doctor allows her. So some of the people take the advantage of this kind of provision.

Legal Provision relating to surrogacy in other foreign countries

Undoubtedly, science and technology has made a great effort to bring the dream of issueless couples into reality to have one's biological child by taking womb in rent. The law relating to surrogacy varies from country to country. Some country prefers altruistic surrogacy over gestational surrogacy, whereas some country totally prohibits all forms of surrogacy. Some countries recognize the surrogate mother as the legal guardian whereas some recognized intended parents as legal guardian. Therefore there is absence of uniform surrogacy law all around the world.

In US, the first formal agreement between a couple and a surrogate mother was signed in 1976 and which was probably a voluntary one. At birth to a child born outside U.S, issuance of a U.S. Citizenship is regulated as per Sections 301 and/or 309 of Immigration and Nationality Act. The determination of citizenship to children born overseas to a U.S. parent falls within jurisdiction of the U.S. Department of State, which necessitates a U.S. citizen to have a biological connection to a child in order to transmit U.S. citizenship to the surrogated child. Merely being named as a parent on a birth certificate issued by Ukrainian authority for a child born as a result of surrogacy arrangement in Ukraine does not mean that the birth certificate will fulfill the requirements under U.S. immigration and citizenship³.

The laws in Ukrain relating to surrogacy are too favourable which supports the individuals reproductive rights. Clause 123 of the Family Code of Ukraine and Order 771 of the Health Ministry of Ukraine regulate surrogacy. The legal

³ surrogacylawsindia.com, last visited on 19th August 2016

provisions allows gestational surrogacy, sperm donation embryo, adoption etc., for which no permission is required. Child begotten legally belongs to the intending parents and the surrogate mother cannot keep the child herself.⁴

In Belgium the altruistic surrogacy is admitted whereas commercial surrogacy is considered as illegal. There are strict rules relating to surrogacy which compels the couples to seek surrogacy outside the country.⁵

In Netherland altruistic surrogacy is legal whereas commercial surrogacy is held as illegal. Though altruistic surrogacy is legal in Netherland however due to limited number of hospitals taking such matter, the couples seeks to go outside the country for the treatment.⁶

In UK, the law relating to surrogacy is too strict. They admit surrogacy arrangements as legal but not the agreements. The agreements between a surrogate mother and intended parents are not legally enforceable, compelling indirectly the agreeing parties to respect and rely on each other's promise. The law of UK does not recognize the biological father of the surrogate child as a father if he lives outside the country. If a British surrogate mother gives birth to a child for a foreign couple, then she alone would be regarded as legal mother of the baby surrogated, her husband would be the legal father, if she is a married one.

In such situation the foreign intending parents have to take domicile of U.K., if they enter in the arrangement of surrogacy.⁷

Japan has taken a different view in respect of surrogacy⁸. According to the law of Japan a mother who physically gives birth to a child is the legal mother. As per the Civil Code of Japan, there is no provision in the Code to recognize the genetic mother as the legal mother. There is no specific law in Japan concerning parent-child relationship and the mother and child relationship for artificial insemination. The relationship between mother and the child will be based on the facts of delivery.

The law of Germany on the other hand does not recognize surrogacy agreements⁸. It is also prohibited to donate egg and embryo for the procreation. Even the medical practitioners are prevented from performing artificial insemination or embryo donations. All these activities are regarded as criminal offences. The same situation is followed in the countries like Sweden, Norway, Italy and so on.

