

# Medical Tourism: In concept of Surrogacy

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**Abstract:** *With the onset of globalization, there has been a decline in fertility levels. This has led to what is known as reproductive tourism'. Of the many options, surrogacy has caught the public-eye and so much so that visa regulations have been changed in line with the growing practice. With no legal regulation and easy availability of surrogate mothers at one-third the global cost, the practice proliferates in an unfettered manner in India. The rapid growth of the industry also poses various challenges to various familial notions and makes settled concepts like 'motherhood' look rather hazy. The paper therefore endeavours to bring to light the socio-legal implications of commercial surrogacy*

**Key Words:** *Medical tourism, Surrogacy, Commercial surrogacy.*

## 1. INTRODUCTION:

Surrogacy is a method of assisted reproduction. The meaning of the word “surrogate” is “deputy or substitute” and this word originates from Latin word surrogates which means “to act in the place of” or “substitution” in English. So, this means that surrogate mother is virtually a “substitute mother”. The term surrogacy is used when a woman carries a pregnancy and gives birth to a baby for another woman who is unable to conceive and carry a child for various reasons such as, the failure of the embryo to implant, pelvic disorder, repeated miscarriages, high blood pressure, hysterectomy, heart and liver diseases. In such cases, the conventional is to go for adoption or the unconventional is Assisted Reproductive Technology (ART) in which pregnancy is caused by artificial or partially artificial means. The most commonly used ART procedures are Intrauterine Insemination (IUI), Tubal Embryo Transfer (TET), In Vitro Fertilization (IVF), Zygote Intra fallopian Transfer (ZIFT), Zygote Intra fallopian Transfer (GIFT) and Gestational Surrogacy. According to the Artificial Reproductive Technique (ART) Guidelines.

*“surrogacy is an “arrangement in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, in which neither of the gametes belong to her or her husband, with the intention of carrying it to term and handing over the child to the person or persons for whom she is acting as surrogate; and a “surrogate mother” is a woman who agrees to have an embryo generated from the sperm of a man who is not her husband, and the oocyte for another woman implanted in her to carry the pregnancy to full term and deliver the child to its biological parents(s)”*

## 2. MEDICAL TOURISM:

In the yester years, people from the less-developed countries used to visit the developed nations seeking medical attention due to lack of medical and technical know-how and infrastructural aspects. However, the trend has now reversed. Living in a world and era where everything seems to be globalised from trade to communication there has been observed a flow of people moving from one jurisdiction to another for the treatment that is not available or legal in their own country. For instance, Canadians visit the United States of America for treatments which are not within the Canadian health care structure, the Americans are going to places like Mexico for routine check-ups, Japanese sniff out medical services in Thailand, and the British, among others, travel to India for a range of health services. India has emerged as a hub of medical tourism. This is so much so that even the Ministry of Tourism, Government of India boasts of it on its website. The Confederation of Indian Industry (CII) reported that healthcare has emerged as one of the largest service sectors with estimated revenue of around \$ 30 billion constituting 5% of GDP. It also noted that it was medical tourism that was the key driving force behind such figures and estimates. Reasons that have been instrumental in putting India centre stage in healthcare sector include cost advantage, lesser language barrier in terms of usage of English language, no waiting period for treatment, seasoned and accomplished medical staff including the doctors and nurses and advanced medical know-how, among others.

## 3. COMMERCIAL SURROGACY:

Though medical tourism has brought in a number of clients to India for different purposes, it is the sub-set of reproductive tourism that has come into the limelight. Even though the infertile couples would find such help in their own respective countries, some still choose to travel to other nations such as India. The reasons for reproductive tourism are no different than those of medical tourism as a whole. NRIs, PIOs and foreigners flock to India for assisted reproductive remedial measures. Commercial surrogacy has secured a major chunk of the cross-border reproductive care services in India. Whilst other reasons as mentioned previously prevail, one can safely infer that the ambiguity of law on surrogacy in the country plays a considerable role in attracting the patient-population. To be able

to decipher the enforceability of surrogacy agreements in the Indian context, one can resort to the Constitution of India and the Indian Contract Act, 1872. Additionally, the non-binding ICMR guidelines and the Assisted Reproductive Technology (Regulation) Bill, 2010 may be analysed. The Constitution of India under part III guarantees certain fundamental rights. It is article 21 of the Constitution of India that has been held to be the cornerstone and heart of fundamental rights.

