

Legal Analysis of Surrogacy Contract in India

Kalpana V. Jawale

Assistant Professor, P.G. Department of Law, Sant Gadge Baba Amravati University, Amravati, Maharashtra, India

Abstract

“The parents construct the child biologically, while the child constructs the parents socially.”¹

In India the Supreme Court stated that surrogacy as an agreement whereby a woman agrees to become pregnant for the purpose of giving birth to a child and hand over to a contracted party. Recently, in India problem of commercial surrogacy are increasing due to the reason of earning money, poverty, parents unable to give birth to child due to physical abnormality or medical abnormality or to avoid pain of natural pregnancy etc. It has been observed by Supreme Court that surrogacy is an agreement but the question in the mind of the researcher that, agreement of surrogacy is enforceable by law or not? Whether all the essential elements of contract have been fulfilled by the parties? What are the contractual obligations on the parties regarding the performance of the etc. Hence the researcher has thrust to highlight on these emerging issues in India.

KEYWORDS: Surrogacy, agreement, Contract, elements of contracts

The word ‘surrogate’ has been originated from a Latin word i.e. ‘surrogatus’, which means substitute. Surrogacy is an agreement between two parties i.e. surrogate mother the women agrees to donate the egg by artificial insemination and carry the fetus in her womb and to give birth with intended parents or childless parents to give birth to child. In this agreement the surrogate mother is agree to carry all the terms of pregnancy and to bear a child to childless couple with the help of artificial insemination. Surrogate mother also agrees to relinquish all the claims and rights of surrogate child after birth. If surrogate mother is agree to take consideration from opposite party it is called as consideration in the term of contract and that is called as commercial surrogacy. Commercial surrogacy was legalized in India in 2002. In 2002, the Indian Council of Medical Research (ICMR) released guidelines which made commercial surrogacy in India without legal enforcement. Hence maximum foreigners are attracting towards India for surrogate child with low amount as compare to their own nation. Therefore India becomes famous for commercial surrogacy. According to a study published by the Centre for Social Research (CSR), an NGO while dealing with women’s issues, in 2014, 88% of surrogate mothers in Delhi and 76% in Mumbai did not know the terms of the contracts of surrogacy.² But later on some issues regarding health of women, parental rights, contractual obligation, consideration etc at national and international level. At International level maximum country has been banned commercial surrogacy. Therefore India has banned the commercial surrogacy. The new proposed bill of i.e. Surrogacy (Regulation) Bill, 2016, terms and conditions of surrogacy is pending till today. This proposed law seeks to protect women from exploitation ad their rights, surrogate child and their rights etc. Once this Act will pass then automatically the commercial surrogacy will be banned in India.

Let's see whether the agreement of surrogacy fulfills all requirements of Indian Contracts Act, 1872? If we treated surrogacy is contract then all essential elements of contract are applicable to parties of the contract.

1. Two Parties of the Contract:

This is an essential element of the contract two parties must be involved to enter into a contract. As per the Indian Contract Act one party can't make contract with himself hence there is need of two parties. Both the parties must be human being and in case of surrogacy contract both parties are human being one is surrogate mother and another is indented parents to give birth to a child through surrogate mother.

2. Offer and acceptance:

In case of valid contract offer³ and acceptance⁴ are also essential elements. In case of surrogacy offeror are contracting parents and offeree is surrogate mother. In this transaction offer is made from contracting parents to surrogate mother regarding consideration or to pay money to surrogate mother. If this offer has been accepted by mother then it becomes promise. In case of valid offer and acceptance, there are few essential elements should be fulfilled by the parties to the contract. But in case of surrogacy contract all the essentials of offer and acceptance are not fulfilled by the parties in strict sense.

3. Free Consent:

Free consent of the parties is essential for entering into a contract. Free consent has been defined under section 10 of the Indian Contract Act, 1872. As in case of commercial surrogacy sometimes consent may be given by somebody else on behalf of the surrogate mother if she is illiterate, poor or any reason. Free consent is defined under section 14 of the contract as⁵ but in commercial surrogacy parties are agree to pay particular amount to surrogate mother hence there are chances of undue influence or burden on mother by her relatives and entering into agreement. Lack of free consent, the nature of the contract will be voidable at the option of the party.

4. Lawful Consideration:

The meaning of consideration is something for something or something in return. Consideration is playing vital role in the contract as well as in surrogacy contract. The legal definition of consideration is provided in section 2(d)⁶ of the Indian contract Act. Hence in case of surrogacy one party is agree to provide monetary benefit to other and other is agree to handover surrogate child. As per the Indian contract Act lawful consideration is valid condition for valid contract. But in case of surrogacy it is not treated as lawful consideration and lawful object as per the Contract Act. Consideration may be past, present or future but according to the proposed bill, 2016 commercial surrogacy is treated as void and hence it will not enforceable by Law.