⁴ .supraftnote 3,pgno.5

⁵ ibid

⁶ ibid

⁷ ibid

⁸ ibid

Legal provisions relating to surrogacy in India

India is preferred by the rest of the countries for surrogacy because of cost effectiveness and flexible laws. In India we do not have sufficient legal provision for effective regulation of surrogacy system. The law relating to surrogacy is in its nascent stage in India. It largely depends on the surrogacy guidelines presently in use for Assisted Reproductive Technology clinics in India laid down by the Indian Council of Medical Research. The Assisted Reproductive Technology (Regulation) Bill, 2008 has discussed the matter relating to surrogacy in detail. Some features of this Bill are mentioned below-

1. The Assisted Reproductive Technology clinic cannot be a party to the surrogacy contract. The contract is carried out between the genetic parents and the surrogate.
2. A surrogate mother carrying a child biologically unrelated to her must register as a patient in her own name. While registering, she must mention that she is a surrogate mother and provide all the necessary information about the genetic parents such as names, addresses, etc.
3. The birth certificate shall be in the name of the genetic parents.
4. All the expenses of the surrogate mother during the period of pregnancy and post natal care relating to pregnancy should be borne by the couple seeking surrogacy. The surrogate mother would also be entitled to a monetary compensation from the couple for agreeing to act as surrogate.
5. A third-party donor and a surrogate mother must relinquish in writing all parental rights concerning the offspring and vice versa.
6. Surrogacy by assisted conception should normally be considered only for patients for whom it would be physically or medically impossible/ undesirable to carry a baby to term.
7. A surrogate mother should not be over 45 years of age.
8. A prospective surrogate mother must be tested for HIV and shown to be negative for this virus just before embryo transfer.
9. No woman may act as a surrogate more than thrice in her lifetime.

The Law Commission of India submitted its 228th report on 5th of August, 2009 on Assisted Reproductive Technology procedures titled as “Need for Legislation to regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of parties to a Surrogacy” to the Union Minister of Law and Justice, Government of India, discussing the importance and need for surrogacy and also the steps taken to control surrogacy arrangements. The following observations had been made by the Law Commission:

1. Surrogacy arrangement will continue to be governed by contract amongst parties, which will contain all the terms requiring consent of surrogate mother to bear child, agreement of her husband and legislation itself should recognize a surrogate child to be the legitimate child of the commissioning parent(s) without there being any need for adoption or even declaration of guardian.
2. A surrogacy arrangement should provide for financial support for surrogate child in the event of death of the commissioning couple or individual before

delivery of the child, or divorce between the intended parents and subsequent willingness of none to take delivery of the child.

3. A surrogacy contract should necessarily take care of life insurance cover for surrogate mother.

4. One of the intended parents should be a donor as well, because the bond of love and affection with a child primarily emanates from biological relationship. Also, the chances of various kinds of child-abuse, which have been noticed in cases of adoptions, will be reduced. In case the intended parent is single, he or she should be a donor to be able to have a surrogate child. Otherwise, adoption is the way to have a child which is resorted to if biological (natural) parents and adoptive parents are different.

5. The birth certificate of the surrogate child should contain the name(s) of the commissioning parent(s) only.

6. Right to privacy of donor as well as surrogate mother should be protected.

7. Sex-selective surrogacy should be prohibited.

8. Cases of abortions should be governed by the Medical Termination of Pregnancy Act 1971 only.

The only observation which can be formed from the above is that the Law Commission intends to recommend a system which is a line between the one followed in the United States and the United Kingdom. The Law Commission recommends that the birth certificate shall be in the name of Intended Parents, and it also recommends that the commercial surrogacy needs to be prohibited. This means that the only those reasonable expenses for the surrogate mother to bear the child shall be given by the intended parents. However, this issue is largely unclear and requires deliberation from the Law Commission of India.

The Law Commission has fallen off from its expectations by making no recommendations regulating the medical institutions who undertake surrogacy. The absence of such recommendations was conspicuously felt.

Because of silence of law, on surrogacy various confrontations have been occurred between surrogate mother and foreign national who come to India with an intention for getting a child and take the child to their own countries, they face various legal obstructions in getting passport and birth certificate from the concerned authority, maternity leave of intended mother, selective sex before birth etc. are the other legal hurdles faced during surrogacy.

