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Surrogacy Rules in Light of Indian Scenario

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ABSTRACT

The paper is centered on "Commercialization of Surrogacy in India, Current law or Bill related to surrogacy in India & History aspect of Commercialization of surrogacy in India". In the wake of presenting the point momentarily, it explains the significance and idea of Surrogacy. From that point, the paper has advanced different meanings of Surrogacy. It likewise examines the three various types of surrogacies followed by a conversation of its verifiable foundation. The set of experiences has been examined in both Indian and World settings in the paper, after which it refers to a conversation on the commercialisation of Surrogacy in India. The paper likewise specifies about Surrogacy Super Store pervasive in India. From there on, different moral and moral issues connected with surrogacy have been talked about. Further, it talks about the law connecting with surrogacy in India. The Legal reaction in India concerning surrogacy has likewise been talked about, followed by the conversation of legitimate issues on surrogacy. The paper also focused on Assisted Reproductive Technology and Surrogacy Board regulation bill 2020, The Surrogacy Bill 2020, & outsourcing for surrogacy in India relating to other countries' laws on surrogacy. Also, talk about the violation of the Human Rights of a woman relating to forced surrogacy and Commercial surrogacy in India with this, "Does the Right to privacy include the right to reproductive choice in Article 21 of the Indian Constitution?" The paper thus concludes after putting forth the concluding observation followed by some suggestions and recommendations on surrogacy.

Keywords: Surrogacy, Gestational Surrogacy, Genetic Surrogacy, Total Surrogacy, Egg Donor, Surrogate Mother, Gestational Mother.

I. INTRODUCTION

Nature has given the lovely ability to reproduce a daily existence inside ladies and each woman treasures the experience of parenthood. Right to generation is an intrinsic right of a person. The craving for kids among couples is a widespread peculiarity. Being a parent is an extraordinary and everlastingly remunerating experience. The aggravation and anguish of not satisfying the fantasy of life as a parent are immense. The study of barrenness treatment has pushed ahead huge amounts at a time. Each general public across the world has given essential significance

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to the establishment of a family. At the point when two people meet up and go into a marital bond, another family appears and such a family becomes total with the introduction of the kids. From the old times, kids are considered as a need for the continuation of the family heredity and a wellspring of bliss for the guardians. Clinicians bring up that birth of a child makes a connection between the companions which can assist unpleasant relationships with support over the long haul.

Anyway because for different reasons, an enormous segment of the general public can't have their kid. Research has expressed that one in every six couples has such issues. The shortfall of a youngster is considered a shame to the family. There are many occasions where the failure to have a kid prompted a wedding breakdown. The powerlessness to have a kid which is known as barrenness in clinical terms is a worldwide issue. As indicated by the WHO Report the occurrence of barrenness across the globe including India is around 10-15 percent.³

A few types of fruitlessness which were viewed as untreatable in the past have straightforward arrangements today. Till as of late the main answer for childless couples was the reception. The progression in clinical science especially in the field of artificial human reproductive technologies (ART) has acted as the hero of such people and furnished them with different choices to generate a hereditarily related kid. There are different choices in Craftsmanship like planned impregnation, In-Vitro preparation, undeveloped organism move, and so on. Among every one of the strategies, surrogacy has become famous.

II. MEANING AND CONCEPT OF SURROGACY

Surrogacy has arisen as another degree of logical headway for propagation with the use of the belly of a lady to repeat kids for another lady. One of the most effective strategies to beat both natural and social barrenness is 'surrogacy.' Surrogacy has given chances to have a hereditarily related youngster to couples who can't replicate through fake multiplication and in vitro treatment. Surrogacy has turned into an alluring option for couples and people who wish to have a youngster naturally connected with them. The idea of surrogacy has become broadly perceived from one side of the planet to the other. Proxy parenthood is considered as help by fruitless couples as it is progressive expect having a child.⁴

³ Annual Report 2008-2009 Ministry of Health and Family Welfare, Government of India available at http://monh.nic.in/FINAL_HEALTH_MINISTRY_ANNUAL_REPORT_2008_09.pdf accessed on 09/04/2014 at 5:30 p.m

⁴ Kusum Jain, 'Surrogate Motherhood: Some Legal and Moral Problems in Bio Ethics', Vol 25 Issue4, 1983 Journal of Indian Law Institute(546 to 558) at 547

The word 'surrogate' has been derived from the Latin word 'surrogates' meaning a substitute, that is a person appointed to act on behalf of another. Traditionally, surrogatemotherhood is referred to as 'an agreement between a married couple who is unable to have a child because of wife's infertility, and a fertile woman who agrees to conceive the husband's child through artificial insemination, carry it to term, and surrender all parental rights in the child.'

