

Surrogacy (Regulation) Bill, 2016: Boon or Bane?

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Surrogacy as a process with the help of technology has given solution to problem of bearing their own child to the infertile couple, homosexuals and to people who wants to be a single parent. Earlier it was not regulated which made it a new form of business and lead to the pathway of commercial surrogacy. Since, the Commercial Surrogacy became legal in India, the State became the largest hub of commercial surrogacy with an industry worth more than US \$400 million. This massive business made women subject to various atrocities. In order to curb such atrocities a law “Surrogacy (regulation) Bill, 2016” was enforced, but here arises the question whether this act has really curbed all this abomination or has created more of such kind. All the lacunas and merits of this act are discussed in this paper and it will endeavor to suggest whether it is a boon or bane.

Introduction

Surrogacy also known as Assistive Reproductive Technology has derived from a latin word *surrogare* which means to elect as a substitute. Surrogacy is of two types full and partial; full surrogacy means when an embryo is planted in the womb of a surrogate mother and partial surrogacy also known as traditional which involves artificial insemination or intrauterine insemination using sperm from intended father and egg from surrogate.¹ Usually full surrogacy is used in commercial surrogacy.

Commercial Surrogacy is basically a contract between intended and commissioning parents wherein a woman carries out pregnancy for intended parents in consideration of some fees. Commercial Surrogacy is legalized in India since 2002 but Supreme Court in case of *Baby Manji Yamada v Union of India and Another (2008)*² explicitly said that commercial surrogacy is legal in country and gave certain guidelines.

India became the largest fulcrum of surrogacy due to simple reason of availability of cheap medical facility and ample woman being ready to be surrogate mother as a solution to their financial problems. There were more than 3000 fertility clinics all over the country ready to carry out surrogacy. The cessation to this was that India became largest fertility tourist destination which led to regulation of this industry and hence Surrogacy

¹ Viji Athreye, *What Are The Surrogacy Laws in India?*, MAPS OF INDIA (March 6, 2017), <https://www.mapsofindia.com/my->

(Regulation) Bill, 2016 was implemented as it became need of the hour.

The dubiety here is still that whether this is fruitful as the basic aim of this law was to reduce monstrosity faced by women in the form of repercussion of this rapidly growing industry. This has also led to decrease in the industry worth from US \$400 million to US \$1million. The fertility tourism which was major source of revenue for government has been shifted to other countries.

The new law brought the sea change in surrogacy practice in India; commercial surrogacy was banned, altruistic surrogacy was allowed and certain conditions need to be fulfilled to be surrogate mother and one of such is that she should be the blood relative of intending parents. It has also closed all doors for single parents and homosexuals to bear their own child, they were left with an option of adoption only. As a consequence to this India's fertility tourism fell drastically which eventually affected economy to an extent, further it gave scope to illegal surrogacy practices, there are other dire consequences as well which are discussed in detail in paper later. Since every coin has two sides this law has also brought some positive changes as well, it is a good method for population control, since population growth through surrogacy will reduce as it will open the door for adoption and as a result to this it will facilitate home to homeless children; according to this law, all Assistive Reproductive Technology must be registered and clinics have to maintain record for past 25years which will lead to transparency in system and hence will strive to reduce illegal practices. All these issues are discussed in detail further in paper.

Objective of Study

The prime objective of this study are as follows:-

- 1) To understand the concept of surrogacy and to be very precise to understand the concept of commercial surrogacy.
- 2) To study laws related to surrogacy in India.
- 3) To critically analyze Surrogacy (Regulation) Bill, 2016.

All the aforementioned objectives are attributed further in this paper.

Scope of Study

This paper discusses the concept of surrogacy along with it brings to light the journey of legality of surrogacy in India. There are many rights attached with surrogacy like legitimacy of child, right of surrogate mother etc., however the scope of this study is limited to critical analysis of Surrogacy (Regulation) Act, 2016

india/india/surrogacy-laws-in-india-whose-baby-is-it-anyway

² *Baby Manji Yamada v Union of India and Another (2008)* 13 SCC 518

highlighting its merits, demerits and the changes which need to be brought in this respect.

Analysis of Data

Till now paper has discussed about its topic in brief under aforementioned heads, in this part the same data will be elucidated in detail and also try to give answer to above raised question.

Commercial surrogacy

Commercial Surrogacy as a concept means when intending parents are paying some sum to commissioning parents for carrying their child. It is a lawful contract between both the parties. India is one of the largest country in world with respect to commercial surrogacy, it is the most preferred destination for fertility tourism.