The matter of surrogacy gets impetus in the eye of law in Baby Yamada's case⁹, where Manji, the baby was born to an Indian surrogate mother, but the Japanese couple who entered in the surrogacy agreement got separated before the birth of the surrogated child. The biological father of the child sought parental right over

⁹ *ibid*

the child but Indian laws were not clear on the status of the foreign parents involved in the surrogacy agreement and hence the matter had to be decided by the Court, who had taken the decision to hand over the custody of the child to the grandmother of the child.

The High Court of Delhi, in a writ petition filed by the party in Amy's case¹⁰, where the First petitioner (wife), cannot physically conceive a baby detected after medical examination, the doctor advised her to undergo a gestational surrogacy to fulfill their desire to have a baby. For the sake of the family balancing they intended to have one girl baby and one boy baby by way of surrogacy, for which they want to do sex selection test of intended baby, so they pray for 'no objection certificate' from the concerned authority to detect the sex of foetus before conception, but the Court dismissed the petition.

Again in Jan Balaz Vs Anand Municipality and 6 others case, the momentous question before the Court has arisen regarding the nationality of the child and issuance of the Passport for the same, where the surrogate mother was Indian national and biological father was a foreign national, which had no precedent in this country. The Court held that the baby of gestational surrogacy would be considered as citizen of India and hence directed the Passport authority to issue Passport in the name of the child.

Before the High Court of Madras, entitlements of maternity leave to the intended mother who was the petitioner has arisen in another case¹¹ who got a child by way of surrogacy procedure requested the concerned authority where she worked for the sanction of maternity leave, which has been rejected by the same of the applicant. The Court heard the matter and directed the respondent Chennai Port Trust to grant maternity leave to the petitioner.

The law is not taking active role in solving various hurdles facing by the surrogate mother and the intended parents. The concrete laws in the form of legislation are still waiting to get the approval from the Houses of Parliament. The Indian lawmakers are in doldrums to make suitable law on surrogacy which has been banned by most of the foreign countries. Because if the law allows surrogacy then various problems may come in to play, such as-

1. In the name of surrogacy, it may lead to commoditization of child which can create a new market for child racket.
2. Exploitation may be made by the intended parents towards the surrogate mother.
3. In Commercial surrogacy, the surrogated mother can demand more money as agreed between them.
4. Health Clinic may also misuse their power in promoting surrogacy.

¹⁰ . Baby Manji Yamada vs. Union of India and Another, AIR 2009 SC 84

¹¹ K Kalaiavelu vs. Chennai Port Trust, 2013 (2) CTC 400

Surrogacy is weaving the web worldwide which involves the matter of legal as well as ethical. After analyzing the facts relating to surrogacy in many countries of the globe some observation has been made in brief as follows:

The concept of surrogacy is welcomed by most of the people in the world, although legal barriers are there. It is fulfilling multiple purposes. It brings smile to the issueless couple by presenting them to have their biological child. Again, for one section of poor people, it becomes as a path of earning by rendering one's Exploitation can emerge in the field of surrogacy in absence of proper legal system to check the deals containing surrogacy. Force surrogacy due to handsome money may compel the brokers and husbands of the poor surrogate mothers to enter into the contract without caring the health of the mother.

Non- availability of common and uniform laws among the countries poses threat in the life of the child to get citizenship in the country of the Commissioning parents. In such situation the innocent child have to confronted serious situation of acceptability and non-acceptability by the countries.

It has been observed that in many of the countries the families consisting of same sex are not allowed to be intending parents of a surrogated child.

In India some privileges are imparted to the women employee to avail in case of giving birth of child or adoption of a child, in the form of maternity leave, child care leave etc,. Since the concept of surrogacy is a new phenomenon, hence non-inclusion of surrogated motherhood to avail the same privileges, many complexities arises in getting leave by the mother of the surrogated child.

There is no doubt that India is accumulating more foreign currency due to the growth of the cases of surrogacy in the country.

The economic status of the downtrodden are elevating and enhancing due to the galloping rate of surrogacy by foreigners.