#### 4. LEGAL STATUS OF SURROGACY IN INDIA:

Following the landmark judgment of the Supreme Court of India in *Maneka Gandhi v Union of India* the courts went all out to widen the scope of the instant article and thus, it acts as the wellspring of countless rights today. Article 21 guarantees to every person right to life and personal liberty. The term life has been unreservedly expanding since the landmark decision. In the present scenario, the provision encompasses within itself a number of rights such as right to live with dignity, right to quality of life, right to shelter, right to medical aid, right to livelihood, right to clean environment, right to clean air and water, etc. It however, does not include the right to die. Among the plethora of rights guaranteed under article 21 of the Constitution, right to privacy holds the key to the enforceability of surrogacy agreements. The issue of right to privacy was first brought before the courts in the case of *Kharak Singh v. State of Uttar Pradesh*. The court in its dissenting opinion held that the right to privacy is an essential ingredient of the right to personal liberty. Further, in the case of *R.Rajagopal v. State of Tamil Nadu*, the court went on to hold that right to privacy is implicit in article 21. The right to procreation is recognised to be implicit in the right to privacy. The legendary American case of *Roe v. Wade* has been alluded to by the Supreme Court of India in a number of decisions dealing with the subject matter. In the instant case, the US Supreme Court held that a citizen has the “right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters. *Skinner v. Oklahoma* is yet another case that has been widely cited by the Indian judiciary. The American court in the instant case held that the right to reproduce is one of the basic civil rights of man. The Andhra Pradesh High Court in *B.K. Parasarathi’s* case held that the right to make a decision about reproduction is essentially a very personal decision either on the part of the man or woman. Necessarily, such a right includes the right not to reproduce. The intrusion of the state into such decision making process of the individual is scrutinised by the constitutional courts both in this country and in America with great care. Likewise, in *Kasturu Lal Lakshmi Reddy v. State of J&K* the Supreme Court of India underpinning the analogous notion held that the right to life and personal liberty as enshrined in article 21 must be interpreted in a broad manner so as to include within its ambit all the varieties of rights which go to make up the personal liberty of man including the right to enjoy all the materialistic pleasures and to procreate as many children as one pleases. The courts have nevertheless acknowledged that such right to procreate can be subject to reasonable restrictions. Surrogacy, though an assisted one, is a method of procreation. In light of the above, surrogacy agreements must be afforded the same level of constitutional protection. The American courts have granted constitutional protection to the surrogacy agreements and held that the parties to the surrogacy agreements have a constitutional right to reproductive privacy. The Indian courts too have kept pace with the concern. The courts way back in the year 2000 held that “the personal decision of the individual about the birth and babies called ‘the right of reproductive autonomy is a facet of a right of privacy. The state cannot intervene in matters of private ordering and matters as intimate as procreation. With the right to privacy and reproductive autonomy in place, the individuals must be afforded protection on how to exercise this right. In other words, the state cannot interfere in matters of mode of procreation, i.e., whether the individuals procreate naturally or through the use of assisted reproductive techniques. Article 21 of the Constitution can be stretched to house the use of assisted reproductive techniques by the individuals under the auspices of the rights to reproductive privacy and reproductive autonomy. Surrogacy being one of the various methods of assisted reproductive techniques thus stands sheltered under the umbrella provision of article 21 of the Constitution of India. The Indian Contract Act, 1872 codifies the legal principles that govern the agreements which are enforceable in the court of law in India. It provides the basis of validity of any agreement which evolves in to a contract on the fulfilment of certain pre-requisites. Section 10 of the Indian Contract Act provides the valid contract. According to section 10 of the aforesaid Act, the following conditions must be fulfilled in order to give rise to a valid contract, viz., (a) there must be an agreement which must have resulted out of a proposal by one party and the acceptance of it by the other, (b) the parties to such agreement must be competent to contract, (c) there should be a lawful consideration, (d) their object should be lawful, (e) the parties must enter into the agreement with their free consent and (f) the agreement must not have been expressly declared to be void. In India, the practice of surrogacy is backed by written agreements between the parties. These agreements are an expression of the proposal and acceptance between the parties. This document of concurrence also cites the amount of payment made to the surrogate mother and hence, meets the requirement of consideration. As noted above, any contract to perform an illegal act is void. With respect to surrogacy, the aim is to ward off and forbid the selling of a baby. In *Surrogate Parenting Associates, Inc. v. Armstrong*, the Supreme Court of Kentucky observed that, the essential consideration is to assist a person or couple who want a baby but are unable to conceive one in the customary manner to achieve a biologically related offspring and thus drew the contrast between the practice of surrogacy and baby-selling. Such a remark underpins the argument that the practice has a lawful object in

