CHAPTER VI

SURROGACY CONTRACTS: ISSUES AND CHALLENGES
SURROGACY CONTRACTS: ISSUES AND CHALLENGES

6.1 Introduction

Surrogacy is a process by which the intended parents take the help of a surrogate woman for begetting a child and the surrogate woman agrees to carry the child for full term and also to relinquish her parental rights over the child after birth and hand it over to the intended parents. Thus surrogacy is a lengthy and time consuming process which requires sincere cooperation and understanding between the parties. Generally every surrogacy process involves an agreement between commissioning parents and surrogate woman. The couples/individuals who wish to beget a child through surrogacy must first find a female who is willing and able to fulfill the particular needs unique to that couple/individual. After a suitable surrogate is found out, the intended parents/parent may enter into an agreement, i.e. a surrogate contract with the prospective surrogate. This contract can be a formal written agreement or a mere understanding between the parties and may or may not involve payment of monetary compensation to the surrogate woman for her service. A surrogacy contract involving payment of monetary compensation to the surrogate is considered as a commercial surrogacy contract, while a surrogacy contract in which no monetary compensation is given to the surrogate for her service is considered as an altruistic surrogacy contract. Such a contract between the intended parents/parent and the surrogate woman is very essential to protect the interests of the various stakeholders involved in the surrogacy arrangement.

The surrogacy contract generally contains in it the rights and duties of surrogate mother and intended parents as well as terms regarding the welfare of child like
custody, parentage, etc\(^1\). However, the issues regarding the legality and enforceability of such a surrogacy contract is debatable because every surrogacy contract raises various legal and human rights questions. For example, the questions that arise in a surrogacy contract are whether surrogacy contract is yet another form of prostitution, a form of slavery or whether it involves commodification of motherhood. It is often criticized that commercial surrogacy is a form of baby selling and would lead to promotion of positive eugenics. It is also argued that surrogacy contracts and more specifically commercial surrogacy arrangements are against public policy. Further, surrogacy contracts also raise questions regarding the appropriate remedies in case of any violation of such contracts. All these issues are very controversial and difficult to answer due to the fact that there is no uniformity in the legal systems prevailing in the world. This diversity has led to different approaches towards the legality and enforceability of surrogacy contracts.

The approaches adopted by different countries towards surrogacy contracts are not uniform. Only some of the countries have enacted legislations dealing with surrogacy contracts and they widely vary in their approach. Some countries consider surrogacy contracts as illegal, some permit only certain types of surrogacy contracts and some countries recognize all types of surrogacy contracts. Thus the approaches of the various legal systems can be classified into three types: a) prohibition of all types of surrogacy contracts\(^2\) b) prohibition of only commercial surrogacy contracts and allowing only altruistic surrogacy contracts\(^3\) and c) allowing both commercial and altruistic surrogacy contracts\(^4\). In India all types of surrogacy contracts are considered


\(^{2}\) For example, countries like Austria, Germany, Sweden, Norway and Switzerland, etc. There are several states in USA also which prohibits all forms of surrogacy like Arizona, New Jersey, and Michigan.

\(^{3}\) For example, countries like United Kingdom, Belgium, Greece, Denmark and the Netherlands, etc. Several states in USA also prohibit commercial surrogacy and allows altruistic surrogacy contracts, they are New York, Washington, North Dakota, Kentucky and Nebraska.

\(^{4}\) For example, countries like Israel, Ukraine, India, Iran, Bahrain, Lebanon, Saudi Arabia, etc. Various states of USA like Maryland, Ohio, Oklahoma, Illinois, Utah, Arkansas, Florida, New Hampshire, Nevada, Texas, Virginia also allows all forms of surrogacy contracts.
as valid and enforceable\textsuperscript{5}. However, there are no legal provisions directly dealing with surrogacy contracts in India. In the absence of a specific legal provision it is very difficult to answer the various questions raised by surrogacy contract. Therefore when a dispute arises the courts will have to decide the case on the basis of traditional contract law and other laws. Such an approach may detrimentally affect the interests of the parties to such surrogacy contracts and also the interests of surrogate children.

There is therefore a need to resolve the ambiguity relating to surrogacy contracts as well as various legal issues surrounding such contracts. This necessity is now a days of utmost importance due to the increasing use of surrogacy in recent times by individuals and couples. It is argued that the current laws in India do not address these issues adequately and the increasing disputes in surrogacy contracts lead to court battles that may adversely affect the interests of various stakeholders involved in surrogacy contracts\textsuperscript{6}. Hence it is essential to examine the existing legal framework in India and its adequacy to deal with various issues raised by a surrogacy contract.