(A) Definitions of surrogacy

According to **Black's Law Dictionary**, 'an agreement wherein a woman agrees to be artificially inseminated with the semen of another woman's husband.'

The New Encyclopedia Britannica defines- 'Surrogate motherhood' as the practice in which a woman bears a child for the couple to produce children in the usual way.

In Medical parlance- the term surrogacy means using a substitute in place of a natural mother.

The ART Bill has defined surrogacy as 'an arrangement in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, in which neither of the gametes belongs to her or her husband, to carry it to the term and handover the child to the person or persons for whom she is acting as a surrogate'⁵

III. TYPES OF SURROGACIES

Surrogacy is of three kinds. They are **Genetic surrogacy/partial surrogacy, Total surrogacy, and Gestatory/Gestational surrogacy.**

In **Genetic/ Partial Surrogacy**, a woman's egg either through planned impregnation or on rare occasions by regular intercourse is treated by the sperm of the male accomplice of the couple craving the kid (charging father). Here the substitute mother is the hereditary mother of the kid and the charging mother assumes the part of the social and lawful mother. This kind of surrogacy is additionally called Incomplete Surrogacy or Conventional Surrogacy. Absolute surrogacy is where the substitute's egg is treated with the sperm of the benefactor or with the charging father.

In **Gestatory/Gestational Surrogacy**, the egg and semen are obtained from the commissioning couple (or from anonymous donors), and the resultant embryo is subsequently implanted into the surrogate or carrying mother. Here, the surrogate mother has no genetic link with the child. This type of surrogacy is also called **Full Surrogacy.**

⁵ Yashomati Ghosh, "Surrogacy and Law: An Affirmative Approach to Deal with the Ethical and Legal Dilemma", Vol. II, Issue 1, 2011 Journal of Law Teachers of India (83 to 92) at 85

Surrogacy can be further divided into two types based on financial compensation. First is **Altruistic Surrogacy** and second is **Commercial Surrogacy**. In **Altruistic Surrogacy** financial compensation is not given to the surrogate mother, though the commissioning parent may provide fees and costs to the surrogate mother in bringing an embryo to the term. This sort of surrogacy is generally normal among relatives or dear companions. The common explanation given for why no monetary remuneration is required is that, in this sort of surrogacy, the choice to be a substitute stems from affection, not from an individual increase or even greed. While the language of liberality is much of the time utilized in the other sort of surrogacy – Commercial surrogacy - the substitute is monetarily repaid past costs related to the pregnancy. That is, the substitute is paid for her gestational administration.

IV. HISTORICAL BACKGROUND OF SURROGACY

Surrogacy is not a new practice. It is an ancient practice. This practice traces back to scriptural times. The principal proxy mother in history is accepted to have lived someplace close to the city of Hebron, the place that is known for Canaan, 2,000 years before the introduction of Christ. Sarah, the fruitless spouse of Abraham, commissions her housekeeper Hager to bear a kid by convincing Abraham to sleep with her. Abraham was 86 years that time. But despite his age, he was stillable to conceive a child. In 1910 BC Hager gave birth to a son called Ishmael. Ishmael was the first child in history born due to the so-called traditional surrogacy program.

The second surrogacy program was carried out in the Summer of Mesopotamia in the middle of the XVIII century BC. Rachel, the wife of Jacob, commissioned her maid Billah to have a child by convincing Jacob to sleep with her.

Surrogacy was quite common in ancient Egypt. Many of the Egyptian Pharaohs asked their concubines to help them in producing offspring. Beginning in 1920 managed impregnation by the spouse's or a chosen giver's sperm has become generally spread in barrenness treatment. The world's most memorable IVF child, Louise Brown, was brought into the world on July 25, 1978, in the UK through the endeavors of Dr. Robert G. Edwards and Dr. Patrick Steptoe. The world's second and India's most memorable IVF child, Kanupriya, false name Durga was conceived 67 days after the fact on October 3, 1978, through the endeavors of Dr. Subhas Mukherjee and his two associates in Kolkota. The principal gestational surrogacy program was executed in Ann. Arbor (MI, US) in April 1986. The principal surrogacy program executed among family members, when 48 years of age Pat Anthony effectively bore and conveyed three grandkids for her own 25-year-old girl Karen Ferreira Jorge, was completed in South Africa in

1987.