Conclusion

Every problem bears its solution. So is the case with surrogacy. Surrogacy is the modern instrument in the hands of issueless couples to fulfill the desire of having own biological child by way of taking womb on lease. But concrete laws are yet to formulation the country like India where various strata of people are living in the society, some of them practice such instrument as a means of earning money to get rid of poverty, again to continue family line of the progeny less couple by way of surrogacy to have biological child cannot be underestimated.

With this some suggestions can be offered to run the system of surrogacy efficiently and hassle free as Consistent rule in and around the world for surrogacy. It has been observed that there is no uniform law relating to surrogacy in and around the countries. However it is a borderless issue where most of the

time intending parties and surrogated mother belongs to different countries having their own legal procedures. The countries which are not allowing the commercial surrogacy, the intending parents of such countries have to face stiff opposition in entering the child within their country by giving the child the citizenship of the country. Therefore to overcome such situation international laws on surrogacy has to be formulated so that the complex situation arising because of surrogacy could be settled without affecting and violating the rights of anyone including the new-born baby.

The question of citizenship of the new born baby is another fertile ground of battle where both the child as well as the intending parents have to fought tooth and nail to prove themselves to be related biologically and have to established beyond doubts the facts which speaks the truth of their relationship.

The provisions should be made for the defective outcome of the surrogacy, under the full responsibility of the intending parents. Because if the intending parents have given birth of defective child of their own, whether they would thrown away or give up their baby. If the answer is in negative then there is no reasonability to ignore or hesitate to accept the defective outcome of the surrogacy.

Awareness of the surrogated mother is an another grey area of great concern. The educationally and economically poor women of rural areas are often compelled in such deals by their husband or broker for earning money easily. Such women are lacking of having any right on the decision regarding their own body and life. In our country there is absence of psychological screening or legal counseling, which is mandatory in USA. After engagement, by commercial firms, such women are shifted to care home during the whole pregnancy period who spent the period worrying about their household and children. So proper arrangement should be made to raise the awareness among such surrogate mother in the centers where surrogacy is operated, before they enter into the agreement to carry the womb for others and accordingly can take sound decision regarding entering into the agreement.

Adequate compensation to the ultimate host mother should be made ascertained. It has been observed that most of the commercial surrogacy is done by the poor women as a means of earning money to reduce the poverty who are not fully aware of the surrogacy. In such situation they are compelled either by their husband or by some group of brokers who performs the role of middlemen between the intended parents and surrogate mother. They avail the opportunity being the middleman to embezzle the compensation given for the surrogate mother. So the host mother deprived of her legitimate dues. In such situation the smell of commercial racket is found in the transaction of surrogacy. To curb such mushrooming growth of commercial racket the government should make the provisions to appoint such staff who will keep vigilance on the transactions of money as well as to

ascertained whether the agreed compensation reached to the ultimate beneficiary or not.

A rethinking on the rules of leave particularly the maternity leave and child care leave should be given by the government. The matter of leave should analyzed and discussed in broad canvass by considering even the matter of surrogated mother, whether she will be entitled for the maternity leave or not for carrying the child of another. Sex- selective surrogacy should not be allowed at all. If anyone is found to engage in such practice of selective child, stringent punishment should be given to the wrongdoer. Introduction of hassle- free legal system for the intending parents coming from the foreign countries. The legal formalities which creates problems before the foreigners who generally are not aware of the laws of our country. A special Court should be made to deals exclusively with the matters of surrogacy to speeding up the procedure relating to surrogacy. Consent of husband in case of married and immediate legal relatives in case of the single, widowed, separated or divorced who is willing to enter into the agreements for the surrogacy should be taken before entering in such agreement.

Hence to lease the womb the Government should take active and careful steps by way of framing comprehensive legislation so that surrogacy cannot be misused and abused by any of the parties related with surrogacy and keep such modern instrument for the welfare of the seedless couple without violating anyone's rights.