

## The Bailment Of Womb (Altruistic Or Commercial): Hidden Psychological & Legal Torments

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*Abstract: Surrogacy has been in existence, since the ancient time, but the practice has been publicized and popularized in the recent times. The term 'surrogacy' refers to wherein the womb of another woman is hired/ taken for rent to conceive and give birth to a child for an infertile couple, individuals or for certain other couples who is willing to give birth to their child with the assistance of a surrogate mother. The desire of 'true heir' gives surrogacy preference over adoption. Surrogacy has been a growing business in the developing country of India, a preferred place for infertile couples across the globe, for the entire process of surrogacy could be completed in a much cheaper cost as compared with other countries. Although, surrogacy brings a ray of hope for the needy childless couples, it has given rise to certain complicated socio-legal, cultural, ethical, economic and medical issues. Once a taboo, surrogacy has been practiced in India even by unmarried couples, single individuals and also by fertile couples who already have children of their own. While this was not welcomed in certain western countries such as U.K, USA, it was followed in India for few decades until the legislator has recently banned commercial surrogacy by drafting Assisted Reproductive Technologies (ART) Bill, 2016 and including certain stringent provisions. While most of the surrogates come from an economically impoverished background, they are sometimes forced to practice surrogacy on the pressure put by their family members to earn money and shoulder the responsibilities. Moreover, they are not educated enough to know about their rights as a surrogate mother. In the business of surrogacy middlemen play an important role, where the majority stake has been taken by them and only a minimal chunk is paid to the surrogate mother. The emotional detachment of the mother from the child, which she carries for nine long months, affects the mental health of the surrogate mother. What if the surrogate mother changes her mind and decides not to give the baby or in certain situation, what will be the scenario if the couple refuses to accept the child? Also, who shall bear the responsibility of post pregnancy complications, if any faced by the surrogate mother? What shall be the future of a Surrogate child if the Commissioning parents' divorce/die during the Surrogacy. All these psycho-legal issues make Surrogacy a very uncertain and complicated practice.*

*Keywords: Surrogacy, Socio-economic, Psychological, Legal*

### I. OBJECTIVES

- The author aims to;
- ✓ Relate Contract of Bailment to the arrangement of Surrogacy,
  - ✓ Highlight psychological traumas of a surrogate acting as a 'Bailee'.
  - ✓ Bring about suitable mechanism by way of an enforceable Contract of Surrogacy (Bailment).

### II. MODE OF RESEARCH

The author has adopted Doctrinal form of research method in collecting data, information relating to the research topic. The author has applied 'Case study method' (referring to the landmark cases relating to Surrogacy) which have questioned the legality of this unethical practice around the world.

The author intends her research to be an 'Applied research' which can benefit the readers in understanding the ignored side of Surrogate mother from a humanistic point of view.

*"The question of whether the suffering of a childless woman is greater than that of the gestational surrogate, who 'abandons' her baby, is 'solved' when the surrogate mother is de-personalized, and looked upon solely as a womb for rent".....*

Rosalie Ber

### III. INTRODUCTION

In order to enjoy 'joy of offspring' and the urge to have a biological child to complete their family, many childless couples opt for assistance in Reproduction. In medical science this concept is called as 'Assisted Reproductive Technology' (hereinafter referred to as for short ART). ART has paved the way for childless couples to dream of having a consanguinity child with the aid of a Surrogate (denotes Altruistic surrogate as well as Commercial surrogate). ART through Surrogacy has also opened the doors for Medical Tourism there-by reducing the fertility risks involved in natural conception. Though the surrogate is not connected to the commissioning husband by affinity, yet she shares a strong bond with the child she procreates. A bond which redefines the concept of motherhood, which makes the surrogate forget the bitter truth that she is acting as a 'Bailee' blindly following the instructions of the 'Bailor' by handing over the child post-delivery to its intending parents. Forgoing this eternal bond is compensated to the surrogate in terms of 'money' for rendering her womb to carry out this unethical act.

Surrogacy is perceived as an 'alternate' to motherhood yet it is stigmatized by the label that it is 'womb for hire/rent'. This taboo arose from the practice of Commercial Surrogacy-wherein the womb of surrogate mother is taken for 'rent' by the intending parents and in return the rent is paid in the form of 'money'. This form of unethical practice seems to be acceptable with the poor surrogate families to form their 'livelihood'. India became a 'Surrogacy hub' for intending parents (national and international) as poverty is rampant in India and this form of unethical earning was welcomed by the lower middle class families for a better fiscal life ahead.

