



## Emerging facet of surrogacy law in India

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### Abstract

Law governing surrogacy assumes great importance in India because India has often been termed as the 'surrogacy capital of the world'. Prior to 2008, surrogacy (essentially commercial) was being briskly carried out in India without any efforts by the Government to set up a statutory regulatory mechanism. The turning point came in the year 2008 when the Supreme Court was called upon to deal with a case revolving around surrogacy. This case was *Baby Manji Yamda V. Union of India*.

In 2016, a Surrogacy (Regulation) Bill was introduced. But this bill lapsed owing to the adjournment sine die of the parliament session. The exact same form of bill was reintroduced and passed by the Lok Sabha in 2019 but the bill would require to be passed by the Rajya Sabha. Thus, till today we don't have any specific law on surrogacy in India. This article lays light on surrogacy, its development in India and having a special mention on legal and judicial development.

**Keywords:** surrogacy, Jann balaz baby manji yamada

### Introduction

Over the years, India has become the hub of the global fertility industry, with reproductive medical tourism becoming a significant activity. Clinics in India have been offering assisted reproductive technology (ART) services such as gamete donation, intrauterine insemination (IUI), *in vitro* fertilisation (IVF), intracytoplasmic sperm injection (ICSI), preimplantation genetic diagnosis (PGD), and gestational surrogacy. Surrogacy, in particular, has drawn many childless couples to India in the last few decades<sup>[1]</sup>

Surrogacy is an arrangement, often supported by a legal agreement, whereby a woman (the surrogate mother) agrees to bear a child for another person or persons, who will become the child's parent(s) after birth. People may seek a surrogacy arrangement when pregnancy is medically impossible, when pregnancy risks are too dangerous for the intended mother, or when a single man or a male couple wish to have a child. Surrogacy is considered one of many assisted reproductive technologies<sup>[2]</sup>. The 'Surrogate' word has its origin within the Latin term *Surrogatus* meaning a woman acts as a substitute for another woman. It is a method of assisted reproduction or assisted reproductive technology (ART) where on behalf of another person or couple a woman or the surrogate offers to carry a baby through pregnancy and then return the baby to the intended parent(s) once it is born and also in return will get compensation as agreed. No doubt it is a highly complex process and there are several important steps to ensure that both parties make the best decisions<sup>[3]</sup>.

### Legal Position on Surrogacy in India

Law governing surrogacy assumes great importance in India because India has often been termed as the 'surrogacy capital of the world'. Prior to 2008, surrogacy (essentially commercial) was being briskly carried out in India without any efforts by the Government to set up a statutory regulatory mechanism. The Indian Council for Medical Research (ICMR) formulated certain Guidelines in 2002 (approved by the government in 2005). However, these

Guidelines did not have any statutory basis and surrogacy continued to remain an unchartered territory in the Indian legal landscape. The turning point came in the year 2008 when the Supreme Court was called upon to deal with a case revolving around surrogacy. The case of *Baby Manji Yamda V. Union of India* merely pertained to obtaining travel documents for a baby with Japanese parents conceived and born in India through commercial surrogacy. Though the issue of the legality of commercial surrogacy under Indian law was not raised, the Supreme Court made an observation that commercial surrogacy is legal in India<sup>[4]</sup>. The timing of the judgment coincided with the formulation of the Assisted Reproductive Technology (Regulation) Bill, 2008. Unfortunately, no steps were taken to table the Bill of 2008 before Parliament. This prompted the Law Commission to suo moto take up the issue of surrogacy for research. The exercise culminated in its 228th Report submitted in August 2009 where the Law Commission mooted the proposal for a revamped legislation to regulate the process of surrogacy in India<sup>[5]</sup>.

### The following observations had been made by the Law Commission

- 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 other family members for the same, medical procedures of artificial insemination, reimbursement of all reasonable expenses for carrying child to full term, willingness to hand over the child born to the commissioning parent(s), etc. But such an arrangement should not be for commercial purposes.
- 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.

- A surrogacy contract should necessarily take care of life insurance cover for surrogate mother.
- 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.
- 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.
- The birth certificate of the surrogate child should contain the name(s) of the commissioning parent(s) only.
- Right to privacy of donor as well as surrogate mother should be protected.
- Sex-selective surrogacy should be prohibited.
- Cases of abortion should be governed by the Medical Termination of Pregnancy Act 1971 only <sup>[6]</sup>.

