

Judicial Response to Surrogacy: A Critical Perspective

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Abstract:

The role of apex court in a democratic country can be understood by its active participation in shaping society under the changing circumstances. On account of development in science and medical field new principles are emerged to govern the consequences of development. In this changing circumstance court can play a significant role for accelerating growth of new emerging principles. It is expected that as per emerging principle, law and society must be modified. And if somewhere legislature fails to cope up with changing circumstances, then apex judiciary need to be active and vigilant. Similarly, it is also expected that apex court must be participate in resolving situation as per the demand of society and should support to make the safe atmosphere in the society.

While discussing about the surrogacy above discourse nearly seem to be worthful and true. The apex judiciary may address the issue of surrogacy as per the beneficial perception of the society. It is research question whether apex judiciary has played significant role in direction of shaping law over surrogacy as per the role assign to it under Constitution. If yes, then, under what manner and under what circumstances accomplish it. In this article researcher is critically examine these questions. And simultaneously exploring the various cases decided by court pertaining to surrogacy along with analysing existing guideline, report, pending surrogacy Bill and Assisted Reproductive Act, 2020.

Key words: Apex Court, Surrogacy, science, medical field, law, society,

Introduction:

India become identified as surrogacy hub since 2002 when commercial surrogacy was legalised by ICMR (Indian Council for Medical Research) guidelines. Since then Indian society is facing dilemma situation, relating to its negative impact on the underprivileged rural background women who

¹. It was the position remain continue till 2015, meanwhile, public interest litigation was filed by Jayshree Wad, in her petition

Supreme Court sought to end commercial surrogacy in India² Accordingly, in October 2015 Indian Government had declare, that it did not support commercial surrogacy and would allow only altruistic surrogacy to infertile Indian couple. Thus, surrogacy Bill of 2016 was a result of this change of intentions³.

Now presently Assisted Reproductive Technology Act 2020 and ICMR guidelines 2005 confirm the parentage issue and legal status of the surrogate child by limiting the role of surrogate mother, but the situation was differed and unclear in

are mostly illiterate and ignorant about their rights. And these women are mostly affected as compare to elite class women who are living in luxurious atmosphere. Such rich elite class community often seen to use these poor women to fulfil their long-term desire of child. The dilemma situation is evident of exploitation of poor women on one hand and long-term desire of own child on the other. Even rich foreigners were using the bodies of poor Indian women to have children

regards to issue of parentage and birth registration before the ART Act 2020 is came in to existence. Even though ICMR guidelines of 2005 was prevailing. These issues had taken momentum after the cases came before the Apex court in India. At the same time there was no proper law to govern surrogacy issues, thus court faced difficulties while dealing with it similarly had to work in absence of regulation as well judicial precedent. Superior Court has helped through its judgement in formation of surrogacy regulation and during this process on several occasion court has also emphasized for the surrogacy legislation. Its decision has expressed public opinion and accelerates the speed of enactment of law over the surrogacy. Moreover, the Apex Judiciary was somewhere played restricted role

while determine the suitable aspect of surrogacy for India. There was two important aspect of surrogacy as commercial and altruistic was prevailing at the globe. But later on, apex Court inclined in favour of altruistic surrogacy. Even Apex Judiciary fails to speak about the enforceability of surrogacy arrangement in view of provisions of contract law and Constitutional provisions. In this area Apex Judiciary had opportunity to interfere in deciding validity of surrogacy trend for Indian culture. In Baby Manji case Supreme court did not rule over the validity of surrogacy contract. In fact, it has elaborated on the concept of surrogacy, and methods of surrogacy even it has recognised all forms of surrogacy including commercial and altruistic without deciding the enforceability of surrogacy arrangement.⁴ Apart from this Superior Courts have resolved issues over the citizenship and birth registration of surrogate child, because there was inconsistency appeared before the court while dealing with Baby Manji and Jan Balaz case.