Though surrogacy is termed as a revolution in the fertility field providing childless couples the ultimate joy of parenthood, it comes packed with certain untouched legal and psychological problems.

When we speak about the practice of Surrogacy we feel happy that the childless couple get their 'child' and the family becomes completed. On the other hand when we look into the economic aspect relating to the act of surrogacy we also feel happy that the Surrogate mother is well taken care off during her pregnancy and paid for her services after the delivery. This picture calls for three cheers to the 'concept of Surrogacy' if, we ignore the bitter truth behind this happiness. Surrogacy is perceived as a miracle by intending parents and surrogates a 'commodity' to perform that miracle. Globally Law speaks lengthly on Surrogacy and the rights given to the intending parents neglecting the surrogate mother as well as the

surrogate child. The Indian legislature by passing the ART Act 2008 has regularized this unethical act to some extent casting a dark spell on the surrogate in some or the other manner.

### IV. LEGAL ISSUES

Surrogacy termed as 'bailment':

Similar features-

- ✓ The act of surrogacy is similar to the Contract of Bailment, wherein the surrogate (Bailee) agrees to act on the directions given by the intending parents (bailor) upon a condition that once the work (delivery) is done the goods bailed (embryos/ gametes in the form of baby) shall be returned back to the intending parents (Bailor).
- ✓ As in the Contract of Bailment, the Bailee does not have any legal right over the goods bailed to her; similarly the surrogate also cannot exercise any legal rights on the child begotten by her.
- ✓ Qualifications of the parties in both types of relationships are also same - Minimum number of parties (2), major, sound mind, not disqualified by law, free consent.
- ✓ In bailment, the Bailee acts as a custodian of the goods bailed similarly in surrogacy the surrogate acts as a custodian of the baby which she intends to carry and deliver on behalf of the intending parents. The Surrogate doesn't enjoy any ownership over the baby nor can she retain the baby after birth.
- ✓ In Contract of Bailment, Consideration is not necessary so as in the case of Surrogacy. Furthermore, types of Bailment also coincide with the types of surrogacy we practice. Bailment for the sole benefit of the Bailor is altruistic surrogacy and bailment for the mutual benefit of the Bailor and the Bailee is Commercial surrogacy.
- ✓ The contract of bailment occurs when a person who is given goods, is given them for a 'specific purpose'. Similarly in Surrogacy the surrogate is injected/implanted intending father/ mother embryo/gametes only with a specific purpose of 'procreating' a child for them.
- ✓ In the mercantile aspect, parties enter into Contract of bailment for 'Goods' which have been specifically defined as 'any form movable property other than actionable claims and money. The Act further says that for a thing to be termed as 'goods' under the law it has to satisfy the 3M's such as Movable, Marketable, and Merchantability. When we scrutinize surrogacy all these 3 elements are present in the materials for Surrogacy.
  - **MOVABLE:** means goods should be of mobility nature so that they can be transferred from one place to another place. In Surrogacy we can find this mobility as human embryos presuming they are 'goods' are transported from one place to another place (from one woman's body to another woman's uterus).
  - **MARKETABLE:** means goods produced/ manufactured should be of saleable character. In Surrogacy whatever the raw material (embryo/gametes) is been implanted/injected in to the surrogate is also of commercial in nature as it has an

open market wherein these are sold and bought for a 'Price'(defined under the Sale of Goods Act, 1930).

- **MERCHANTABILITY:** this is an important implied condition which one can find in the Sale of Goods Act. Goods sold should be of merchantability i.e. fit for the purpose for which it has been bought by the consumer/customer. Even in Surrogacy, the baby which is procreated/ delivered by the surrogate satisfies the urge (purpose of surrogacy) of the intending parents.

When we have characteristics similar in both types of agreements, we have to make suitable device to bring Surrogacy in the ambit of Contract of Bailment and thereby provide relief (damages) to the Bailee in case of her physical and mental damage caused because of the act of Surrogacy.

The author wishes to highlight the mental distress caused to a Surrogate by stating certain Psychological issues.