Acting upon the recommendation of the Law Commission, in the year of 2013 an improved Assisted Reproductive Technology (Regulation) Bill was prepared and after several modifications, the Assisted Reproductive Technology (Regulation) Bill, 2014 came into being. However, this Bill met with the same fate as the Bill of 2008 and did not see the light of day <sup>[7]</sup>.

In 2016, a Surrogacy (Regulation) Bill was introduced and passed by Lok Sabha, the lower house of the Indian parliament, proposing to permit only Indian heterosexual couples married for at least five years with infertility problems to access altruistic or unpaid surrogacy and thereby banning commercial surrogacy. The 2016 bill lapsed owing to the adjournment sine die of the parliament session. The exact same form of bill was reintroduced and passed by the Lok Sabha in 2019. The bill would require to be passed by the Rajya Sabha, upper house of the Indian parliament and presidential assent before it becomes an act and thereby a law <sup>[8]</sup>.

#### **Main features of the surrogacy bill, 2019 are**

- Made commercial surrogacy illegal now
- Only allows altruistic surrogacy for needy, infertile Indian couples and envisages prohibition on foreign nationals from availing surrogacy services
- Requires intended parents to be married for five years and have a doctor's certificate of their infertility
- Restricts women to being surrogates only once, and only if they are a close relative of the intended parents, are married and have a biological child
- Bans single parents, homosexuals and live-in couples from surrogacy <sup>[9]</sup>.

#### **Approach of Indian Courts on Surrogacy**

In *Baby Manji Yamada v. Union of India* <sup>[10]</sup>, baby Manji Yamada was a child born to an Indian surrogate mother for a Japanese couple who before a month of the child's birth separated and the future of the child was left in dark. The biological father, Ikufumi Yamada wanted to take the child

to Japan but the legal framework had no such provision for such a case nor did the Japanese government permit him to bring the child back home. In the end, the Supreme Court of India had to intervene and the child was allowed to leave the country with her grandmother. The biggest impact of the *Baby Manji Yamada* decision has been that it spurred the government of India to enact a law regulating surrogacy. The Supreme Court of India in 2008 held surrogacy permissible in India after Manji's case which increased the international confidence in going in for surrogacy in India. In *Jann Balaz v. Anand Municipality*, <sup>[11]</sup> also Gujarat High Court ruled that the birth certificate of the child born through surrogacy will carry the name of the surrogated mother as against the biological mother and the child would be granted a passport of India which certifies him as the Indian Citizen and the surrogate mother in turn had to give the child to German couple in adoption, who had sought the services of Indian surrogate mothers. Eventually, the matter reached the supreme court which requested Central Adoption resource Agency, (CARA) is an autonomous body under the Ministry of Women & Child Development, Government of India. It deal with inter- country adoptions in accordance with the provisions of the Hague Convention on Inter-country Adoption, 1993, ratified by Government of India in 2003) to make a one time exception on humanitarian ground considering the child welfare and facilitate adoption for these twins. Accordingly these surrogate twins were adopted by the German Couple and they were taken back to Germany. These cases open a flood gate of unresolved legal issues as the court has not laid down any guidelines but provided for adoption as a provisional measure for saving the surrogate child from being rendered stateless and parentless.

Back in 2012, Justice K.S. Puttaswamy, in a landmark judgment, had recognised the constitutional right of women to make reproductive choices, citing personal liberty under Article 21 of the Indian Constitution. In fact, this was as inalienable as other fundamental rights, which is what Pragya Vats, who works with an international NGO and is single, testifies to. "It's about freedom of choice and expression," she says. "As women, we must be able to own our bodies. The law shouldn't encroach on that freedom."