6.2 Surrogacy Contracts: Meaning

A surrogacy arrangement between an intended parent/parents and the surrogate woman requires clear understanding between them regarding their rights and duties towards each other. Such an agreement may or may not be reduced into writing. When the arrangement between the parties is reduced formally into writing, to give effect to the intention of the parties, it may be termed as a contract. Generally every contract exists to enforce promises and protect the parties’ expectations in a transaction\textsuperscript{7}. However, with respect to surrogacy arrangements, there is a debate regarding whether the agreement between the parties in a surrogacy is a contract or not. Hence it is essential to determine the legal status of a surrogacy agreement. In

\textsuperscript{5} There is no law but the ICMR Guidelines presuppose the validity of such contracts, and the surrogacy cases dealt with by Supreme Court of India also are supporting such a view.


this context it is necessary to understand the meaning and nature of a contract as recognized in legal terms in general and in India in particular.

A contract is a voluntary, deliberate, and legally binding agreement between two or more competent parties. A contractual relationship is evidenced by an offer, acceptance of the offer, and a valid (legal and valuable) consideration. According to Sir Frederick Pollock, “every agreement and promises enforceable at law is a contract.” As per Sir William Anson, a contract is an “agreement enforceable at law made between two or more persons, by which rights are acquired by one or more to acts or forbearances on the part of the other or others.” Each party to a contract acquires rights and duties relative to the rights and duties of the other parties. However, while all parties may expect a fair benefit from the contract (otherwise courts may set it aside as inequitable) it is not necessary that each party will benefit to an equal extent. Contracts are normally enforceable whether or not in a written form, although a written contract protects all parties to it. The object of contract law is to deal with the situations in which the parties are breaking their promises or due to unwarranted circumstances are unable to fulfill their promises and thereby violate the contract.

In India, the legal principles governing contracts are codified in the Indian Contract Act, 1872. According to this Act, ‘a contract is an agreement enforceable by law’. An agreement consists of reciprocal promises between the two parties. Therefore to create contractual obligations there must be both a proposal and

---

8 See for more <http://www.businessdictionary.com/definition/contract.html#ixzz1xPlk2cvC> Visited on 20.6.2012
10 Ibid.
acceptance. The most common way of making a contract is through a proposal by one party and its acceptance by another party. A contract creates rights and obligations between the parties entering into a contract. Refusal by any one party to a contract to honor a contracted obligation gives a right of action to another party.

It is to be noted that in every surrogacy arrangement there is an agreement or understanding arrived between the intended parents/parent and the surrogate woman. There is an offer from intended parents/parent and an acceptance by the surrogate woman. Thus the agreements between the intended parents/parent and the surrogate woman can also be termed as a contract within the meaning of the Indian Contract Act, 1872.

A surrogacy contract can be defined as a private contract based on which a woman (single or married), acts as a surrogate, agrees to become pregnant through artificial reproductive techniques, carry the foetus to term, give birth to the baby, and relinquish her rights over the baby and hand it over to his/her intended parent/parents. In a surrogacy contract the parties to the contract are the intended parents/parent, the surrogate woman and in certain cases the husband of the surrogate woman.

Most infertility clinics require a contract between the intended parents and the surrogate. The object of such a contract is to avoid any dispute between the intended parents/parent and the surrogate woman in future. Disputes may arise in issues like payment of medical expenses, payment of compensation to surrogate, liability of intended parents in cases of any harm to surrogate, liability of surrogate in case of non-fulfillment of the obligations, biological parenthood, parental rights, and

---

custodial aspects of the child to be born. A standard surrogacy contract will remove ambiguities and provide a clear answer in cases where a dispute arises between the parties in relation to the matters mentioned in the contract. Thus every surrogacy is usually preceded by some form of an agreement or contract between the surrogate mother and the intended parents/parent.

A surrogacy contract can be between family members or between total strangers. It can evolve out of purely altruistic reasons such as love and affection or it may be due to economic reasons. Depending upon the nature of payments involved, the surrogacy contracts can be classified into two types, viz. “commercial” and “non-commercial (altruistic)” surrogacy contracts. A commercial surrogacy contract is one in which the intended parents agree to pay an amount to the surrogate for her service. These types of contracts are also known as compensated surrogacy contracts. In case of a non-commercial or altruistic surrogacy contracts, the surrogate woman agrees to act as a surrogate without any compensation for the service. However, the intended parents may agree to provide for the medical expenses incurred during the surrogacy process. This type of contract is also called as uncompensated surrogacy contracts.

