

# INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

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Volume 8 | Issue 2

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2025

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# Rights, Surrogacy and the Indian Judiciary: An Expedition

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## ABSTRACT

*The Judiciary has been tirelessly dedicated in upholding all the rights enshrined in the Constitution of India and has strenuously informed all the aspects of the realm of Surrogacy since its inception as a process in India by its judgements. The Judiciary has promptly adjudicated cases wherein conflict of the interests of the entities involved in the process of surrogacy was concerned. The Judiciary has catered to the nuances of surrogacy in the absence of any dedicated legislation until 2021 and thereafter, India enacted a dedicated legislation in the year 2021, the Surrogacy (Regulation) Act, 2021 and since then the provisions of the Act has been challenged on varied grounds. The present Research Paper is an expedition of the enthusiastic endeavours of the Judiciary in dispensing justice via safeguarding the rights of the individuals entangled in the process of surrogacy.*

**Keywords:** Surrogacy, maternity, adjudication, rights, judiciary.

## I. INTRODUCTION

Procreation is the essence of subsistence of life in this planet and the domain of procreation has become all the more complicated amongst humans with the emergence of the concept of surrogacy. Surrogacy is the process where a woman acts as a substitute for another in procreating a child. Thus, as the entities involved in the realm of surrogacy and the process employed is all divergent from the traditional means of procreation so it gives way to numerous instances of contest of rights.

The Constitution of India enshrines the existence of three organs of the Government. The Judiciary as one of the three organs has been endowed with the responsibility of dispensing justice and has also been entitled to interpret the various provisions of the Constitution and other statutes enacted by the Legislature. The Constitution of India has enumerated certain fundamental rights and the Judiciary has been conferred the power in the Constitution itself to act as an agency and provide redressal in case of any abridgement of the rights so concerned. Also, law and social transformation goes hand in hand and whenever there is enactment of a statute, the Judiciary vehemently looks upon the matters wherein interpretation of the provisions

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of the statute is in question and also assess if the provisions of the statute concerned are in consonance with the rights enshrined in the Constitution of India or not and also analyses if the provisions fall short in catering to the needs of the society.

The Judiciary has adjudicated upon instances involving contest of rights when there was no dedicated legislation pertaining to the realm of surrogacy and the Judiciary has also been approached for adjudication and redressal of disputes pertaining to the domain after the enactment of the Surrogacy (Regulation) Act,2021.

## **II. REQUISITION FOR INTERVENTION**

Surrogacy as a means to procreate has been on the rise in India since the early 2000's with India becoming a surrogacy capital given several factors contributing to it and thus India was very much in limelight due to medical tourism industry with respect to surrogacy proliferating tremendously. With the increase in the number of surrogacy arrangements in India to procreate a child and in the absence of any concrete legislation dedicated to surrogacy, the Judiciary faced issues determining various rights and obligations of the parties so involved in the realm of surrogacy and the babies born out of such surrogacy arrangements. Foreigners resorted to surrogacy arrangements in India given the lesser cost here and also the readily availability of surrogate women with proper medical facilities and no stringent laws but such arrangements also culminated into issues lately given the very nature of surrogacy arrangements.

With the coming into effect of the Surrogacy (Regulation) Act,2021 though foreigners have been outrightly excluded from employing surrogacy facilities in India but issues pertaining to the realm of surrogacy is still very prevalent which are in need of adjudication. Thus, owing to the complexities involved, the Judiciary has been approached and had to intervene in a number of cases involving surrogacy both in cases with regard to the foreigners and also when issues emerged in case of nationals. The Indian Judiciary has tirelessly upheld the rights of the persons involved in the process of surrogacy and is still in the process of reiterating and safeguarding the rights so enshrined in the Constitution of India.

## **III. DETERMINATION OF RIGHTS BY THE INDIAN JUDICIARY PRIOR TO THE ENACTMENT OF SURROGACY (REGULATION) ACT, 2021**

India lacked any dedicated legislation pertaining to the realm of Surrogacy and this absence led to a number of instances where the Judiciary had to intervene for the purpose of resolution of disputes and redressal in events of conflict in contest of rights.

