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THE SURROGACY (REGULATION) BILL, 2019 : ANALYSIS

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ABSTRACT

Surrogacy is the method in which a woman carries the baby of another woman who is unable to become pregnant or have a baby in her womb. The couple who due to some biological issue like infertility, absence of uterus due to which they cannot have a baby. That couple hires a surrogate mother to have their baby in her womb. Surrogacy is a blessing on medical services for all those couples who are not able to produce a child. This miracle in medical technology has come as a blessing for a heterosexual, gay couple and single man who wants to become a father by their sperm and donor oocytes. Customs and norms of the society allowed surrogacy to avoid the bound to happen divorce.

The rising hub of commercial surrogacy is the reason for bringing the surrogacy regulation bill. Dr. Harsh Vardhan said: “The Bill is aimed at ending the exploitation of women who are lending their womb for surrogacy and protecting the rights of children born through this. The Bill will also look after the interests of the couple that opts for surrogacy, ensuring that laws are protecting them against exploitation by clinics that are carrying this out as a business”. This bill has been passed in the Lok Sabha but not passed in Rajya Sabha. Even though this bill is not free from bugs and loopholes.

Keywords - Biological issues, Infertility, Divorce, Custom, Norms

INTRODUCTION

Surrogacy is a worldwide practice. When a woman gives birth to a child for a couple who want to start a family. The surrogate mother delivers the baby to the couple once it is born. The "surrogate" Word was originated from the Latin term "surrogatus" meaning a woman acts as a substitute for another woman. In India for the last few decades, the practice of surrogacy has been prevalent but now the situation has changed. Surrogacy has been on a rise ever since it has been introduced.

There are two kinds of surrogate mothers:

1. Traditional Surrogate - In this method, a woman gets artificially inseminated with the father's sperm. They then carry the baby until the baby is born. A traditional surrogate is the baby's biological mother. That's because it was their egg that was fertilized by the father's sperm.

2. Gestational Surrogate – In this method, a technique called “In vitro fertilization” (IVF) now makes it possible to gather eggs from the mother, fertilize them with sperm from the father and place the embryo into the uterus of gestation surrogate.

The surrogate then carries the baby until birth. They don't have any genetic ties to the child because it wasn't their egg that was used.

IMPORTANT YEARS RELATED TO SURROGACY

1976 - The first surrogacy contract was written by Michigan lawyer Noel Kean.

1985 - The first gestational surrogate pregnancy carried by a woman was in the USA.

1993 - In California, the gestational surrogate Anna Johnson refused to give up the baby to intended parents (**Calvert vs. Johnson**)¹

2008 – In Baby **Manji Yamada vs. Union of India & Another** ², in which a Japanese couple opted for Surrogacy via an Indian-origin mother, and the baby was born in Anand, Gujarat. The couple separated a month before the child's birth, the wife rejected the baby that was biologically tied to the father, the surrogate mother declined to keep the baby.

2009 - **Jan Balaz vs. Anand**³ Municipality and further elucidated that commercial surrogacy was legal in India as there was no law prohibiting

¹ Johnson VS. Calvert – 5 Cal. 4th 84, 19 Cal. Rptr. 2d 494, 851 P.2d 776 (1993)

² Baby Manji Yamada VS. Union of India (2008) 13 SCC 518

³ Jan Balaz VS. Anand Municipality and ors. (2009)

BACKGROUND OF SURROGACY

In 2002 Commercial surrogacy was legal in India. And there were no proper regulations hence the exploitation started. Like the low cost of fertility clinics, poor women who are willing to provide their services have now turned out as transnational surrogacy hubs. Low cost is also the reason for favorable destinations of surrogacy for foreign couples. They started coming to India because of the cost-effective treatment for infertility. In India the surrogacy was initially a glorified industry but because there were no regulations it happened to be an unsafe, unethical practice. 2,000-3000 surrogacy clinics are illegally running in India. People who have poor living conditions, unawareness and lack of knowledge are likely to come into the surrogacy process. Due to financial gain their health declines as they effectively become “child-making machines” year after year. They also didn’t receive that much amount of money, respect, and supportive services in their emotional journey. As per the CII report 2012, the size of India’s surrogacy industry was \$2 billion a year. And it was estimated that more than 3,000 fertility clinics were engaged in this across the country. After watching the malpractice of “renting the womb” The government of India in 2015 banned surrogacy for international couples.