A surrogacy contract usually defines the rights and duties of the intended parents and the surrogate woman. Such contracts typically provide that the surrogate woman will be artificially inseminated, and carry the resulting foetus to term, and

---


20. Supra n.17.

21. Supra n.1.


23. Id. at pp.560-61.


26. Ibid.
then relinquish her parental rights to the intended parents. Some of the contracts may also require the surrogate to undergo physical and psychological testing before the artificial insemination takes place\textsuperscript{27}. The contracts may require the surrogate to refrain from the use of alcohol, drugs or tobacco during pregnancy. In addition, some contracts may require an amniocentesis test and if it reveals any defect in the pregnancy, the intended parents may have the contractual right to demand an abortion. Many contracts forbid the surrogate mother from aborting the foetus unless it is necessary for the surrogate’s physical well-being. In exchange for these services, the intended parents agree to pay all medical and health-related expenses associated with the surrogate’s pregnancy. Contracts may also provide that the intended parents pay for the living expenses of the surrogate during the period of pregnancy. Further, the intended parents may agree to pay health insurance connected with the pregnancy. So also the contracts may provide for the fee to be paid to the surrogate in consideration for her services\textsuperscript{28}.

### 6.3 Object and Purpose of Surrogacy Contracts

The object and purpose of every surrogacy contract is to protect the rights and interests of all the stake holders involved in the surrogacy arrangement, i.e. the intended parents/parent, surrogate woman and the surrogate child. Therefore, the surrogacy contracts must clearly lay down the rights and duties of the parties involved. Further it must also consider the interest and welfare of the surrogate child which would be born as a result of such contract. Thus every surrogacy contract may have the following objectives:

(i) To confirm an agreement between the intended parents/parent and the surrogate woman that the surrogate woman agrees to become pregnant through ART and carry the child to the full term. This is because every


surrogacy contract is based on the desire of the individuals to beget a child.

(ii) To establish the paternity and maternity of the surrogate child. The intended parents enter into surrogacy arrangement with the desire to beget a child of their own and bring it up. The surrogate woman and her husband generally are not interested to assume any parental obligations. So also the anonymous sperm or egg donors are also not interested to have any parental obligations. Therefore, a surrogacy contract can clearly establish the paternity and maternity of the child. Usually it is the intended parents, as they have entered into contract with the intention to have a child to assume parental responsibility. Such a declaration prior to the birth of the child would help to resolve any disputes at a later stage.

(iii) The surrogate agrees to relinquish her parental rights over the child immediately after its birth and hand it over to the intended parents. This is because if the surrogate woman changes her mind after the birth of the child and refuses to hand over the child to intended parents, it would defeat the very object of a surrogacy arrangement. Hence the surrogacy contracts expressly terminate parental rights of the surrogate woman so as to ensure that the surrogate child is placed under the custody of intended parents.

(iv) The surrogacy contract seeks to provide compensation to the surrogate woman for acting as a surrogate as well as for medical expenses incurred during surrogacy process. However in case of commercial surrogacy contracts, the surrogate is provided with both compensation for acting as a surrogate as well as medical expenses. In case of altruistic surrogacy contracts, there is provision only for providing medical expenses during the surrogacy process.
Every surrogacy contract attempts to regulate the conduct of the surrogate woman during pregnancy by imposing certain duties. This is to ensure the normal development of the foetus as well as to prevent the surrogate woman from entering into any activity that may adversely affect the safety of the child to be born.

Finally, every surrogacy contract seeks to take care of any unwarranted situation which may arise in a surrogacy process. Such unwarranted situations may arise due to the fact that every pregnancy carries risks and may cause harm to the health and life of surrogate woman or the child in the womb. Therefore, the surrogacy contract provides for liability of intended parents in case the surrogate suffers any harm or if the surrogate child suffers from any birth defects. Therefore the surrogacy contract attempts to deal with the situations where there is divorce or dispute between the intended parents or death or injury to such parents or any refusal by intended parents to accept the child.