The case of *Baby Manji Yamada V. Union of India and Another*<sup>2</sup> attracted the attention of the Judiciary in India towards the parentage, custody, passport or visa issue and different other social and legal issues pertaining to surrogacy in India. In this case a Japanese Couple sought to have a child via surrogacy in India with the employment of an egg donor and the male counterpart of the Couple so concerned and so a contract was entered into with a woman who consented to gestate the child for the entire period of pregnancy. But the couple got engaged in a matrimonial dispute during the course of the pregnancy and got divorced. The commissioning mother thus was unrelated with the child so procreated as the pregnancy ensued with a donor egg and she did not wish to have the child any more. The father on the other hand was very much interested of having the baby. During that period of time there was no enacted legislation pertaining to the realm of surrogacy specifically though the Government endeavoured to legislate some rules to regulate the process of surrogacy but those rules were insufficient to regulate the surrogacy industry and the different social and legal issues pertaining to surrogacy. Issues emerged when the father of the child applied for a visa in the Japan embassy in India but his plea was rejected as Japan did not recognise surrogate child and so he applied for an Indian passport so as to be able to take the child with him to Japan but here the issue that emerged was with the birth certificate of the child as it has to have the name of both the father and the mother but in case of Baby Manji ambiguity arose and proper determination could not be made as to who qualifies to be the mother of the baby the commissioning mother, the surrogate mother or the egg donor but the father was the genetic father of the child. Under the Guardian's and Wards Act, it has been mentioned that a girl child cannot be adopted by a single man and so the father was debarred from adopting the child so born. So, neither could visa be procured nor a birth certificate so as to apply for an Indian Visa. The Supreme Court was thus approached on the issue but the Court itself faced a lot of difficulties so as to ascertain the legality of the surrogacy procedures. The Court then held that a birth certificate is to be issued to the child the father being the genetic father and later she was adopted by her grandmother and left the country for Japan. The Commission for child rights was also instructed to intervene in the issue so as to reach to an unambiguous decision best suited to the interest of the child. In this case the surrogacy contract was also held to be a valid arrangement and the custodial rights were conferred upon the grandmother of the child and the child was allowed to move out of the country to Japan.

In the case of *Jan Balaz V. Anand Municipality and Others*<sup>3</sup>, the Judiciary was approached for

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<sup>2</sup> Baby Manji Yamada V. Union of India and Another, WP. (C) NO.369 of 2008

<sup>3</sup> Jan Balaz V. Anand Municipality and Others, Special Civil Application No. 3020 of 2008

the determination of the status of citizenship of babies who are born within the territory of India with the help of an Indian surrogate mother when the commissioning parents happened to be nationals of some other country. In this case twins were born to a German national via surrogacy after fertilization of his sperm with a donor egg and then gestation by a surrogate mother as the petitioner's wife due to medical reasons could not conceive a child and so they opted for surrogacy. The couple was working and residing in UK so they applied for VISA to UK for the children which could only be provided to persons having passports and so they applied for passports which was granted to them for the two babies. Subsequently, they were asked to submit the passports so issued by the Government of India, Ministry of External Affairs on the pretext that the babies as born through surrogacy were not Indian Nationals and were not eligible to passports. The petitioner then submitted his petition in the High Court of Gujarat and contended that as the egg used for the process of surrogacy and the surrogate mother both are Indians and also the babies are born in India so under the Indian Citizenship Act, 1955 and the Indian Passport Act, 1967 the babies born are eligible for Indian passports. The Court held that as the babies are born in India and also genetic material contributed and gestated by Indian national so they are eligible for Indian Passports. Also, the Court reiterated on the need for 'a comprehensive legislation' to cater to all the issues created by the emerging reproductive science and technology

In *K. Kalaisevi V Chennai Port Trust*<sup>4</sup> the Madras High Court was approached for the ascertainment of the fact as to if a commissioning mother who has procreated a child via the employment of surrogacy is entitled to maternity benefit under rule 3A of the Madras Port Trust (leave) regulations. The petitioner here was working in the Chennai Port Trust and she along with her husband commissioned the process of surrogacy and a female child was born to them via surrogacy. The petitioner accordingly applied for leave pertaining to maternity benefit to care for the child. Under rule 3A of the regulation so stated a female employee was entitled to leave in case of adoption of a baby by her. But it was contended that the same does not apply to the petitioner as she has procreated a child via surrogacy which involves a lot of moral, ethical, social and legal issues. The Court but held that the leave that a female employee is entitled to in case of adoption is for the proper bonding of the child with the parent and so in case of a child born through surrogacy as well the female employee so concerned is eligible to the same maternity benefit as is available to adoptive parent.