5. Lawful object:

Lawful object is also considered as essential element for contract. Both the parties should agree on same view and in same sense. But in case of surrogacy

consensus ad idem⁷ is not followed by the parties in strict sense. It is generally observed that in case of surrogacy biological parent sets terms and conditions and the surrogate mother have to give response to it. As per the Indian contract Act, the object of the contract should be lawful one. Whether the object of the surrogacy is lawful? The object of surrogacy is depending on parties to the contract. Now homosexuals and parties who are involved in live in relationship are also demanding for surrogate child then what about the rights of the child? Who will take care of them?. Many National and International conventions on rights of the child has been ratified b India, hence it is an obligation to give respect them and to protect rights of surrogate mother and child.

6. Enforceability/ Legal Status of Surrogacy:

In India, till today there is no specific legislation on surrogacy by the Indian Government. Hence it is difficult to make this contract legally enforceable by law. On surrogacy there are only National Guidelines for Assisted Reproductive Technologies which provides reference to surrogacy arrangements, however by factual difficulty arises regarding their enforceability. The Law Commission Report⁸ on surrogacy has recommended that, the enforceability of surrogacy agreement. Therefore Assisted Reproductive Technologies Bill has been first time introduced in 2008 and then in 2010 and 2013 respectively, which recognises the legality of surrogacy and the enforceability of surrogacy agreements.⁹ Hence above evidences shows that till today contract of surrogacy has not been legally enforceable.

7. Immoral Object:

There are debatable issues on surrogacy is moral or immoral act? Prima facie if it observed that, it is immoral one and compared it with prostitution because artificial insemination not direct sexual intercourse with surrogate mother, hence it is immoral one. A far as the consideration is concern, the surrogate mother gives birth to the child only due to the reason of money and not else. It is also treated as immoral one.

8. Against Public Policy:

The nature contract should not violate public policy or public interest is an essential element of the contract. As far as surrogacy contract is concern the question is relating to whether it is based on public policy? The answer is no, because very few interest of the society has been protected through the medical technology of surrogacy. India is developing country it having more problems like poverty, illiteracy, unemployment etc. Public policies always based on general interest of the society. Through the contract of surrogacy there are many chances to violation public interest like to earn money, to commit unlawful act with the child, to sell child for immoral purpose etc. These types of polices or acts does not protect public interest.

9. Conclusion:

While doing legal analysis of surrogacy contract in India, it can be concluded that, even though the Supreme Court of India has stated that surrogacy is an agreement and it will convert into a contract as per the Indian contract Act. But if we observed minutely it is not a legal contract between parties. As above discussed, for valid contract there are some essential elements stated in the Indian Contract Act.

Prima facie nature of surrogacy contract is looking like as a contract but actually it is not a valid contract. Hence in strict sense it is very difficult to say that it is contract. In India, till today the specific legislation passed by the Indian Government relating to the nature of surrogacy contract, rights of the child, nature of consideration, rights of the surrogate mother etc. Therefore commercial surrogacy should be banned through specific legislation. Hidden practices of commercial surrogacy should be punished through specific legislation. Option to the childless parent should be provide as adoption of the child instead of surrogate child. Health issues of surrogate mother and child should be protected.

References:

1. 228th Law Commission Report of India, August 2009
2. <http://www.livemint.com/Politics/iJaMugwI57XmKANE1juUnO/Cabinet-clears-bill-on-surrogate-motherhood.html>
3. Section 2(a) defines an offer as, “a proposal made by one person to another to do an act or abstain from doing it.” The person who makes the offer is known as the promisor or offer or and the person to whom an offer is made is known as the promisee or the offeree.
4. Consent said to be free when it is not obtained by coercion, undue influence, fraud, misrepresentation and mistake.
5. "When at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or abstain from doing something, such act or abstinence or promise is called **consideration** for the promise".
6. It is a phrase in contract law used to describe the intentions of the parties forming the contract. In particular, it refers to the situation where there is a common understanding in the formation of the contract.
7. The 228th Law Commission of India August, 2009 on ‘Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of the Parties to a Surrogacy’.
8. For more detail see section 34 of the Assisted Reproductive Technologies (Regulation) Bill, 2010.
 - Bangia R.K., the Indian Contract Act, Allahabad Law Agency, 2009.
 - Sutherland, David G., the Indian Contract Act (Act IX of 1872) and the Specific Relief Act (Act I of 1877): With a Full Commentary, Thacker, Spink, 1879
 - John M. Eekelaar, Petar Sarcevic, Parenthood in Modern Society: Legal and Social Issues for the Twenty-First Century, Martinus Nijhoff Publishers, 1993
 - Daniela Danna, Contract Children: Questioning Surrogacy, ibidem-Verlag / ibidem Press, 2015