place. Free consent of the parties is a pre-requisite to the validity of the contract and therefore, the parties to the surrogacy agreement must enter into the arrangement diameters of exercise of their free will. With respect to the free consent of the surrogate mother, it is however, immaterial whether or not the surrogate mother is driven by altruistic motives. Against the given backdrop, one may infer that surrogacy agreements are not only entitled to constitutional protection but are also valid under the domestic contract law. Furthermore, in early 2000s the ICMR framed and brought out the National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India which were later updated in 2005. The ICMR guidelines, irrespective of how far-reaching they may seem, are purely persuasive in nature and are not binding. These guidelines have been taken to another level of being the blueprint of the draft of The Assisted Reproductive Technology (Regulation) Bill, 2010. The ART bill attempts to iron out a number of issues which were unaddressed by the ICMR guidelines on the subject. Nonetheless, being a draft bill, it too lacks the force of law. The ICMR guidelines as well as the ART bill endeavour to put into order various points in question. These include who can act as a surrogate mother, who can be the commissioning couples, what health and age requirements must be fulfilled before the potential surrogate mother is said to be fit to act as a surrogate mother, how the agreement may be entered into and what all issues must the agreement expressly address in its content etc. While the ART bill and the ICMR guidelines try to fill the voids, there exist many issues that arise from the practice which need to be focussed on and plugged. These include issues of contractual remedies, determination of parentage of the child born and the child citizenship, among others etc.

## 5. THREATS:

Simply put, the agreements determine the rights and liabilities of the respective parties. In order to be able to understand the type of challenges that the parties could face, it is vital to identify what possible situations may crop up:

- The surrogacy agreement has been signed by the parties. During the course of the pregnancy however, the commissioning couple which is genetically related to the child, splits and the respective partners separate. The surrogate mother refuses to take custody of the child born.
- On account of medical reasons, the commissioning couple has to put to use a donor-oocyte instead of the oocyte of the commissioning mother.
- The commissioning couple, genetically related to the child, agree upon and sign the surrogacy agreement with the surrogate mother. However, during the course of pregnancy, the commissioning parents pass away and the surrogate mother refuses to keep the child.
- The commissioning couple and the surrogate mother agree and sign the surrogacy agreement. The commissioning couple is genetically related to the child. However, during child-birth, due to medical complications, the child is born but the surrogate mother passes away.
- With the exception that not only does the surrogate mother die but also the child is still-born.
- With the exception that the surrogate mother who is alive gives birth to a child that is still-born or born with birth-defects.
- The commissioning couple which is genetically related to the child signs a surrogacy agreement with a surrogate mother. The sum of money, which is agreed to be paid to the surrogate, is however, not paid in full. The surrogate mother nevertheless gives birth to a healthy baby.
- The commissioning couple being genetically related to the surrogate mother arrangement. However, the commissioning parents default in making the full payment and the surrogate refuses to hand over the child on birth.
- The surrogate mother enters into the agreement with the commissioning parents who are genetically related to the child.

However, prior to the birth of the child, the surrogate mother demands a greater sum of money that was agreed to and that only on the fulfilment of such condition would she hand over the child. The probable cases highlight the presence of a sort of broad spectrum along which the incidents may occur. The situations are laden with a number of legal issues which would make their presence felt only when disputes between contracting parties come forth.

## 6. CONTRACTUAL COUNTER STEPS:

Surrogacy arrangements may be legally protected under the law. However, it is unclear as to what remedy damages or specific performance may be available in the event of a breach by either of the party. Specific performance of the contract may be suitable only under certain circumstances. If the instance is one which is on the lines of situation (i), the court may be willing to order specific performance of the contract as the child was born as a result of the intention of the commissioning couple. Also, in a case where there has been a default in paying the agreed sum of money as a recompense to the surrogate mother, the court grant specific performance on part of the defaulting party, as in situation (vii). However, if there is a requirement of relinquishing rights over the child that is sought, the court may be wary of granting a relief of specific performance given the fact that under the prevailing

domestic law it is the birth mother who is considered to be the mother of the child. Thus, in the event that a situation like situation (ii) erupts, the court may not permit the specific performance of the contract. Damages, which are sought as yet another remedy under the contractual law, may be a tough call for the courts to take. This is due to the sensitive nature of the practice and how it may take a step further from commercialisation to actually baby selling. For instance in situation (vi), if the child is born with some abnormality or birth defect, and in case the parents file a suit for damages, it would take the practice into the realm of trading of babies. However, by all means, Indian courts would be cautious, and vigilant to not allow mushrooming of any such system.

