



Rent a womb: End of an era?

Deepika Singhvi

Research Scholar, Manipal University Jaipur, Rajasthan, India

Abstract

The author has expressed her opinion with respect to the regime of surrogacy in India prevailing till now and the way forward after the advent of The Surrogacy (Regulation) Bill, 2019. The main focus of the legislature while drafting the aforesaid Bill was to prohibit commercial surrogacy and in order to do certain provisions have been made which has received mixed reviews all across as for some it will hit hard those who have been engaged into this process for a long time and while restricting it to “close relative only. Not only this, since the category of those who can avail this process has also been revised and subsequent to this Bill being transformed into an Act, this shall be available only to the ‘married couples’ leaving the dream of being a single parent shut forever.

Keywords: surrogacy, commodification, regulation bill, commercialization, womb

Introduction

If individuality is about how influence plays out inside us, then having a baby is the profoundest transformation a human being can accomplish. As a surrogate mother, you will be giving the greatest gift ever to the intended parents, i.e. the gift of parenthood, a reason to smile and live their second innings with the first. During the surrogacy process, a mother creates a strong bond and sense of personal relationship with the intended parents, and it may be one of those kinds which may last for a lifetime more than a blood relation. Back in 2012, Justice K.S. Puttaswamy, in a signpost verdict, had recognised the constitutional right of women to make reproductive choices, citing personal liberty under Article 21 of the Indian Constitution. But the question which is being dawning upon this mind is as to whether the increase in the number of surrogacy cases might result in a profession which was never aimed at as such which was intended as a ‘blessing’. Not only this whether this would lead to misuse of practice when a single parent could also use this? Many of such questions remained unanswered for a long epoch of time which had basically forced the government to formulate the law regulating surrogacy incorporating provisions for regulation of the concept of surrogacy which as earlier governed by the ICMR guidelines and notifications issued by the government from time to time.

By the advent of the Surrogacy (Regulation) Bill of 2019 *hereinafter referred to as the ‘Bill’*), India is on its way to impose a mantle forbiddance on and criminalize commercial surrogacy and there are certain effective and germane grounds for banning the same. The Indian government in order to promulgate law and considering this as “the need of the hour” and passed the Bill, in the Lok Sabha, which has put in strict conditions on what constitutes legal surrogacy in India. For instance, Section 2 (zc) of The Surrogacy (Regulation) Bill, 2019 ^[1], defines surrogacy as “*a practice where a woman gives birth to a child for an intending*

couple to hand over the child after birth to the intending couple”. Firstly, it shows as to how surrogacy had become a business for some rather than the need for which it was basically intended. The Bill has come in the light of India’s position as the ‘rent-a-womb’ capital of the world which is referred to as a cheap and barely regulated market that has exposed not just the dire financial constraints of surrogates but also the reproductive trafficking business that’s emerged from it. “Due to lack of legislation to regulate surrogacy, the practice of surrogacy has been misused by surrogacy clinics, which leads to rampant commercial surrogacy and unethical practices,” said the bill.

However, PM Arathi ^[2] says that without addressing the ground reality on employment and wages in India, banning commercial surrogacy is neither a solution nor an answer. In her recent research paper ^[3], she adds, “*When the state withdraws from its responsibility of providing universalisation of primary, secondary and higher secondary schooling, better housing for all, land redistribution and universalisation of healthcare, the banning of surrogacy is ultimately counterproductive*”.

The Bill of 2019 seeks to entail a blanket ban on the dogma of commercial surrogacy while laying imperative and recognizing only altruistic surrogacy primarily considering commercial surrogacy to be inconsistent with the provision of the Act ^[4] as well as to curtail the commodification of the facility which was basically introduced only for the unfortunates and infertile couple. As India was considered to be one of the most favorite destinations chosen by the infertile couples and single parent across the globe mainly owing to better availability and at seriously low price, the exploitation of women was on the cards. The legislative intent to come up with such a bill to basically limit and criminalizing the act of commercial surrogacy is basically nothing else but an offshoot of this ideology which somewhere affects the fundamental rights of the surrogate

¹ Introduced by the Minister of Health and Family Welfare, Dr. Harsh Vardhan in Lok Sabha on July 15, 2019

² Assistant Professor, Council for Social Development, New Delhi

³ Silent Voices: A Critical Analysis of Surrogacy’s Legal Journey in India’

⁴ Transplantation of Human Organs Act, 1994

mothers which is the touchstone of the Constituion of India, 1950.

Through the bill, the legislature has also put an embargo in as much as restricted the surrogacy process to be adopted only by the married couple thereby killing the dream of an individual, members of the LGBT community, older couples of becoming a single parent, once the Bill turns into an Act. This provision though seems to be harsh, biased and partisan in nature; it will have multifarious impact on the concept of surrogacy which might be linked with contours of Article 14 and Article 21 of the Constitution of India, 1950 as well. Apropos to the above, the Bill not only mandates the intended parent to be married rather also wants that such couple should be an infertile couple for a minimum epoch of 5 years and also that they should not have a child before adoption of such process. Though it does not cover partners who suffer from medical conditions, such as uterine fibroids, that may allow a woman to conceive but foil her from carrying a baby for the epoch of 9 months.

Arguendo, the Bill aims to restrict and limit the woman's surrogacy choice only once, thus limiting the ideology of a few who has measured this practice as foundation of their revenue generation though which ultimately comes down to the point of consent ^[5]. Given a situation when a woman is willing to be a surrogate mother more than once coupled with assurances of safe birth of the child and covered with insurance, then why to restrict her to only one child is a question which the Bill fails to retort. In the modest outlook of the author, the objective can be to impede considering the women as a '*child producing machine*' rather it be an event of giving birth to new hope, vision and belief that being of an unfortunate infertile couple.

The Bill is *sub-silentio* as regards giving the biological parents a say rather a right to continue or terminate a pregnancy as per their wish and it criminalizes not only the women who serve as commercial surrogates but also their spouses and relatives who were involved in the process which raises a dark cloud on the approach of the law makers and seems to be marred with non-application of mind and is also a step to overcome the law laid down in *Baby Manaji Yamanda vs. Union of India* ^[6] by the Hon'ble Supreme Court of India. The Bill also fails to address or connect the rights of the child born out of such surrogacy process to the provision of the inheritance as applicable in India at present, apart from the provisions relating to maternity leave and raises a doubt on such incompetence of the legislators.

To sum up, it is now to be observed as to whether or not the legislature will take into consideration these aforesaid issues highlighted by the author or many alike or be adamant and wait pass the same. Even otherwise if the bill is passed as present, the same shall be subjected to challenge before the court of law it being ultra vires and against the spirit of the Constitution of India, 1950. Not only this it will also be interesting to see as to the definition of 'close relative' shall be acted upon in toto or the surrogate mothers shall take out the lacunas in the Act and overturn the basic intent of the legislature in the same way as the legislature has overturned the law settled by the Hon'ble Apex Court. In the humble opinion of the author the passing of the Bill from both the houses will end the era of surrogacy for those who had

enjoyed becoming intended parents and surrogate mothers who stands restrained as per the new law.

"Sometimes the strength of motherhood is greater than natural laws."

Barbara Kingsolver, USA

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⁵ Pyali Chatterjee. 2015, Role of Law Relating To Commercial Surrogacy In India And Protection Of Surrogate Mother. International Journal of Recent Scientific Research. 6(9), pp. 6187-6192,

⁶ (2008) 13 SCC 518