HISTORY OF BILL

The unregulated business of surrogacy has raised concerns like unethical practices, due to it the middleman and commercial agencies profited most, exploitation of surrogate mothers, abandonment of children born out of surrogacy, rackets like organ trade, embryo import, poor living conditions, etc. Surrogacy has become the new commercial industry. Children are produced for the prostitution rackets, for begging on road, for delivery of drugs. Surrogacy is no longer altruistic. That is why the legislation regulating the new surrogacy bill in the country came into force. The new bill i.e. Surrogacy (Regulation) Bill 2019 is an example of a 2016 bill that wasn’t able to make it through both houses. The bill was introduced in Lok Sabha on 15 July 2019, and it was passed on 5 August 2019. In the Rajya Sabha, the Bill was referred to a Select Committee for examination and consultation on 21st November 2019. The committee submitted its report on 5th February 2020. The committee, upon considering the suggestions of the concerned stakeholders, gave 15 recommendations in total to be incorporated into the 2020 bill. The amended bill i.e.

Surrogacy (Regulation) Bill, 2020 is a reformed version of the draft legislation which was passed by Lok Sabha in August 2019, after the Cabinet has approved all the 15 recommendations of the select committee.

SURROGACY (REGULATION) BILL 2019

1. The Bill completely prohibits commercial surrogacy and only allows altruistic surrogacy, meaning that the surrogate mother would not receive any financial compensation and awards for her pregnancy, except for the basic medical expenses and insurance coverage. Commercial surrogacy will be prohibited, including the sale and purchase of human embryos.
2. The present bill also deletes the definition of ‘infertility’ which was previously defined as the inability to conceive after five years of unprotected intercourse. The view of the selected committee is that five years is too long a period for a couple to wait for a child and regarded it as unreasonable and against the objectives of the act.
3. The Bill allows surrogacy to Indian married (heterosexual) couples (between 23 to 50 years for wife and 26 to 55 years for husband) and widens the applicability to include Indian-origin married couples, and Indian single women (only widows and divorcees between the age of 35 and 45 years).
4. The proposed Insurance cover for surrogate mothers has been increased from 16 months to 36 months, to counter the high risks of medical complications even after pregnancy.
5. It is mandatory for the couple to obtain a certificate of essentiality and also a certificate of eligibility (proven infertility) before going ahead with surrogacy. It also provides that intending couples should not abandon the child born out of surrogacy under any condition. The newborn child shall be entitled to all rights and privileges that are available to a natural child and no sex selection can be done in this process.
6. The bill also regulates the functioning of surrogacy clinics by making a mandatory registration for them with the appropriate authority.
7. The offenses under the bill include advertising or undertaking commercial surrogacy, selling or importing human embryos for surrogacy, exploiting the surrogating mother or the surrogate child

and disowning the child. The penalties for such offenses attract imprisonment up to 10 years and fines up to 10 lakh rupees.

8. The bill also proposes to regulate surrogacy by establishing a National Surrogacy Board (NSB), and State surrogacy board (SSB), whose function will be to advise the government on policy matters and supervise the functioning of the clinics.

MAJOR ISSUES RELATED TO BILL

1. Is the complete ban on commercial surrogacy viable?

Many women choose to become surrogate mothers due to financial problems. So banning commercial surrogacy might hamper their financial status. The lawmakers of India should wisely and deeply observe the global scenarios related to this bill. This bill is beneficial for stopping the black market or it will increase the exploitation of poor women.

2. Medical condition of the couple has to be revealed!

Society always boycotts those couples who are incompetent for babies. Acceptance in this society about medical conditions is quite impossible. Maybe society doesn't give that position or respect after knowing that medical condition. To show the certificate of infertility, absence of uterus or many medical-related problems somewhere also violates the right to privacy of the couple.

3. Maternity relief to surrogate mothers and what about LGBTQ+ person?

In this bill, there is nothing mentioned about the LGBTQ+ person, live-in couple and single parents? This bill easily curtails the individual's rights. Even a woman who could not have a biological child has to give a certificate essentially.

4. This new bill says that women who are medically fit cannot have surrogacy. Now the question arises: what about women's choice?

If they don't want to get pregnant due to any personal reasons. Why does any woman need to become medically unfit if they want a surrogate mother?

CONCLUSION

Bringing surrogacy (Regulation) 2019 seems to bring about greater change in society because it will help to stop the notorious activities involved in surrogacy. The complete ban on surrogacy is to prevent surrogate mothers from selling their wombs for money and also prevent them from foreigners who come to India for the reason of surrogacy because of the cheap rate of the surrogacy process. The process of surrogacy involves many things like human rights, the interest of every party must be balanced and harmoniously to prevent adverse effects. However, there are also many loopholes in these bills. This bill will easily curtail the women who either were surrogate mothers or wanted to be surrogate mothers in the future. This incomplete bill may affect the parties, the surrogate and the couple seeking surrogacy. But the legal implication is always challenging for the society like, will people appreciate it? Will this new bill stop the

previous problems? Will this bill bring a new change in Indian history? It is interesting to see, will this bill become an act? And what impression will it leave on society? If the child is born from a surrogate mother, should the child have the right to know about people involved in that child's conception and delivery? Or how it will fill up the loophole.