V. COMMERCIALIZATION OF SURROGACY IN INDIA

Envisioning the youngster as commerce is hard. Infants, after all, are the result of affection, not cash, an origination that happens far away from any business activity. Unfortunate guardians across general settings have seen their youngsters as possible monetary resources, gauging their possible financial commitment in the rice field or plant or estate against the expenses of bringing them through adolescence. Moreover, surrogacy has turned into a business in nations like India, which has led to many inquiries prompting political discussion. Women's activists have squabbled about the alienability of ladies' bodies; legitimate researchers have tested the authoritative and jurisdictional issues. The market for surrogacy is huge and is developing. There are large numbers of expected guardians across the world with both the longing and the fortitude to employ one more lady to bear their youngsters.

Commercial surrogacy, or " wombs for rent" is a developing business in India.⁶ Pundits have depicted the prominence of surrogacy game plans in India as a 'child blasting business', 'belly on employ', 'child firm', and 'life as a parent by proxy'.⁷ Surrogacy has turned a typical natural capability of a lady's body into a business contract. Surprisingly, surrogate hiring of wombs exists in India even though the Transplantation of Human Organs Act, 1994, bans the sale of human organs, loaning of organs, and commercialization of trade of human organs. Moreover, surrogates are nowhere available in India to single parents, and gay and unmarried partners, despite the fact that same-sex relationship is not permissible in India. The urge to have a biological child of one's flesh, blood, and DNA, aided by technology and purchasing power of money coupled with the Indian entrepreneurial spirit has generated this flourishing Indian reproductive tourism industry.⁸

VI. MORAL AND ETHICAL ISSUES RELATING TO SURROGACY

The underlying idea behind surrogacy is a noble one as it is based on the altruistic principle of doing good to others i.e. one woman helping another woman. The religious texts of Hinduism

⁶ Available at <http://www.stanford.edu/group/womenscourage/Surrogacy/> accessed on 30/01/2014 at 7:15p.m

⁷ yashomati Ghosh, "Surrogacy and Law: An Affirmative Approach to Deal with the Ethical and Legal Dilemma", Vol. II, Issue 1, 2011 Journal of Law Teachers of India (83 to 92) at 84

⁸ Anil Malhotra, Ranjit Malhotra, *Surrogacy In India*. 1st Edition (New Delhi: Universal Law Publishing Co. Pvt. Ltd. 2013) at 8.

and Christianity highlight the practice of surrogacy in ancient times. Some of the moral and ethical issues relating to surrogacy are as follows:

- **Harm to Surrogate Mother**-Most Indian ladies go about as proxy moms because of destitution or other monetary need. Nonetheless, surrogacy innovation might include a few complexities and truly hurt the well-being and life of the substitute mother. This raises the significant issue of obligation for the mischief caused or endured by a substitute mother. Assuming there is no clinical carelessness concerning the specialists and other clinical staff, it would be hard to fix the responsibility and subsequently reimburse the misfortune endured by the proxy mother.
- **Interest of the Youngster** - Surrogacy by and large includes the installment of cash to the proxy mother for conveying and giving over the kid to the appointing guardians. In this way, it is condemned as identical to trading a kid. It is contended that it would prompt the choice of sex and qualities in a youngster, for example, making originator infants. In this way, surrogacy would bring about regarding a kid as an item that is thought of as ethically off-base and exploitative. It is additionally seen that the course of surrogacy including in vitro preparation generally brings about the birth of trios or quadruplets.
- **Surrogacy Debases the Nobility of women** - The right to respect is one of the innate and treasured freedoms of every person. It is contended that surrogacy debases the innate nobility of a lady. Surrogacy includes the utilization of a lady's body for delivering a child which is given over to the charging guardians. During the term of pregnancy, the proxy mother needs to comply with the circumstances set down in the agreement and has no privilege to take any choice influencing her body. Besides the proxy mother likewise considers pregnancy for bringing in cash and attempts to try not to foster an exceptional bond with the kid in her belly. In this manner, the normal mother-kid bond is either missing or smothered and the whole cycle is seen as a business exchange. The pundits contend that the lady's body is diminished to being a hatchery or raiser machine and consequently it debases the nobility of woman.⁹
- **Surrogacy has been compared with Prostitution**-Many creators have scrutinized that surrogacy is like prostitution, as it includes selling off the regenerative limit of a lady

⁹ Kaumudhi Challa, "Contentious Issues in Surrogacy: Legal and Ethical Perspectives in India" Vol.1, 2012 Christ University Law Journal (117 to 126) at 121

and the utilization of her body as a trade-off for the installment of cash. Further, it is contended that like a whore who must choose between limited options and control before a client who has solicited her approval and paid cash; the proxy mother additionally must choose between limited options and needs to maintain every one of the agreements set forward by the dispatching guardians. In the two cases, one's actual administration is being offered, in the two cases, material remuneration is presented for the actual administrations provided.¹⁰