## V. PSYCHOLOGICAL ISSUES

The substitute mother who lends her womb, for procreating a genetic child for the intending parents undergoes a chain of emotions during the process of surrogacy. Not only she is emotionally exploited but also physically tortured by the complicated procedures which she has to withstand in order to be a surrogate and the fact that she comes from an economically backward and illiterate background add more perils to her given state.

Surrogacy, if not monitored will not only draw ethical, moral and legal problems but also awaken tons of psychological and economic issues into the global society.

Here are some of the psychological crises a surrogate undergoes:

- ✓ **LOSS OF SELF-DIGNITY:** The guilt of surrendering her body for an unethical practice for the sake of deriving money to maintain her family.
- ✓ **GUILT OF SHAME:** she undergoes guilt of hiding pregnancy from her own children/ Society because of fear and shame.
- ✓ **FEAR OF OUTCAST:** fear that she will be isolated by her family and by the society once the news about her surrogacy act is known to them.
- ✓ **STIGMA OF BABY SELLING 'SELLER':** society's stigma on renting/ selling her sacred womb for the sake of money.
- ✓ **LOSS OF SEXUAL RELATIONSHIP AFFECTING MARITAL RELATIONSHIP:** the surrogate is not allowed to maintain sexual relationship with her husband during the entire process as it might affect surrogacy. This spoils the marital relationship of the surrogate and her husband.
- ✓ **EFFECTING SURROGATE HEALTH:** use of ART have emotional effect on host woman or Ovule i.e. donor mother. The surrogate mother is exposed to repeated hormone treatments before an embryo gets successfully implanted in to her Uterus. The chances of such implantation rates are relatively less when compared to the natural conception. These medical treatments have lasting effects on the health of the surrogate.

- ✓ **FEAR OF MEDICAL COMPLICATIONS DURING SURROGACY:** the surrogate is constantly under pressure regarding her health affecting pregnancy and in case of any uncertain medical issues arising during that period.
- ✓ **UNCERTAINTY OVER MOTHERHOOD:** she is under more psychological pressure regarding her pregnancy and the dilemma regarding her successful healthy delivery. Uncertainty over the health of the child about to be delivered, what if the child is not healthy?
- ✓ **MEDICAL PROBLEMS:** she might face medical issues like Pre-Eclampsia, maternal anemia, excessive blood loss, gestational diabetes, liver or kidney damage, HBP, damage to uterus because of high medications. etc.
- ✓ **OBSTETRICAL COMPLICATIONS:** risk of infection transferred when another woman's eggs are transplanted in to the surrogate mother's womb.
- ✓ **FEAR OF LIABILITY:** in case of any medical emergencies resulting in miscarriage/ abortion the burden of treatment is not clearly figured out. Under such circumstances, the surrogate or her family has to bear the loss.
- ✓ **FEAR OF GIVING BIRTH TO A RETARDED OR ABNORMAL BABY** adds to the ocean of emotions which the surrogate experience during the entire process, which affect her physically as well as mentally.
- ✓ **POST-DELIVERY COMPLICATIONS:** apart from postpartum depressions like negative emotions, physical weakness, deterioration of body, loss of the surrogate child; surrogate is again injected with heavy drugs so as to stop her lactation and her reproductive cycle.
- ✓ **MENTAL ILLNESS:** surrogate during the gestational period will have varying degrees of attachment with her fetus. The bond between her and the child cannot be breached by paying money for her services. Post-delivery when she gives the child to its intending parents she faces mental illness or depression.  
**CASE :** In year 1980 first Surrogacy arrangement was entered in New Jersey (USA) wherein Mrs. Whitehead (surrogate mother) refused to deliver the baby referred to as baby 'M' even though she was paid a huge lump sum of \$10,000 for the surrogacy she rendered, on account of emotional attachment with that baby. She had to finally forgo her motherhood before the Judiciary and handover baby 'M' to the intending parents (decision of USA Supreme Court).  
Impact of Psychological distress on the Bailee (Surrogate)/ Goods (child):
- ✓ British Medical Association has found that relinquishing the child for a Surrogate may be extremely distressing and may result in clinical depression as she develops foetal-maternal bonding with the growing fetus. If she is not counselled properly at the right time she may land up in severe Clinical depression affecting her real family life as well (British Medical Association, 1996).
- ✓ ART results in 50% multiple-births and high risk premature delivery which is caused by infertility treatment. Problem arises when the intending parents don't want more than one child from the surrogate when she is carrying twins or multiple fetuses. Under such circumstances, absences of statutory laws leave the

surrogate with utter confusion of aborting the unwanted fetus or continuing with the pregnancy.

