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SURROGACY (REGULATION) BILL, 2020

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ABSTRACT

Being human, many couples and women have the desire to have children in their life. However, due to many factors, this desire remains unfulfilled. To overcome this defect, the process of surrogacy came into play. But, it had more malfunctions due to improper implementation of the law. Declaration of Human Rights, 1948, recognized having a child as a human right. In India, we followed commercial surrogacy for a vast period, but it led to many problems that affect the surrogate mother as well as surrogate children. The surrogate mothers are illegally subjected to repeated pregnancies that affect their health adversely. Poverty is one of the reasons behind this; they are not given proper post-delivery requirements. To overcome these many defects, the Surrogacy (regulation) bill, 2020, was passed with many changes to the 2019 bill. The 2020 bill had many features that ensured the right and health of the surrogate mother and surrogate child born. The paper will analyze all these changes in detail.

KEYWORDS: CONTRACTUAL SURROGACY, FUNDAMENTAL RIGHT, SURROGATE MOTHER, SURROGATE CHILD.

INTRODUCTION:

Surrogacy is one such topic that is debated due to various reasons. It is socially, legally, ethically, and in many ways, controversial. This conflict gave rise to many questions in society. In surrogacy, the child born out of a surrogate mother will be given to the intended or contracted parties. The intended parents and surrogate mother usually undergo a contract; hence this is also called “Contract Pregnancy”. As to regulate the surrogacy practice, the surrogacy bill was amended so that a balance would be achieved between the rights of the surrogate mother and infertility couples. After consolidating the guidance of the Select Committee of Rajya Sabha, the Surrogacy (Regulation) Bill, 2020 was approved by the Union cabinet.

BACKGROUND:

The origin of the term ‘surrogate’ was from the Latin word ‘surrogatus’, which means ‘substitution or replacement’. Here, a person will be replaced in another person’s place. This is by *Black Law’s Dictionary*. There were various types of surrogacy which have been followed in many countries and societies since ancient. Commercial Surrogacy, Gestational Surrogacy, Natural Surrogacy, Altruistic Surrogacy.

- ◆ **Commercial Surrogacy:** When the surrogate mother accepts the contract for monetary benefit, then it is known as Commercial Surrogacy. This type of pregnancy is usually banned in many countries, as many women who are under poverty are exploited for these activities.
- ◆ **Altruistic Surrogacy:** in this type, the surrogate mother is paid only the expense of reimbursement.

- ◆ **Natural Surrogacy:** it is the artificial insemination of male gametes; here, the surrogate mother is the biological mother of the child born. It is also called artificial insemination.
- ◆ **Gestational Surrogacy:** in this, the fertilized egg is carried by the surrogate mother till the birth of the child. The surrogate mother acts as a gestational carrier.

As the '*Baby M case*' happened in 1986, it is known as the landmark year for surrogacy. A New Jersey couple entered a contract with a surrogate to bear a child. But, in the end, she denied accepting money and chose the child. As there is the involvement of money, it was held, 'criminal', 'illegal', and 'degrading of women'. That was invalidated by the court as it was in contradiction with the public policy. Somehow, finally, the parents who intended to have children had custody, and the surrogate had the only privilege of visiting it. The evolution of surrogacy was due to factors like infertility, difficulties in bearing a child, and so on. With the development of technology, these activities also get developed. Though we practice commercial surrogacy, it was opposed by many. Due to the possibility of growing a baby full term in any womb, the phrase, "*wombs for rent*" came into existence.

In India, commercial surrogacy was first made legal in the year 2002. When it is made legal, the guidelines laid down by them are not much effective, which is almost equal to no law to govern them properly. As a result of this, many foreigners reached India for the process of surrogacy. India became a global market for surrogacy because of its cost-effectiveness too. They felt comfortable as India had a cheap cost comparing many countries. Surrogate mothers, at some point, became machines that produce babies.