- **Surrogacy has been contrasted with Abuse of Unfortunate-** Ladies with restricted financial means in India have promptly acknowledged this strategy for bringing in fast cash and satisfying the requirements of the family. This act of reevaluating has been subjected to extraordinary analysis raising issues like 'servitude of ladies', 'neocolonialism' 'double-dealing of unfortunate ladies, etc.
- **Surrogacy is Assuming the Part of God** -Generally, a kid is considered as an endowment of God. The demonstration of multiplication was likewise thought to be a hallowed commitment to be embraced by the couples for generating a youngster. Before the progression of clinical innovation, the main choice accessible to the childless couple was either to embrace a youngster or to acknowledge childlessness as a choice of God.. The pundits contend that by impeding the normal regenerative cycle, man is assuming the part of God. This is considered a moral, moral and strict wrong.¹¹

VII. INDIA IS THE DESTINATION FOR SURROGACY

In India, where medical tourism is increasingly common, surrogacy is only one of the numerous services that may be purchased. India is currently the most popular nation outside of the US to provide international surrogacy services; the business is estimated to be worth more than \$400 million. However, because foreign surrogacy is mostly uncontrolled in India, it is difficult to pinpoint the actual transactions taking place in terms of both money and the number of births that they cause. As a result, this is merely an estimate.

India is a popular destination for international surrogacy due to a lack of regulations and affordable surrogacy services although in 2013 India passed its Assisted Reproductive Technology Bill, 2013 which banned gay or single foreigners from agreeing to surrogacy in

¹⁰ Aneesh V. Pillai, "Surrogate Mother and its Challenges to the Indian Legal System", Vol.1 No.2, 2011 *The Legal Analyst* (89 to 93) at 92

¹¹ Kaumudhi Challa, "Contentious Issues in Surrogacy: Legal and Ethical Perspectives in India" Vol.1, 2012 *Christ University Law Journal* (117 to 126) at 124

India The SAMA¹² Resource Group for Women and Health (2012) made note of India's lax policy toward surrogacy, the low cost of surrogacy services compared to other nations, and the length of time it takes to find surrogates. We take note of the limited time available and the potential for women to be interested in surrogacy. Being a surrogate mother, having these surrogates under careful observation, and India's cutting-edge medical facilities are all significant elements that make the country an appealing choice for surrogacy.

VIII. JUDICIAL RESPONSE TO SURROGACY IN INDIA

Landmark Cases Relating to the Surrogacy

1. **Baby Manji Yamada vs Union Of India & Anr**¹³

In the famous case of Baby Manji Yamada vs Union Of India & Anr in this case, a Japanese couple, Dr. kutum Yamada, and his wife visited India to have a baby through the practice of simply Then they hired an Indian woman as a surrogate mother for their child who lived in Gujarat where the practice was won to some matrimonial disputes, the couple had divorced. But the father wanted to have custody of the child but according to law, a single father cannot adopt a girl child. So, in this case, Justice Arijit Pasayat and Justice Mukundakan Sharma of the supreme court give the custodial rights of the girl child to her grandmother. So, in this case, it was analyzed that have regulated surrogacy laws in the country.

2. **Jan Balaz v. Anand Municipality**¹⁴

In this case, a German couple hired a surrogate mother named Marthaben Immanuel Khrishti who gave birth to two twins. This German couple worked in the UK and now their two twins need an Indian passport to travel. Since the two twins did not have citizenship because the process was litigating in the courts so, the passport authorities did not grant passports to the twins. And in German, there was no law for surrogacy. Supreme did not grant to give a passport but granted an exit permit to the children and German authorities allow them to adopt the children and fight for their rights.

3. **Suchita Srivastava v. Chandigarh Administration**¹⁵

In this case, the court held that Article 21 of the constitution guaranteed the personal liberty under which the right of women to make a reproductive choice also lies, and along with that it

¹² SAMA-Resource Group for Women and Health. (2012). Birthing a market: A study on commercial surrogacy. Retrieved from SAMA women's health

¹³ Baby Manji Yamada v. Union of India, (2008) 13 SCC 518

¹⁴ Jan Balaz v. Anand Municipality AIR 2010 GUJ 21

¹⁵ Suchita Srivastava & Anr v/s Chandigarh Administration (2009) 14 SCR 989

also includes various other rights. Women have the right to carry a pregnancy to its full term and to give birth, and these rights form part of women's right to privacy, dignity, and bodily integrity.