*CASE:* In the year 2001, a surrogate mother from Britain files a suit in San Diego Superior Court against a California couple, charging that they abandoned the children they hired her to bear. The problem started when the intending parents forced the surrogate carrying twins to abort one child as they couldn't afford two children. She refused and this led to the termination of surrogacy arrangement between them and the surrogate. Aggrieved by this, Surrogate approached the Court of law.

- ✓ During the gestation period if the Fetus is diagnosed with an incurable disease/ disability, the life of Surrogate will be at risk if the intending parents don't decide/ignore to abort that fetus.
- ✓ Bewilderment of Genealogical origins leaves the surrogate child emotionally disturbed as he craves to seek his original identity. This missed- identity crisis will hamper his overall development.
- ✓ Absence of laws on the future aspect of the child being abandoned by the intending parents on divorce and no specific legal provision allowing surrogate to retain such child leaves the welfare of the child into dark.
- ✓ The parentage of the child or the Paternity of the child will be a puzzle for the surrogate child as laws speak traditionally on paternity matters. Paternity or fatherhood automatically gets attached to the child if he /she is born out of a legal wedlock or born within 280 days from the dissolution of the marriage, if the wife remains unmarried during that time. But for a child born out of a surrogacy arrangement it is difficult to establish paternity as there exists no legal wedlock between the surrogate and the intending father. Moreover as per the laws, maternity is conferred on the woman who gives birth to the child herself and not who hires womb for procreation. In such scenario surrogate will be considered as the natural mother of that child as she reproduces the child, yet she suffers from the denial of motherhood to her.
- ✓ Lack of emotional bonding with the intending parents hampers healthy overall development of a surrogate child resulting in insecurity/ lack of confidence/depression/lost identity crisis.

## VI. SUGGESTIVE REMEDIES TO OVERCOME THIS DISTRESS

These above cited traumas can be overcome by taking following suitable measures;

- ✓ By regulating and not prohibiting the act of Surrogacy which is the only viable option for the child less couples to have a progeny of their own. For this we can draw inference from the laws framed in UK and Ukraine.
- ✓ By legalizing the surrogacy centers (licensing few centers) who act as mediators in performing the act of Surrogacy, so that no quacks take up this act in an unethical manner.
- ✓ By making strict rules to be followed by these licensed centers and by establishing Enforcement agencies to keep a check on such Centers functioning.

- ✓ By making amendments in the personal laws as well as the Indian Evidence Act regarding the maternity/paternity and bring advanced procreation within its ambit.
- ✓ By amending Indian penal Code to accommodate offences relating to Surrogacy and bring within its scope Doctors/Clinics/intending couples/surrogates/families and make provisions for strict punishment in case any violation/manipulation/coercion/abortion/forced detainment of the child/human trafficking for the sake of surrogacy take place.
- ✓ By setting up effective Counselling centers as in Ukraine wherein the surrogate can be counselled to overcome various legal, psychological aspects relating to her act.
- ✓ Most important, draft a suitable Law relating to Surrogacy which covers all the 4 vital parties to this arrangement – surrogate, intending parents, clinics, child.
- ✓ Draft a Surrogacy Arrangement Contract to provide a boundary for the people using Surrogacy and also provide damages in case of breach, by any of the parties to such arrangement.
- ✓ Broaden the concept of 'Public Policy' to include Surrogacy and amend laws relating to Indian Contract Act, 1872 which declare agreements opposing public policy as Void ab initio. This change will give legal enforceability to the 'Surrogacy Arrangement Contract' and from then it can be legally contested in the Indian Court of Law.
- ✓ Amend the laws relating to ART bill 2016 as to the proximity of relationship of a surrogate to be within the near family and the fact that such woman can be a surrogate only once. Going by the ratio of infertility booming in India, if we are following one child- one family policy lets drive the experience what China is facing today because of unreasonable birth control policy. Moreover India is a country which still believes in a male to carry forward family legacy and to give moksha to his parents. One child policy can be badly misused if the fetus is a Girl child adding to already arising female feticide.

On the other hand if we are permitting second surrogate to the second child (opting for son) then imagine the nature of that family (having 3 or more mothers) which ultimately causes a lot of emotional disturbances in the whole Family institution.