In *Dr. Mrs. Hema Vijay Menon V. State of Maharashtra*<sup>5</sup>, the petitioner was an employee of the

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<sup>4</sup> K. Kalaisevi V. Chennai Port Trust, WP. NO.8188 of 2012

<sup>5</sup> Dr. Mrs. Hema Vijay Menon V. State of Maharashtra, WP. NO.3288 of 2015

Central Railways and she adopted the means of surrogacy to procreate a child and a successful pregnancy ensued to a surrogate woman. Subsequently, twins were born via the concerned surrogacy arrangement and the petitioner applied for maternity benefit leave to the appropriate authority under the rules so specified for adoptive leave under the railways but her claim was rejected because it was contended that surrogacy arrangements do not fall within the purview of the eligibility of the rules so specified. The petitioner then approached the Court and it was held by the Court that the petitioner is very much eligible to procure the leave to care for the children born to her even though such children were born via the employment of surrogacy as the leave was intended to provide proper time of bonding between the child and the mother and it very much falls within the ambit of the rules as a child cannot be left at the mercy of its fate. Thus, the Court asserted that a child if procreated via the employment of surrogacy then the commissioning mother is entitled to the leave under the appropriate rules of maternity benefit.

In the case of *Rama Pandey V. Union of India*<sup>6</sup>, as well the contention before the court was as to whether a commissioning mother is entitled to maternity benefit or not. The Court in this instance has also held that a commissioning mother is no different from an adoptive parent and thus is very much entitled to maternity benefit leave. Thus, a female employee who has resorted to the process of surrogacy for the purpose of begetting a child is eligible to avail leave for the purpose of devoting attention to the child and attending to its needs and also to form a bond with the child. The appropriate and competent authority is to be submitted with a request by the commissioning mother with appropriate materials if any and such materials are to be analysed to ascertain as to the period of leave whether in the pre-natal phase or the post-natal phase and if the request is rejected then substantial reasons are to be given to substantiate such decision.

*In P Geetha Vs. The Kerela Livestock Development*<sup>7</sup>, the petitioner was the commissioning mother of a child which was born via the employment of the process of surrogacy and the commissioning mother applied for a leave to the competent authority in the place of her work where she was an employee and the competent authority who was bestowed with the power to provide with the leave to the commissioning mother declined her claim and asserted that no explicit rules are enshrined for maternity leave in case the route of surrogacy is undertaken to procreate a child and it was also asserted by the authority that in case the female employee seeks to avail leave then she can go on a leave with loss of pay. The counsel for the petitioner asserted before the Court that under Article 21 and Article 42 the Petitioner is entitled to maternity benefit and also in case of absence of any municipal law on this aspect of surrogacy international

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<sup>6</sup> Rama Pandey V. Union of India, WP (C) NO. 844/2014

<sup>7</sup> P Geetha Vs. The Kerela Livestock Development, WP (C). NO. 20680 of 2014

regimes and conventions are to be taken into account and stated that the commissioning parents are as much natural parents of the child so born via surrogacy and in case any explicit provision is absent then extraordinary leave without loss of pay is to be provided to the commissioning mother under the rules so made in the Kerela Livestock Development rules. The Court held that the commissioning mother is very much entitled to leave of maternity benefit to take care of the child so born via surrogacy as much as a natural mother is entitled to.