6.4 Essentials of Surrogacy Contracts

A contract is an agreement enforceable by law. Thus every agreement is not a contract but only those agreements which are enforceable by law are contracts. Therefore in order to be an enforceable contract, the agreements should satisfy the essential elements of a valid contract. In India the essential ingredients of a valid contract are provided under Section 10 and 56 of the Indian Contract Act, 1872. According to Section 10, “all agreements are contracts if they are made by free consent of parties, competent to contract, for a lawful consideration and with a lawful object and are not hereby expressly declared to be void”. Section 56 provides that an agreement to do an act impossible in itself is void. It is to be noted that the surrogacy agreements between the intended parents/parent and the surrogate woman are also a form of contract and therefore to be considered as a valid contract they must also satisfy the essential conditions of a valid contract. In this context it is necessary to

---

29 Supra Chapter V.
examine the surrogacy contracts in the light of essential ingredients of a valid contract.

6.4.1 There must be an agreement

An agreement either oral or in writing is very essential condition of a contract. Every promise and every set of promises forming the consideration for each other is an agreement. There must be at least two parties to an agreement, one party makes a proposal and the other accepts the same. A contract arises only if the other party accepts the proposal. A proposal from one party to do or abstain from doing a particular act and its acceptance by the other party are the two essential conditions of an agreement. In every surrogacy contract there is a proposal from the intended parents/parent asking the woman to act as a surrogate and carry their child for full term and hand over the child to them after its birth. If the woman accepts this proposal there comes into existence an agreement between the intended parents/parent and the surrogate woman.

6.4.2 Consensus-ad-idem (meeting of minds) and Free Consent

To constitute a valid contract, there must be meeting of minds i.e. consensus-ad-idem. The parties should agree to the same thing in the same sense and at the same time. Section 13 of the Indian Contract Act provides that two or more persons are said to consent when they agree upon the same thing in the same sense. Thus when it is said that there should be meeting of minds, it only means that the offer and acceptance must correspond. It is the sense of both of them but not the sense of one of them that constitutes consent. In a surrogacy arrangement when the surrogate woman accepts the proposal of intended parents/parent it means that she has understood the intention and purpose of the surrogacy and has agreed to fulfill the same. To be a valid contract, the consent must be free. According to Section 14, “consent is said to

31 See, The Indian Contract Act, s. 2(e).
32 Supra n.15 at p.56.
be free when it is not caused by Coercion, Undue influence, Fraud, Mis-representation, or Mistake.

In a surrogacy contract if the surrogate woman agrees to act as a surrogate without any Coercion, Undue influence, Fraud, Mis-representation, or Mistake, it may be considered that there is a free consent to such agreement. The nature of a surrogacy arrangement is such that it requires the surrogate woman to undergo various medical tests and procedures and become pregnant through ART and carry the baby to full term. Thus if after knowing these terms and conditions if a woman agrees to act as a surrogate must be considered that she has given her free consent.

6.4.3 Competency of the Parties

The parties to an agreement must be competent to contract. The capacity to enter into a contract is mentioned under Section 11 of the Indian Contract Act, 1872. According to this Section, every person is competent to contract who is of age of majority according to the law to which he is subject, and who is of sound mind and is not disqualified from contracting by any law to which he is subject. It means that the following three categories of persons are not competent to contract: (a) Minors, (b) Persons of unsound mind, and (c) Persons disqualified from contracting by some law to which they are subject.

The parties to a surrogacy contract are the surrogate woman, her husband if she is married, and the intended parents/parent. It is to be noted that every individual has the right to procreation and is entitled to beget a child with the help of another. Thus if the intended parents/parent and the surrogate woman are major; are not of unsound mind; and are not disqualified from entering into such surrogacy arrangements; they are competent to enter into a valid contract of surrogacy.

34 Supra n.14 at p.82.
36 Supra Chapter II.
37 Supra Chapter IV & V.
6.4.4 Lawful Consideration.

Another important element of a contract is the presence of consideration which can be said to be the price for the promise\(^\text{38}\). Consideration can be defined as the price of a promise, a return or *quid pro quo*, something of value received by the promise as inducement of the promise\(^\text{39}\). Section 25 of the Indian Contract Act, 1872 declares that an agreement made without consideration is void. Further this consideration must be lawful. The Act also states the circumstances under which consideration of the contract is treated unlawful\(^\text{40}\).