4. Justice K.S. Puttaswamy And Anr v. Union Of India¹⁶

It was held by the court that there is a violation of the right to privacy in obtaining and showing the certificate of infertility and it is also against the moral and ethical point of view of society to make it compulsory to have a certificate of infertility from the district medical board and this fundamental right must be protected.

IX. CRITICAL ANALYSIS OF THE SURROGACY (REGULATION) ACT 2021¹⁷

The Surrogacy (Regulation) Act 2021 came into effect on 25th January 2022. The Act aims to prohibit commercial surrogacy and allows for altruistic surrogacy. In commercial surrogacy, the surrogate mother is compensated for her services beyond reimbursement for her medical expenses. Commercial surrogacy was legalized in India back in 2002. Due to the absence of legal regulations and lack of implementation, surrogate mothers faced multiple challenges, including exploitation, unhygienic living conditions, and unfair treatment. Thus, the law is a welcome move in the right direction; however, banning commercial surrogacy has created its own set of challenges.

1. It was suggested that this law create a National Commission on Assisted Reproductive Technology and Surrogacy. Having the power to advise government on issues involving surrogacy in the country and being in charge of developing the necessary infrastructure for clinics and hospitals are two examples of this. actual surrogacy He also oversees the state's Assisted Reproductive and Surrogacy Commission now.
2. Only ethically upright surrogacy is acceptable. In other words, the surrogate mother does not receive payment for bearing the child. Commercial Surrogacy is prohibited.

Condition for parents to go for the Surrogacy Service

- At least 5 years have passed since having been married.
- The couple must prove the essentiality and incapability of fertility by showing a certificate of it.
- They must also undertake that abandonment of the child born out of surrogacy will not be

¹⁶ Justice K.S. Puttaswamy (Retired). vs Union of India And Ors., 2012, (2017) 10 SCC 1

¹⁷ The Surrogacy regulation act 2021 act no. 47 of 2021 on 25 dec 2021

done by the intending parents

The eligibility criteria for the same requires a Certificate of Essentiality for couples and a certificate of eligibility for couples. issued by the authorities as stated under the act.

Condition to become a Surrogate Mother

- The woman chosen for surrogacy must be a close relative of the parents who will take the child after the birth.
- It is essential that the Surrogate mother must be a married woman and should also have at least one child of her own.
- The age of the surrogate mother should be between the age of 25-35 years.
- She can go to become a surrogate mother only once and must possess a certificate of physical and mental fitness for surrogacy.
- There should have insurance coverage for the Surrogate mother for some time to cover a period of pregnancy as well as for the period after that.
- The act also gives directions for the regulation of the functioning of surrogacy Clinics
- All surrogacy clinics in the country should be registered.
- It also specifies that no sex selection can be done when it comes to surrogacy.

X. CONCLUDING OBSERVATION

Since the old times, surrogacy has been a strategy for siring a youngster. In any case, with the improvement in science and innovation, this technique is being utilized for siring a kid by fruitless couples as well as by any individual who wishes to have a kid. An innovation made contraception more straightforward and more affordable; a market arose to satisfy this interest. Thus, the rising utilization of surrogacy has raised legitimate, moral, moral, and strict discussions everywhere. As surrogacy game plans affect multiple individuals, where every one of whom can authentically guarantee that he/she is the parent of the kid. Thusly, a contention can emerge about who ought to expect parental limitations towards the kid. This is an issue intrinsic to surrogacy and one can't be sure that such an issue won't emerge. On one hand, surrogacy is a shelter for barren couples however then again it has prompted the commercialization of this technique presenting different issues. It's presently time for India to assess the situation, assess, access, and choose the future course of surrogacy. An obvious regulation on surrogacy should be sanctioned by the Parliament. The clinical experts need to

help and help the Public authority in setting up another draft regulation on surrogacy, with appropriate checks, shields, well-being measures, and sufficient safeguards to ward off the ills of the business over of surrogacy. The unfamiliar residents should not be off track any longer. A legitimate regulation should get control over completely concerned. There's a need to set up a regulation to manage the Craftsmanship centers as well as the freedoms and commitments, everything being equal, to a surrogacy including the privileges of the proxy kid. Surrogacy makes both positive and adverse consequences. Assuming it is carefully utilized, it would give joy to a great many couples. In any case, on the off chance that it is utilized in a thoughtless manner and for trade, it would unfavorably affect society.