- ✓ The Judiciary is already over burden by the pendency of cases and the new Bill is adding more loads to that pendency. For each surrogacy transactions in an over populated country like India, it becomes very difficult for the lower courts to verify genuineness of each case opting for surrogacy. Setting up additional suitable adjudicating authorities to look into these types of issues would be advisable.
- ✓ An alteration in Insurance Laws so as to cover insurance coverage to Surrogate mother is required to be done so as to match ART bill 2016.
- ✓ The ART bill 2016 nowhere speaks about the rights of a surrogate mother. The bill no doubt has banned commercialization of surrogacy but it has not addressed the legal/psychological/economic/physical issues faced by a surrogate.

- ✓ The Bill 2016 is partial, favoring infertile couples and neglecting surrogates that they are also human beings whether altruistic or commercial. Equal emphasis should be given to them also. Surrogates should also enjoy certain legal rights as they enjoy in the States like USA, and UK.
- ✓ The Bill 2016 fails to draw reasonable classification between surrogate of altruistic surrogacy and surrogate of commercial surrogacy. Removing the monetary side attached to commercial surrogacy, in both cases these are woman (both enjoy equal right to Dignity) who give 'Birth' to a child.
- ✓ The Bill 2016 has neglected totally 'welfare of the child and the surrogate mother' as it has not touched upon a very important part of infant's and just delivered mother's life – breast feeding. There is sufficient evidence to show that for a period of 6 months breast feeding is very important for baby's overall growth. In case of surrogacy this act is not performed by the surrogate as the child is taken by the intending parents immediately after the delivery.
- ✓ The Bill 2016 should be clear with the legitimate status of the children born out of commercial surrogacy before this amendment, as it has not stated retrospective application of the law. This will disturb the legitimacy of an already born surrogate child.
- ✓ Inclusion of a clause in the ART bill 2016 wherein the surrogate child has a right to get his identity revealed on attaining the age of majority.
- ✓ A Clause in the ART bill 2016 which stipulates that in the event of dissolution of marriage between the intending parents the child would be in the custody of the surrogate mother (natural mother) and maintenance of that child shall be borne by the intending father/mother whoever is/are financially sound.
- ✓ Finally in order to safeguard moral and ethical Indian values, the Government should take inference from UAE law which focus on reaching the problem and finding the solution at the ground level by focusing on the fertility levels of the married couples/ upgrading fertility treatments for couples/ creating awareness on the aspects relating to infertility and how to overcome this. This step will surely increase natural conception and decrease the artificial reproduction.

## VII. CONCLUSION

Relinquishment of the child by the surrogate cannot subside the biological link/bond which the surrogate shares with that child, no matter what the 'law of the land' says surrogate is the natural mother of the child whom she procreates. This birth giver has every right to enjoy her motherhood in a dignified manner like any intending mother would enjoy. Though the intending father also a major role in procreating but the truth that a woman (not related by affinity) gives her blood, energy, lengthy precious time, emotions, body to a child knowing that it doesn't belong to her, need not to be ignored off. The Success of any medical process gets influenced by the psychological state and the mindset of the

patient. If Surrogate is free from all mental and physical stress then she can deliver a healthy baby or else India will have future generation with depression, obesity, identity crisis to name few. Laws have to tackle the socio-legal problem (infertility) at the Zero level than providing an alternate (surrogacy) and creating an additional problem (plenty of issues related to Surrogacy) in the Society. Laws have to quickly mould themselves to the changing Society by providing suitable beneficial legislations for the common welfare of the Society in order to maintain Law and Order in the society.

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- [11] Surrogacy Arrangements Act, 1985 wherein Surrogacy (altruistic) is regulated and commercial surrogacy is banned.
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- [13] Population planning policy of China- one child-one family was introduced in 1979 but began to be formally phased out in 2015 as it cast an adverse male: female ration in the Chinese society.
- [14] In both nations, Surrogate is considered to be the legal Mother of the child she delivers through Surrogacy.
- [15] Guidelines on breast feeding by WHO and National Guidelines on Infant and Young child feeding, Ministry of HRD, Women and Child development (food and nutrition Board) Govt. of India 2004.

[16] UAE prohibits any form of surrogacy practice and lays more emphasis on the fertility treatment of married couples.

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