A contract of commercial surrogacy similar to other contracts involves consideration and the intended parents agree to pay some amount of money to the surrogate woman. However in case of altruistic surrogacy contract there is no monetary consideration and the surrogate may agree to the contract due to love and affection. It may be argued that, altruistic surrogacy contracts are void because they do not involve monetary consideration. In this context it is pertinent to point out that Section 25 of the Indian Contract Act, 1872 provides three exceptions to the general rule that an agreement without consideration is void. One of the exceptions is that, the contract is expressed in writing and registered under the law for the time being in force for the registration of documents, and is made on account of natural love and affection between parties standing in a near relation to each other\(^\text{41}\). It is to be noted here that in case of altruistic surrogacy, the surrogate woman may generally be a near relative i.e. a woman in the status of sister or sister-in-law provided it is gestational surrogacy\(^\text{42}\). Thus an altruistic surrogacy contract also comes within the ambit of exceptions mentioned under Section 25 because in such cases the surrogate is acting

---

\(^{38}\) The term consideration is defined under Section 2(d) of the Indian Contract Act, 1872. It states that, ‘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 to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise’.

\(^{39}\) See, This definition is given by Calcutta High Court in the case of *Fazaluddin v. Prachananam Das*, A.I.R. 1957 Cal. 92.

\(^{40}\) See, The Indian Contract Act, 1872, S. 23; It provides that, “a consideration is considered to be illegal if it is forbidden by law; if it is of such nature that if permitted it would defeat the provision of any law; if it is fraudulent; if it involves an injury to the person or property of any other; and if the court regards it as immoral or opposed to public policy”.

\(^{41}\) *Id.*, S. 25(1).

\(^{42}\) See, Chapter V.
as a surrogate out of love and affection. Hence an altruistic surrogacy can also be considered as a valid contract. It may again be argued that an altruistic surrogacy contract is invalid in case a total stranger acts as a surrogate without any consideration. However it is to be noted that such a possibility is very rare and even if it occurs the contract should be protected under Section 25 (1) due to the nature of service rendered by a surrogate. Hence, an exception should be added to Section 25 of Indian Contract Act, 1872 to include altruistic agreements including surrogate and intended parents.

6.4.5 *Lawful Object*

The object of an agreement must be valid. The object of the agreement would be unlawful if it is forbidden by law or if permitted it would defeat the provisions of any law or is fraudulent or causes injury to the person or property of any other or where it is immoral or opposed to public policy[^1]. Every agreement in which the object is unlawful is void[^2]. It is to be noted that the object of every surrogacy contract is to beget a child. The right to beget a child is a basic human right and is recognized by national and international human rights law[^3]. This right is an expression of the right to procreation and includes right to beget a child through surrogacy also[^4]. Thus the object of surrogacy agreement which is to beget a child is in consonance with the national and international human rights provisions cannot be said to be unlawful. It does not defeat the provision of any other law nor is it fraudulent in nature. Further in India, there is no legal provision that prohibits the getting of a child through surrogacy. Hence the surrogacy contracts can be considered lawful in India. However various authors have argued that all types of surrogacy contracts are immoral and opposed to public policy. It is submitted that surrogacy contracts are not immoral and are not opposed to public policy[^5] and in fact such contracts are aiding the individuals to exercise their right to beget a child.

[^1]: See, The Indian Contract Act, 1872, s. 23; Also see *supra* n.9 at p.7-8.
[^2]: *Id.*, at p.8.
[^3]: *Supra* Chapter II.
[^4]: *Supra* Chapter III.
[^5]: See, for detailed analysis, the latter part of this chapter.
6.4.6 Not Declared to be Void or Illegal

A contract may satisfy all the essential conditions of a valid contract and may still be void or illegal if it is declared to be void or illegal by any law. Therefore the agreement though satisfying all the conditions for a valid contract must not have been expressly declared void by any law in force in the country. The Indian Contract Act, 1872 expressly declares agreements mentioned in Section 24 to 30 as void.