It *Sushma Devi V. State of Himachal Pradesh and others*<sup>8</sup>, the Court held that a woman cannot be denied her right to avail a maternity leave only on the ground that the baby was born out of a surrogacy arrangement. The leave that a mother is entitled to after the birth of a child is to form a bond with the child and to cater to its needs and also to regain health after pregnancy. Though in case of surrogacy arrangements the commissioning mother does not carry the child herself and so there is no question of availing leave to regain health but the baby born is as much vulnerable as is any other baby and the mother has to be around to cater to its needs and also to establish a bond between the commissioning mother and the baby. The petitioner in the present case was posted as a language teacher in a school and she was a commissioning parent to baby boy born by surrogacy and her application for the grant of maternity leave to care for her child was rejected on the ground that she has had the child via surrogacy. The Court but decided otherwise and has asserted that even though the baby was born via surrogacy the commissioning mother is also very well entitled to the benefit of maternity benefit to care for the child. The petitioner became a mother in the year 2020 through surrogacy and applied for maternity leave but her application was rejected. When the Court was approached it observed that a woman contractual or ad hoc employee is entitled to maternity leave at par with a regular woman employee and thus both the surrogate mother and the commissioning mother is thereby eligible to avail the benefit of a paid leave for a period of 26 weeks.

In the case of *Vandana Suneja Arora Vs. Government of NCT of Delhi*<sup>9</sup> the petitioner was employed as an employee of the Directorate of Education, Government of NCT, Delhi and she applied for maternity leave after a child was born to her via surrogacy as biological complexities acted as a hindrance from procreating a child naturally and so contended that she is entitled to leave. The respondents but asserted that she is not eligible for leave. The Court held that the petitioner is very much entitled to avail leave even though the child was born to her via the means of surrogacy and also the child care leave as any other female employee who under

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<sup>8</sup> Sushma Devi V. State of Himachal Pradesh and others, CWP No. 10354 of 2012

<sup>9</sup> Vandana Suneja Arora Vs. Government of NCT of Delhi, O.A. No. 3967/2014

normal circumstances gives birth to a child.

Thus, from the analysis of the cases it can well be ascertained that Judiciary has adjudicated upon an ample number of issues and deliberated upon the rights of the entities involved in the realm of surrogacy in the absence of an Act specifically dedicated to the cause.

#### **IV. DETERMINATION OF RIGHTS BY INDIAN JUDICIARY AFTER THE ENACTMENT OF SURROGACY (REGULATION) ACT, 2021**

The Surrogacy (Regulation) Act, 2021 happens to be the first enacted legislation pertaining to the realm of surrogacy specifically. India lacked any enacted legislation with regard to surrogacy due to which the issues and challenges so faced lacked proper determination and the rights and obligations of the entities so involved in the process lacked proper entitlement. The Act has enshrined provisions that are to be applicable to the process of surrogacy. The Judiciary has been approached in a number of cases from the date of coming into effect of the Act wherein different provisions of the Act has been called into question for relief before the Judiciary.

In the case of *Arun Muthuvel Vs. Union of India*<sup>10</sup>, the Surrogacy (Regulation) Act, 2021 was challenged as being discriminatory and an outright violation of the right to privacy and reproductive autonomy of women. The Supreme Court in this case has held that as per the Act an intending woman has to use her own gametes in the process of surrogacy and can use a donor sperm for fertilization but when such woman is unable to use her own gametes due to some circumstance concerning the quality of the genetic material or the health of the women then donor eggs can be used for furthering the process of surrogacy.

In the year 2023, in the case of *H. Siddaraju Vs. Union of India*<sup>11</sup> a writ petition was filed by a couple where the husband was 57 years of age and the wife was 45 years of age had challenged Section 2(1) (zg) and section 4(III)(c) (I) of the Surrogacy (Regulation) Act, 2021 as these provisions curtailed their right to avail the process of surrogacy. Under Section 2(1) (zg) a surrogate mother could only carry a child genetically linked with the couple and as per section 4(III)(c) (I) the couple's age was above the upper age limit as specified by the Act. The counsel for the couple contended that the Act should be made age free.

The Court formulated a triple test to ascertain whether the couple is fit to embrace parenthood via surrogacy or not namely:

- i) Genetic Test- To assess the strength of the genetic material of the sperm of the father.

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<sup>10</sup> Arun Muthuvel Vs. Union of India, W.P.(C) No. 756 of 2022

<sup>11</sup>H. Siddaraju Vs. Union of India, W.P. No. 5861 of 2023



- ii) Physical Test- To assess if the intending couple is physically equipped to take care of the child.
- iii) Economic Test- To assess the economic strength of the couple for the wellbeing of the child to be born.