In a case,¹ a Japanese couple took an Indian woman as a surrogate mother. A baby was born for them through that surrogate mother at Anand in Gujarat, which is known as ‘cradle of the world’. But, the couple got separated before the birth of the child (a month ago). The biological mother ignored the custody of the child, and the biological father was denied to take custody as he was a single parent. The Japanese government didn’t allow him as the child had neither Indian nor Japanese nationality. By the intervention of the SC, the Japanese government gave Visa and a travelling certificate by the Indian government on humanitarian grounds. The baby was taken back under the grandmother’s custody to Japan. This made Commercial surrogacy legal in India. In another case, it again recapitulated the legal status of Commercial Surrogacy in India.² In a case³, it was held that under article 21, the right to make reproductive choices falls under the personal liberty of a woman. In another case,⁴ the court held that under article 21, the right to life is an important ingredient to be considered. In the year of 2014, the Centre for Social Research (CSR) conducted a study over India, and it published that about 88% and 76% of surrogate mothers from Delhi and Mumbai respectively were unaware of the contractual clauses and there were more than 2000 clinics are functioning without making valid registration at appropriate authorities.

On August 5, 2019, Lok Sabha passed the Surrogacy (Regulation) Bill, 2019. On November 21, 2019, a motion was embraced from a Select Committee that was recommended at the Rajya Sabha’s meeting that would refer to the bill. The existing bill of 2020 was a reconstructed version of the bill which was passed by the Lok Sabha earlier.

¹ Baby Manji Yamada v. Union of India, (2008) 13 SCC 518.

² Jan Balaz v. Anand Municipality, (2010) 21 AIR GUJ.

³ Suchita Srivastava v. Chandigarh Administration.

⁴ Devika Biswas v. Union of India, (2016) 10 SCC.

FEATURES OF SURROGACY (REGULATION) BILL, 2020:

- ***Eradicating “infertility” definition:***

As mentioned, though the couple had unresisting intercourse of 5 years,⁵ unable to conceive. It would be a long term for the couple to hold back for a child.

- ***It permitted any “willing women”⁶to undergo as a surrogate mother:***

Whereas, the previous bill mentioned surrogate mother could only be a close relative⁷ to that couple. If we impose such restrictions on relatives alone, then the availability of surrogate mothers will be less.

- ***Rights of the newborn child,⁸ in any situation, the child shall not be left abandoned. It possesses the same and equal rights as to the natural child.⁹***

- ***Establishment of Surrogacy Board:***

It suggested establishing a surrogacy board at the National level by the Central Government,¹⁰ and State level by the respective State,¹¹ and Union territories government with recognized authority.¹²

⁵ The Surrogacy (Regulation) Bill, 2019, §2(p).

⁶ The Surrogacy (Regulation) Bill, 2020, §4(iii) (b) (II).

⁷ The Surrogacy (Regulation) Bill, 2019, §4(iii) (b) (II).

⁸ *Jan Balaz v. Anand Municipality*, (2010) AIR Guj 21.

⁹ The Surrogacy (Regulation) Bill, 2020, §8.

¹⁰ The Surrogacy (Regulation) Bill, 2020, §15(1).

¹¹ The Surrogacy (Regulation) Bill, 2020, §24(1).

¹² The Surrogacy (Regulation) Bill, 2020, §33(1).

- ***Increase in insurance cover period:***

It recommended the increase in insurance period from 16 months to 36 months.

- ***Ban of Commercial Surrogacy:***¹³

The main objective of the bill is to allow Altruistic Surrogacy¹⁴, and it also suggested the prohibition on human gametes and embryo sales. It allows married Indian Couples; females of age group between 23 to 50 years, and males of age group between 26 to 55 years.

- ***limited to Indian couples:***

It allowed only ethical surrogacy to **Indian-origin married couples, Indian single women** (*only widow or divorcee between the age of 35 and 45 years*)¹⁵ and, **Indian married couples**. This will be allowed only by fulfilling the terms and conditions mentioned.¹⁶

While undergoing surrogacy, the intended couple should not have biological as well as adopted children. The only exception is when such a child shall be mentally or physically challenged or having any serious disease that would endanger life as well as has no curative option. If any of the above-mentioned scenarios occur, they should avail a medical certificate from their District Medical Board.¹⁷

¹³ The Surrogacy (Regulation) Bill, 2020, §36(1) (a).

¹⁴ The Surrogacy (Regulation) Bill, 2020, §4(2) (b).

¹⁵ Definition clauses, section 1(s), page 39 of the report.

¹⁶ Clauses 4.54 and 4.55 at page 31 of the Report of the Select Committee on the Surrogacy (Regulation) Bill, 2019 presented to the Rajya Sabha on 5 February 2020.

¹⁷ *Ibid*, clause 4, at 3.