1.2 ICMR Guidelines

With respect to surrogacy, ICMR in 2000, had released a statement of specific principles for assisted Reproduction Technology, these principles prima facie provide several protection to surrogate women, some of the principles are as a woman who carries the child and gives birth consider her/his mother; the contract for surrogacy which permitting reasonable compensation on completion of adoption would be valid but subject to surrogate's right to retain the baby if so desires; surrogacy should be resorted only when it is coupled with authorised adoption and intended parents must be given preferential right to adopt the surrogate child.⁵ Then after on September 4, 2002 the secretary of family welfare had released draft guidelines on Assisted Reproduction Technology (ART). These draft guidelines were developed by a committee formed by the ICMR and the National Academy of Medical Sciences, New Delhi, with respect to surrogacy, these guidelines were support the child born through surrogacy should be presumed to be the legitimate child of the couple as born within wedlock; genetics parents must adopt a child born through surrogacy; no relative could act as surrogate; surrogacy available only to the patient who physically or medically undesirable or impossible to carry

pregnancy.⁶ Again in 2005 after several discussion and debate the Ministry of Health and Family Welfare with support of National Academy of Medical Science and ICMR, published the nonbinding National Guideline for accreditation, Supervision and Regulation of ART clinics in India.⁷ Mostly guidelines related with gamete transfer and surrogacy. Following guidelines specially provided for surrogacy as the birth certificate must be in the name of genetic parents (names of the commissioning parents only), and clinic should provide a certificate to the genetic parents giving the name and address of the surrogate mother; surrogate mother would also be entitled to monetary compensation from the couple for agreeing to act as a surrogate; a child born through surrogacy must be adopted by the genetic parents; and a child born through ART shall be presume to be legitimate child of the couple as having born in wedlock and consent with both the spouse; the surrogate mother and third party doner must relinquish in writing all parental rights concerning the offspring and vice versa.⁸

By pursuing above guidelines, we can infer that guidelines published by Ministry of Health and Family Welfare in 2005 are prevail over the guideline set down by ICMR in year 2000 relating to surrogate's right over the child. Since 2005 commissioning parents (genetic parents) name listed on the birth certificate. In addition to these guidelines speak about the monetary compensation to surrogate mother for her service and relinquishment of rights over the child. But it was obscure and had not mention about the mode of payment to her, payment is exceedingly imbalanced and unfavourable towards the surrogate.⁹ Even if these guidelines were prevailing but issues regarding legal mother, birth registration for the child born through surrogacy was unclear. As we have seen under Birth registration Act¹⁰ birthing mother is considered as natural mother. Where, as in India birthing mother is to be recognised as legal mother in absence of surrogacy law. On the other hand, 2005 guidelines permitted the legal motherhood to be vested with intending mother or wife of intending father to the exclusion of surrogate mother. This inconsistency was appeared before Superior Court while dealing with surrogacy cases. And the issue of parenting mostly links with citizenship and birth registration.

For the first time issue relating to parentage arise through surrogacy practice came before the Superior court in following cases.

1.3 Jan Balaz case¹¹

In this current case practice of listing names of commissioning parents on the child's birth certificate called in question. "The petitioner Jan Balaz a German Citizen along with his wife entered a surrogacy agreement with Dr Patel's fertility clinic in Anand Gujrat state. The twins were conceived with Balaz sperm and egg from an undisclosed source because Susanne Lohle wife of Jan Balaz failed to produced eggs. Apparently, the petition arose from a couple's difficulties in obtaining a twin's visa. After the twins were born on January 4, 2008, the Anand Municipality listed Jan Balaz and Susanne Lohle as parents of the twins on their birth certificates. Although they did not comply with the names in the birth register maintained by the hospital. Before the court it was explained that names of commissioning parents were given on the wishes of the couple to the Municipal authority there was no any bad motive."¹²

In this case there are number of areas that may be required to be addressed but upmost question was relating to the listing of commissioning parents name on the child's birth certificate. Therefore, court decided to keep case open for further issue and granted interim relief with respect to petitioner that twins could travel out of India with couple.