The Court asserted that if the couple is found eligible in all the above mentioned three tests, then an eligibility certificate should be provided for them to avail the process of surrogacy. The Court has also invited submissions from the National Board of Surrogacy regarding the contentions raised in the case.

In the case of *XYZ and Anr. Vs. Union of India*<sup>12</sup>, the Bombay High Court was approached with a contention that because of the notification of 14<sup>th</sup> March, 2023 by the Government of India due to which the couple was not being able to use donor eggs as the amendment precluded the usage of donor eggs for procreation via surrogacy. The Wife here had medical issues and there have been problems with her gametes because on two occasions when she conceived one baby was a still born and the other died shortly after birth. For avoiding similar consequences, it was advised not to use her own gametes for the process of surrogacy but due to the impugned order it was now not possible. The Bombay High Court did allow the couple to use donor eggs for the process of surrogacy and has held that reproductive health is a facet of personal liberty as enshrined under Article 21 of the Constitution of India and if the couple is not allowed to use donor eggs it would entail into the abridgement of their right to procreate via surrogacy and achieve parenthood.

In 2024 another couple approached the Court for determination of their rights concerning the children born out of surrogacy arrangement. In *Shailaja Nitin Mishra Vs. Nitin Kumar Mishra*<sup>13</sup>, a couple was married and via the employment of surrogacy had twin daughters. In the process of surrogacy, the oocytes used were that of the wife's younger sister. Due to matrimonial dispute the husband took the daughters amidst which the wife approached the court for custody rights of the daughters. Later, the sister of the wife who began to live with the wife who donated eggs which were fertilised with the husband's sperm to ensure the process of surrogacy alleged that she is the real mother of the twins and so custody should be given to her. The Court has held that donating eggs or sperm in no way grants parental rights of the children born out of surrogacy and hence the sister of the wife has no rights of parenthood with regard to the twins concerned. The Court has reiterated that the custodial rights can only be claimed and contested

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<sup>12</sup> XYZ and Anr. Vs. Union of India, 2024: BHC-AS:6439-DB

<sup>13</sup> Shailaja Nitin Mishra Vs. Nitin Kumar Mishra<sup>13</sup>, WP (ST) No.6772 of 2024

amongst the wife and the husband concerned.

## **V. CONCLUSION**

The Indian Judiciary has vigilantly adjudicated and looked into the nuances at hand at every point in time when surrogacy as a process began to be employed for procreating within the domain of India. At the time when surrogacy as a process gained its momentum and India became a hub for the process owing to various favourable factors there was no legislation in existence for regulating the process of surrogacy. When surrogacy began to be used as a process by varied individuals for procreating there happened conflicts with regard to the rights of the entities involved. The Indian Judiciary came to the rescue by promptly adjudicating the cases wherein relief was sought by the entities involved in the process. The Judiciary has adjudicated a number of issues with regard to parentage, custody, maternity benefit of women who procreate via the employment of surrogacy when India lacked any legislation pertaining to the realm of surrogacy.

In the Year 2021 when the Surrogacy (Regulation) Act,2021 was enacted, the ambit of the process was constrained with regard to a number of parameters owing to the exploitation of the individuals involved in the process and the alleged commodification of the process of surrogacy altogether in India as a market. Therefore, after the coming into force of the Act, foreigners were excluded from the purview of surrogacy within India but other concerns with regard to the Indian population whose rights got affected started to come to the forefront like the age limit of couples who can seek to procreate via surrogacy or if donor eggs can be used for the process of surrogacy or whether the Act has put a bar on the realisation of the right to reproductive autonomy or not or whether donating gametes, to the process entitle the person donating to parenthood.

The Judiciary stood its ground and also the test of time to prove its allegiance to the highest law of the land, the Constitution of India and has upheld the rights of the individuals concerned involved in the process of surrogacy and is deliberating upon the interpretation of the statute in existence at present by deliberating on issues whether are constitutional or not like ban of the commercial surrogacy, upper age limit of couples, age limit of single women, surrogacy by only individuals who do not have a surviving child and also the fate of individuals who initiated the process of surrogacy prior to the coming into effect of this Act awaits determination.

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