In India Commercial surrogacy was legalized in the year 2002 but Supreme courts gave guideline regarding it in **Baby Manji Yamada v Union of India and Another (2008)**³ wherein a Japanese couple came to India looking for surrogates, in India they found the surrogate. The eggs were extracted from biological mother, Dr. Ikufumi Yamada was fertilized by her father, Dr. Yuki Yamada's sperm and these fertilized eggs were implanted in the womb of Indian surrogate mother. Soon, during the surrogacy period couple had some matrimonial discord and the wife left him. According to prevalent laws custody of girl child could not be given to single father. The paternal mother of child took her custody but this seek court's attention to the fact of legality of commercial surrogacy that there is no law for its regulation and then the Apex Court issued certain guidelines and asked legislature to draft a law. After this case **Assisted Reproductive Technologies (Regulation of) Bill, 2010** came into existence as a first explicit law on surrogacy.

After this recently Surrogacy (regulation) Bill, 2016 is implemented which brought a major change in the previous law which is being stressed upon in the next section.

Surrogacy (Regulation) Bill, 2016

After legalization of commercial surrogacy India became the largest market for the same due to simple reason of availability of medical facilities at cheaper rate and also due to huge population and lack of financial resources women being ready to be surrogate mother. As a downfall to this, atrocities on woman have increased which led to emergence of new law. But, did this law really curbed atrocities on woman or it has given scope to other crimes, which is being discussed hereunder.

Important Features of Act

A) Ban on Commercial surrogacy: The new law has banned commercial surrogacy and making any sort of

payment to any woman to be a surrogate mother is prohibited and punishable.

B) Limited Surrogacy: Surrogacy is allowed to heterosexual infertile couple. Surrogacy for single parent, homosexual, foreigners and NRI is banned.

C) Altruistic Surrogacy: This law has brought a concept of altruistic surrogacy in which a blood relative of intending parent aged between 25-35yrs can be the surrogate mother and furthermore there should be no monetary benefits should be given to surrogate mother expect for maternity requirements.

D) Condition for Surrogate Mother: Since altruistic surrogacy is allowed, woman who is opting to be a surrogate mother should be married and have a child of her own.

E) Condition for Intending Parents: The intending parents should be married for at least 5years and could not conceive child through natural sexual intercourse since 5 years as a condition to prove their infertility.

F) Ban on Egg Donation.

Critical Analysis:

The new law rather than reducing atrocities on woman has created other new issues.

The ban on commercial surrogacy has reduced fertility tourism as serious that Indian surrogacy industry went down to US \$1million from US \$400million. It closed all doors for single parents, homosexuals, foreigners, NRI and couple in live-in-relationship to bear their own child. It is also violation of human rights as right to personal liberty, right to procreation, right to equality are being infringed. When the questions were raised regarding banning of surrogacy for the aforementioned people one of the leaders said it is against "ethics" of Indian society specially allowing it for homosexuals. The commercial surrogacy was banned for the simple reason that was to prevent exploitation of women but rather than banning it completely the laws could have been strengthened and could have been implemented strictly. This was one of the financial source for surrogate mother and for some may be sole. Also due to ban on commercial surrogacy, the surrogacy industry has been affected massively and therefore it is shifted to Nepal and as a reason to this various cross border crime happens, women are exported, surrogacy is occurring without consent of woman. The Act talks about altruistic surrogacy, it means one of the blood relative of intending parents can be the surrogate mother for them and that woman must be married and have a child of her own, such type of rule may cause family problem and there will be emotional baggage in family moreover the child and the surrogate mother will belong from same family this may lead to various psychological issues in family. The woman in the family must be between the age 25-35years. For proving infertility as a precondition, for opting for surrogacy, they have to show that have been

³ Baby Manji Yamada v Union of India and Another (2008) 13 SCC 518

trying to conceive child from 5years through natural sexual intercourse but medically, to prove infertility only 2years are sufficient, why unnecessary 5years clause is added is still unanswered.

Further the bill is silent on various issues like breach of surrogacy contract, maternity relief to surrogate mother, genetically designed baby, rights of intending parents etc. and hence these will act as a loop holes in bill and give rise to major disputes. Through all these lacunas this bill has become regressive rather than progressive.

Despite all these demerits it has some merits as well. India has second largest population in the world through ban on commercial surrogacy it will be become one the measure for population control. It will provide home to orphan as people will be left with no other option than adoption. Due to this act ART registration is made mandatory and also clinics have to maintain record for more than 25years so as a result of this illegal surrogacy will be curbed to an extent as which will prevent exploitation of woman. This act has made illegal surrogacy punishable, also child will no longer remain a saleable commodity. Unfortunately, demerits of this bill outcasts its merits.

Conclusion

It can be stated that this law has become regressive and stringent rather than progressive. The government could have amended some aspects of earlier law rather than bringing all together a new one. The question earlier raised is still debatable whether it is a boon or bane.

The new law could have made strict laws for commercial surrogacy instead of banning it as with this it takes away right of homosexuals and single parents their right to have family. They now have to resort to abroad for surrogacy which is very expensive and therefore it has become non feasible for middle class and lower middle class people. Secondly, the introduction of altruistic surrogacy is hard to digest for Indian society as surrogate mother will be from same family this will create problems and awkwardness in family. This new law is method to population control but its impact could not be seen.

To make this law successful few changes are required which will make it a very good law.