The court directed that the twins birth certificate be changed and substitute the Susanne Lohle's name by surrogate mother. The Court decided the case by inclining to recognize the surrogate mother as natural mother of the children.¹³ And since the woman is an Indian national, therefore, surrogate children will also be treated as Indian nationals and entitle for Indian citizenship. While announcing the verdict, the division bench of Gujarat High court comprising Chief Justice K.S Radhakrishnan and Justice Dev observed that a lot of legal, moral and ethical issues arise for our consideration for which no precedent in this country.¹⁴ Thus, Court has also emphasised need for a comprehensive legislation dealing with all the issues and situations being created by the third party reproductive technology.¹⁵

Central government was not happy over this verdict and challenge the interim order of Gujarat

High Court to Supreme Court. Similarly, Supreme Court has held that surrogate mother is to be the legal mother of the child that her name will be appeared on the birth certificate of the child. But this verdict is showing inconsistency with the ICMR guideline which clearly mention and state that the indented parents name shall be on the birth certificate of the child. It was also inconsistent with the surrogacy arrangement entered by commissioning parents with surrogate mother.¹⁶ Similar issues had been faced by the Superior Court during the proceeding in Baby Manji case.

1.4 Baby Manji Case¹⁷

In this case a surrogacy agreement was entered between the biological father Dr. Yuki Yamada and anonymous biological mother on one side and surrogate mother on other side. Further embryo was implanted in the uterus of surrogate mother. Thereafter, child was born on 25th July 2008. Meanwhile there were matrimonial discords between Dr Yuki Yamada and Dr Ikufumi Yamada and later on couple got divorce. On 3rd August 2008 the child was moved to Arya Hospital in Jaipur following a law and order situation in Gujarat and child was being provided with best needed care including breasted and custody was given to child's grandmother. After her birth issue of legal mother and citizenship was arose. The difficulties over the citizenship arose when Japanese foreign Ministry told that in order to bring baby back to Japan, he must have to adopt the baby and have to obtain Indian Passport. On the other hand, ICMR guideline states that baby born through surrogacy would be consider the legitimate children of their biological father or mother. With view to resolving issues of parenting and citizenship the Government of India had issued identity certificate to the baby Manji.¹⁸ But the certificate did not have mention nationality, mother's name, and only valid for one year¹⁹. During this grandmother's custody was challenged by one Satya Jaipur based NGO in Rajasthan High Court as illegal custody. Similarly, Rajasthan High Court had given certain direction to intended father and state government. Later on grandmother had challenge certain direction given by division bench of Rajasthan High Court in the Supreme Court. While dealing with case Supreme Court had formally legalized commercial surrogacy and explores its

form and types. Moreover other several problems were also arose such as baby Yamada had three mother one intended, second egg donor and third one gestational surrogate and out of this who will be the legal mother or whose name must be mention on birth certificate with father. And second question was relating to contract basically which was not legally binding with regard to parental responsibility. Then question remain unresolved about the status of surrogacy contract. Again what shall be the remedy if in case contracting party indulging in breach of any condition, which is enumerated under the contract? In this case contract might have breach on the part of ethics in favour of child, similar kind of many more ethical and legal questions surrounding surrogacy were remain unanswered by this case.

Here Superior Court had better chance to intervene and decide over legality of contract, status of surrogate mother for birth registration but the apex judiciary is seen reluctant in this regard. With this study we can inferred that Baby Manji case throws up need for legal framework on surrogacy law, which has remained unclear as to child born to Indian surrogate is a citizen of India²⁰. Lastly, we can say that Supreme Court had formally legalized commercial surrogacy in India by this case but later on it has accepted its altruistic aspect in further proceeding in Jan Balaz case.