## 7. PARENTAGE:

Surrogacy generates debate on an area that one would think is settled by nature itself determination of parentage. It was paternity that was always in the dock. However, with surrogacy even the once irrefutable maternity comes into question. In any surrogacy arrangement, there would always be a commissioning mother who may or may not be genetically related to the child and the other would be the surrogate mother. There could be an additional mother in case there is an anonymous donor involved. In the event that there may be three different 'mothers' who may be contending for the child, it would be a difficult task for the courts to ascertain who should be the legal mother. In order to determine the maternity, the court can potentially lay emphasis on any of the following aspects: the gestation and birth, the genetics, the intention of having a child or the best interests of the child. These parameters cannot be said to be mutually exclusive as they may overlap under different facts and circumstances of the respective cases. For instance, as in the abovementioned situation (i), the couple splits during the term of pregnancy and the surrogate mother too doesn't wish to keep the child. In such a scenario, the court, if it resorts to the genetic and the intention parameters, it may order either of the commissioning parents to take custody of the child. Thus, in these circumstances the commissioning mother may be held to be the legal mother of the child. Even though not explicit, a reflection of such an approach however can be traced in the Baby Manji case. On the other hand, if the court follows the best interests of the child concept, it would look into the suitability of the different mothers and on identifying where the child would be best taken care of it would determine who the legal mother should be. The state of affairs could also be such that the relationship between the genetically related commissioning couple and the surrogate mother turn sour and the surrogate mother refuses to hand over the child. If and when the parties approach the court for custody, in case the court is inclined towards gestational primacy, it would, in all likelihood, grant the custody of the child to the surrogate mother and hold her as the legal mother of the child. It is noteworthy that till surrogacy arrived, such a complex situation was unfathomable. One can decipher this from the interpretation of the term mother by the courts. In *Bai Daya v. Natha Govindlal*, the Bombay High Court held that the expression mother and parents should be read in their natural sense. That is to say, it referred only to the birth mother of the child. In *Kirtikant D. Vadodaria v. State of Gujarat*, the Supreme Court of India held that a mother is a woman who has given birth to a child or a female parent. It went on to observe that mother means only the natural mother who has given birth to the child, not the one who is the wife of one's father by another marriage. Hence, according to the court, the expression, mother does not even include in its ambit a step-mother. However, at this juncture, section 112 of the Indian Evidence Act, 1872 comes into the picture which is the prevalent law. If any case with respect to the determination of parentage is filed at present, the court would necessarily look to this provision. In light of the provision of this section, it would be the surrogate mother and her husband who would be the legal parents of the child born and not the commissioning couple. This is because it is the surrogate mother who would be giving birth to the child and that too during the continuance of a valid marriage. It must be borne in mind, as aforementioned, that it is the birth mother who is held to be the legal mother in the present day of the law. While the interests of the surrogate mother are secured by the provision, such a situation would undermine the intention and the amount of effort, time and money that the much-desirous commissioning couple would put in to having the child. The legal position on parentage is quite hazy and hence fraught with conflicting interests that need to be handled dextrously with sensitivity.