The new Surrogacy (Regulation) Bill, 2019 does not disregard this argument but makes the condition that only legally married heterosexual couples can opt for surrogacy. Now this excludes single persons, divorcees, live-in couples, widows and widowers, gay couples among others. Yet another condition is that couples should have been married for five years and must be certified 'infertile' in order to be able to hire surrogates. It also says that under altruistic surrogacy no monetary benefits should be involved other than the medical expenses and insurance. "Parenthood is beyond gender, sexuality or sexual preferences! If you are excluding anyone from availing surrogacy, based on sexuality, caste, religion, gender or sexual, it's a gross violation of human rights. The recent surrogacy bill will prohibit same sex couples and LGBTQ people from becoming parents through surrogacy, which is really denial of justice for sexual minorities in India <sup>[12]</sup>.

The bill in this sense dictates the entire process and by putting the surrogate on a pedestal expects the act to be selfless in nature. These expectations have created air of uncertainty around the whole process itself where the women have to meet abstract requirements of warmth,

nurture etc. It places pressure as well aims to manipulate them out of the monetary component <sup>[13]</sup>.

The bill also is tinged with inherent patriarchy due to the approach take out of a drafting committee of 23 people only 3 are women and therefore it also poses a case of misrepresentation of an entire section of the society <sup>[14]</sup>.

### Loopholes and Limitation in Bill

- No uniform standard monetary compensation: Though the ART Bill clearly states that the monetary compensation may be provided to the surrogate mother but neither the ART Bill, Rules lay down the minimum or the maximum quantum of monetary payment for same.
- Non enforceability within India: The legal enforceability of such surrogacy agreement is a questionable issue as evident in the case of Baby Manji Yamnda V. Union of India where in it was found that the surrogacy agreement entered between the parties is held null void or without any legal effect <sup>[15]</sup>
- No procedural mechanism of entering into the surrogacy agreement, there is silence in the ART Bill or Rules on the administrative legal compliance including the attestation, stamp value, requirement of witness, approval and scrutiny as necessary among others.
- Non enforceability of surrogacy agreement in foreign legal jurisdiction: One of the most significant features of the surrogacy agreements as stated in the ART Bill is its enforceability within the geographical territory of India not outside taking after the relevant provision of the ART Bill which imposes territorial limitation on the legal effect of agreement. Therefore a surrogacy agreement providing for pertinent concerns as legal parentage, custody rights of couple over surrogate child entered by the foreign intending couple in India though may receive the legal approval in India but the same agreement may have no legal effect in their respective foreign jurisdiction. This held true in the case of Baby Manji <sup>[16]</sup>.
- Non applicability of contractual legal remedies: In case of surrogacy agreement neither the remedies provided under the Indian Contract Act nor the remedies provided under the Specific Relief Act may be applicable. One such case was reported by a leading surrogacy law firm based in Mumbai which the surrogate mother refused to hand over the custody of surrogate child to the couple but the lawyers claimed to have necessarily “sorted” the issue. But it is not disclosed if the same amounted to breach of surrogacy agreement by the surrogate mother and if she was sued against or any other legal proceeding or legal action taken by either the intending couple, law firm against the surrogate mother for the same <sup>[17]</sup>.
- Lack of the specified judicial forum for dispute resolution.
- Inconsistency with right to medical termination of pregnancy: The provisions in the surrogacy agreement take away from the surrogate mother the guaranteed legal rights namely the reproductive right to seek termination of medical pregnancy subject to the terms and conditions under the Medical termination of Pregnancy Act 1971 <sup>[18]</sup>.

### References

1. <https://www.hindustantimes.com>.
2. <https://en.wikipedia.org>.
3. <https://www.jagranjosh.com/>
4. <https://www.barandbench.com>.
5. Ibid.
6. Supra note ii
7. Supra note v
8. Supra note ii
9. <https://surrogate.com>.
10. AIR 2009 SC 84
11. AIR 2010 Guj.21
12. <https://www.indiatoday.in>
13. <http://www.legalserviceindia.com>.
14. Report of the Select Committee on Surrogacy bill 2019, Rajya Sabha, 5th February, 2020.
15. Swati Vashishtha, Baby Manji faces another legal hurdle, CNN-IBN, Aug 15, 2008. available at <http://ibnlive.in.com/news/baby-manji-faces-another-legal-hurdle/71068-3.html>
16. AIR 2009 SC 84
17. Mother & Baby, Womb in your heart, news.advisen, 09/03/2014, news advisen .com.
18. Medical Termination of Pregnancy (MTP) Act, 1971. Section 3(2), 3(b)