1.5 Discussion

In absence of law we expect the effective role of judiciary in regulating issues and problems relating emerging trends. Apex judiciary generally represent the true voiced of the people to create pressure on the government in regard to enactment of proper law. As we have seen in the important cases Baby Manji²¹ and Jan Balaz²² case apex judiciary including Gujarat High court has subsequently expressed the need of immediate effective proper law on the surrogacy for regulation of the surrogacy procedure. Similarly, Delhi High court in Rama Pandey vs. Union of India²³ expressed concern over the maternity leave to surrogacy procedure. In this case court has made available maternity leave to the commissioning parents by interpreting the existing legal provisions in the Indian legal system. In addition to this a nine-judge bench of the Supreme Court of India on 24th August 2017, unanimously

declared right to privacy is the fundamental right of the Constitution.²⁴ While judges formulating their conceptions of privacy differently, the bench all together held privacy to cover personal autonomy relating to the body, mind, and to making choices as well as informational privacy. And also held that personal autonomy includes reproductive rights and decisions.

The apex judiciary did not expressly mention surrogacy but it affirmed existing privacy jurisprudence, which has recognised personal decisions about birth and babies as being part of reproductive autonomy.²⁵ This newly reproductive technique must be part of privacy right because it involves issues such as procreation of child, carrying pregnancy for another, birth of child, motherhood, and exploitation of surrogate women. Moreover, we can observe from the Supreme court judgments over the last few years that it has explicitly recognised surrogacy as a method of reproduction. Thus, judiciary is trying to bring surrogacy within the reproductive aspect of the privacy rights.

Conclusion.

Surrogacy is considered as very complex issue as it has raised several legal ethical issues in the human society. And it is very tough and difficult for the court to determine issues in absence of law over the surrogacy. Merely guidelines are not sufficient to regulate and control these problems, we need proper effective law over it. And on several occasion Apex court has express need of better policy decision on the part of Government to avoid exploitation of underprivileged women and commodification of surrogate children. From above discussion we may affirm that Superior Court has played very vital and restricted role in shaping surrogacy concept in India.

Some question may need elaborate answer from court and Government also such as reproductive right of surrogate women, why we need complete ban on surrogacy, exclusion of gay and single parent surrogacy, and close relative women for surrogacy included in recent surrogacy bill 2019.

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- ² Ibid.
- ³ Ibid.
- ⁴ Legal Briefing, Surrogacy in India: a dilemma. Available at <https://www.inhouselawyer.co.uk/legal-briefing/surrogacy-in-india-a-dilemma/#:~:text=In%20Baby%20Manji%2C%20the%20Supreme,surrogacy%2C%20including%20altruistic%20and%20commercial>. Accessed on Nov 21, 2020.
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- ⁶ Ibid. page no 35.
- ⁷ Indian Council of Medical Research, National Council of Medical, Science, National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India. Available at <http://www.icmr.nic.in/art/art-clinics.htm>.
Supra note 5.
- ⁸ Ibid.
- ⁹ Chaturvedi, Garg & Mishra (2014). Surrogacy Police in India and Need of Acts to Regulate Commercial Surrogacy. Journal of Evolution of Medical and Dental Science. Vol 3. Issue 20.
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- ¹¹ Jan Balaz vs. Anand Municipality, No.3020, Special Civil Application (Gujarat H.C.2008).
- ¹² Supra note 5.
- ¹³ <http://archive.indianexpress.com/news/hc-confers-indian-citizenship-on-twins-fathered-through-surrogacy/540419/2>.
- ¹⁴ Ibid.
- ¹⁵ Ibid.
- ¹⁶ Union of India & ANR vs. Jan Balaz and others, Civil Appeal No. 8714 of 2010 Supreme Court of India.
- ¹⁷ (2008) 13 SCC 518 at 521.
- ¹⁸ <https://timesofindia.indiatimes.com/city/jaipur/identity-certificate-issued-to-surrogate-Japanese-baby/articleshow/3609530.cms>.
- ¹⁹ <https://www.telegapindia.com/india/japan-gate-pass-for-baby-manji/cid/534514>.
- ²⁰ Ibid.
- ²¹ Supra note 17.
- ²² Supra note 16.
- ²³ (2015) SCC onlineDel110484.
- ²⁴ K.S Puttaswamy vs. Union of India. Writ petition(civil) No 494 of 2012.
- ²⁵ <https://economictimes.indiatimes.com/news/politics-and-nations/twins-head-for-germany-sc-look-law-on-surrogacy/articleshow/5977902.cms?from=mdr>.