## 8. CITIZENSHIP:

India draws to her shores a large population of foreigners besides the NRIs for surrogacy. The commissioning parents of the child born of surrogacy, especially foreigners, face problems with respect to his/her citizenship. It is the conflict of laws complicates situations. The Citizenship Act, 1955 provides that citizenship in India can be acquired by birth, descent, registration, naturalisation, and incorporation of territory. The issue first arose in the Baby Manji case. A Japanese couple, Mr. & Mrs. Yamada, hire the services of an Indian surrogate mother to bear a child for them who would be genetically related to Mr. Yamada and an Indian oocyte donor. However, after the birth of Baby Manji Yamada, the commissioning couple got divorced and the commissioning mother made no claim to the baby. A birth certificate was issued by the Anand Municipal Office bearing only the name of the commissioning father. He was informed by the Japanese authorities that the baby could be permitted to enter Japan only if he adopts Baby Manji in compliance to the Indian as well as the Japanese laws and secure an Indian passport. Whilst Mr. Yamada was trying to arrange for the same, a public interest litigation was filed by an NGO in the High Court of Rajasthan in an attempt to put a stop to the transfer of Baby Manji to Japan and to question the legality of surrogacy.

in India. The NGO contended that in the absence of any law on the subject, the practice was illegal and that hence, no one could assert a right over Baby Manji. While the high court directed that the baby be produced within four weeks, Mr. Yamada's mother filed a writ petition in the Supreme Court. The apex court allowed for temporary custody of the baby with the grandmother and disposed off the case holding that it were the commissions established under The Commissions for Protection of Child Rights Act, 2005 that were competent to look into the alleged grievances of the NGO. It expressly held that commercial surrogacy was legal in India. As a consequence of the holding of the court, Baby Manji was issued an identity certificate by the Jaipur passport office. Following that the Japan Embassy granted Baby Manji a Japanese visa and thus, the grandmother was able to take her to Japan. What is noteworthy here is the fact that the baby was issued a certificate of identity which is granted by Government of India to stateless persons residing in India. The validity period for such a certificate is ten years. Yet another instance of such a nature came up in *Jan Balaz v. Anand Municipality Corporation*. In that case a German couple hired an Indian surrogate mother for her gestational services in Anand, Gujarat. The surrogate gave birth to twins in 2008 who were genetically related only to the commissioning father. Initially, the birth certificate named the commissioning couple as the parents of the child on the birth certificate. Be that is it may, the German authorities refused to recognise the parentage and nationality of the twins born to the couple as surrogacy was illegal in Germany. The commissioning parents then resorted to the Indian authorities to grant the children Indian passports. In the meanwhile, the birth certificates issued by the competent authority were recalled on account of typographical error of date of birth for necessary correction. In addition to this rectification, the name of the mother on the birth certificate was changed from the commissioning mother's name to that of the surrogate. Balaz nevertheless, continued to be named as the father on the document. Indian passport authorities issued passports on the ground of the children having an 'Indian mother. On the issue of citizenship the court held that on the basis of the Indian Evidence Act, 1872 "no presumption can be drawn that child born out of a surrogate mother, is legitimate child of commissioning parents, so as to have a legal right to parental support, inheritance and other privileges of a child born to a couple through their sexual intercourse". The court observed that the babies born to surrogate mothers in India would be Indian citizens and therefore entitled to get passports. Following this, the German Embassy issued visas to the children on the condition that the commissioning parents would duly adopt the children under the German law on arrival. As a step to curb such issues from cropping up wherein the issue of determination of citizenship of the children born come up, the Ministry of Home Affairs, Government of India brought about a change in visa regulations. In 2013, the government made its stand clear on the visa regulations for foreign nationals coming to India for surrogacy. In its order it said that a tourist visa, which is most commonly and frequently used by foreign nationals, is an inappropriate one. It pronounced that no such relaxation would be given and all such couples must obtain the medical visa for such purposes which may be grant on the fulfilment of a number of conditions. Among others are the conditions that the couple must have been married for at least 2 years and letter from the embassy of the their respective country must be enclosed with the visa application stating clearly that "(a) the country recognizes surrogacy and (b) the child/children to be born to the commissioning couple through the Indian surrogate mother will be permitted entry into their country as a biological child/children of the couple commissioning surrogate. Even though some measures have been taken by the government, a level of uncertainty nevertheless remains.

## 9. CONCLUSION:

The thriving practice of surrogacy and the legal challenges it carries with it fortifies the well known saying, all that glitters is not gold. There are a lot of success stories but not all. It cannot even be estimated how many issues with respect to surrogate mothers' stand come up given the social milieu they belong to. Their own socio-economic conditions act as a barrier to their bargaining capacity and hence what come to light are only concerns that the commissioning couples face. The government does recognise that the subject area is laden with many legal and ethical issues. The Law Commission in its 228th Report even recognises these difficulties. However, what is required is a legislation that is drafted keeping in mind the interests of all stakeholders involved and that too, very soon!

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