Reference in this regard is made to the recently celebrated judgment handed down by the Hon'ble Supreme Court of India.¹⁸ The court held that formulating an infertility certificate amounts to a violation of the fundamental right (I.e.) right to privacy guaranteed by the Constitution. In another case,¹⁹ it was held that the right of a person in reproductive autonomy is private, and the state has no right to intrude in such a decision-making process.

- ***Criteria to undergo surrogacy:***

The eligibility certificate should be obtained by the couple before moving for surrogacy which is mandatory.

- ***Registration of clinics:***

Every surrogacy clinic in the country should be registered under the appropriate authority as to the government.

- ***Prohibits sex selection:***

During surrogacy, the intended parents should not make any sex selection.

- ***Rights of surrogate mother:***

She can act as a surrogate mother only once in her lifetime,²⁰ in that too; she should not provide her gametes.²¹

¹⁸ *KS Puttaswamy v. Union of India*, (2017) 10 SCC 1.

¹⁹ *B.K. Parthasarathi v. Govt. of A.P.*, (2000) 1 ALD 199, (1999) 5 ALT 715.

²⁰ The Surrogacy (Regulation) Bill, 2020, § 4(iii) (b) (IV).

²¹ The Surrogacy (Regulation) Bill, 2020, §4(iii) (b) (III).

- ***Excluded persons from surrogacy:***

Single/ Unmarried persons, as well as persons who are in a relationship but not married, are all excluded from making surrogacy arrangements.

- ***Abortion of surrogate child:***

If a surrogate child is to be aborted, it requires permission from the appropriate authority, and the surrogate mother should give her consent in written form. They should undergo the procedure as mentioned by the Medical Termination of Pregnancy Act, 1971. If the surrogate mother wants to discontinue this process, she can do it whenever but before the embryo is being implanted in her uterus.

- ***Punishment and offences:***

If anyone does commercial pregnancy or exploitation of surrogate mother or anything that affects the surrogate children or sale of embryo and gametes or even importation; they can be punished up to 10 years and can even liable to pay the penalty up to 10 lakh.

WORLDWIDE VIEW ON SURROGACY:

COUNTRY	ALLOWED OR NOT	FORM OF SURROGACY
The United States and Argentina	YES	Decided by independent surrogacy committees.

United Kingdom, Denmark, South Africa, Australia, Canada and, Greece	YES	only altruistic surrogacy
Russia, Ukraine, and Thailand.	YES	Commercial surrogacy is legally allowed
France, Germany, Spain, Sweden, Italy and, Iceland	NO	Banned in any form



IMPORTANCE OF THE CHANGES:

We were practising surrogacy from long back without any ground and definite rules. The main aim to bring changes is to provide a legal and regulatory framework to surrogacy. Even in the present time, there are many issues regarding it. Some of them are as listed:

Women are being exploited to serve as surrogate mothers,²² the children born out of surrogacy are left abandoned²³ for several reasons, and sometimes there may be importation of gametes and embryos. Many women in India play the role of surrogate mothers to overcome poverty, and because of their family welfare which adversely affects their health. Prohibiting commercial surrogacy and the insurance cover will help many women to regain their health.

²² Jessica Cussins, *Indian Surrogate Dies amid Complications in Eighth Month of Pregnancy*, CENTER FOR GENETICS AND SOCIETY, (May 31, 2012), <https://www.geneticsandsociety.org/biopolitical-times/indian-surrogate-dies-amid-complications-eighth-month-pregnancy>.

²³ Smriti Kak Ramchandran, *Australian couple abandoning surrogate child highlights need for strict laws*, THE HINDU, (Oct. 10, 2014), <https://www.thehindu.com/news/national/australian-couple-abandons-child-from-indian-surrogate-mother-bolsters-campaign-for-strict-laws/article6487751.ece>.

CONCLUSION:

There are many children in India without parents living in orphanages. The couples who don't have children can adopt a child. But, it involves a rigid and prolonged process that compels people to opt for surrogacy. Though, we make many laws to protect the rights of the surrogate mother and surrogate child, many clinics in India run without making registration. Those clinics violate the law by identifying the sex of the child and doing the abortion. Surrogacy is not followed in many areas. They believe that a child is a gift of God, not a right. The victims of the process of surrogacy are the surrogate mother and the surrogate child. Though the bill recommended many features that should be included, the effective implementation of it is necessary to fulfil the objective of it.



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