According to Section 24 and 25 an agreement devoid of a lawful consideration or a lawful object is void. It is already discussed above that a surrogacy contract includes a lawful consideration and lawful object. Further Sections 26, 27 and 28 provide that those agreements which are in restraint of trade, marriage, and legal proceedings respectively are void. A surrogacy contract does not involve any such restraint of trade marriage or legal proceedings. Section 29 of Indian Contract Act states that, “agreements, the meaning of which is not certain or capable of being made certain are void”. The meaning of a surrogacy agreement is certain and the purpose of such agreement is capable of being made certain. Further Section 30 provides that agreements by way of wager are void. An agreement is said to be a wager if the parties have opposite views regarding an uncertain event, and if there are chances of gain or loss to either of the parties on the determination of the event one way or other and if the parties have no other interest except winning or losing of bet. Thus it is promise to give money or money’s worth upon the determination of ascertainment of uncertain event. Every surrogacy contract depends upon the surrogate woman becoming pregnant through ART and carrying the child for full term and giving birth to the child. It may be argued that due to this peculiar nature of surrogacy the surrogacy contract is equivalent to a wagering contract and is void. It is submitted that though a surrogacy procedure involves numerous experiments to initiate a successful pregnancy through ART, it is not uncertain and in fact the surrogacy arrangement becomes certain as soon as a surrogate woman becomes pregnant.

48 Supra n.33.
49 Supra n.14 at p.201.
through ART. Further a surrogate woman is selected only after various clinical tests to determine whether she is capable of becoming pregnant through ART and is able to deliver a child. Therefore a surrogacy contract cannot be equated with a wagering contract.

6.4.7 Possibility of Performance

An essential ingredient of a valid contract is that the obligations created through the contract are not impossible to perform. The Indian Contract Act, 1872 provides that, an agreement to do an impossible act is void. It is submitted that the agreement in a surrogacy arrangement is not impossible to perform and therefore a surrogacy contract cannot be held to be void on ground of impossibility of performance. A surrogacy contract thus fulfills all the essential ingredients of a valid contract as per the provisions of the Indian Contract Act 1872.

6.5 Enforceability of Surrogacy Contracts

The question whether surrogacy contracts should be enforced is one of the most controversial issues in the contemporary times. The opponents of surrogacy contracts argue that if surrogacy contracts are made enforceable it would lead to potential exploitation of the surrogate, the commodification of women and children, and promote positive eugenics, etc. The supporters on the other hand argue that, if surrogacy contracts are made unenforceable, it would undermine the woman’s ability to contract freely for the use of her body. Moreover making a surrogacy contract enforceable would not lead to exploitation, slavery, baby selling and

---

commodification as argued by the critics; but it would help to protect the rights and interest of parties to such contracts by providing them an opportunity to enforce the obligations.

The courts all over the world have also discussed the issue of legality of surrogacy contracts. For example, the first landmark surrogacy case of Baby M raised the question regarding the legality of surrogacy contracts. Thereafter, this issue has been discussed in a number of cases in various countries. There is however no consensus in the judicial decisions regarding the legality of such contracts. The courts in certain countries have held such contracts as valid, while in some other countries the courts have held such contracts as invalid. Yet in some other countries the courts have validated only altruistic surrogacy contracts and invalidated all commercial surrogacy contracts. The legislations in different countries have also adopted diverse approaches with respect to the legality of surrogacy contracts. In India, there is no direct legal provision dealing with surrogacy contracts. In the absence of such legal provision, the general laws regulating commercial contracts i.e. The Indian Contract Act, 1872 can be applied to such contracts. According to Indian Contract Act, all contracts which satisfy the essential ingredients of a valid contract are legal and enforceable. As stated above, a surrogacy contract satisfies all the essentials of a valid contract. However various authors have pointed out that though surrogacy contract satisfies all the essentials of valid contract, such contracts are still illegal and should not be enforced. Most of the arguments against surrogacy contracts are based on legal, ethical and moral considerations. Some of the arguments are

57 In re Baby M, 537 A.2d 1227, 109 N.J. 396.
58 In this case, in 1987, New Jersey Superior Court Judge Harvey R. Sorkow formally validated the surrogacy contract and awarded custody of Baby M to William Sterns (intended father) under a “best interest of the child analysis”. On February 3, 1988, however, the Supreme Court of New Jersey, led by Chief Justice Robert Wilentz, invalidated surrogacy contracts as against public policy but in dicta affirmed the trial court’s use of a “best interest of the child” analysis and remanded the case to family court. On remand, the lower court awarded the custody to Bill and Betsy (intended parents) and Mary Beth (surrogate mother) was given visitation rights. See, <http://en.wikipedia.org/wiki/Baby_M> Visited on 10.6.2012.
specifically against commercial surrogacy. Therefore, in order to protect the interest of the parties in a surrogacy contract, it is essential to determine whether such contracts are legal or illegal. The major contentions are discussed below:

6.5.1 Commodification of Motherhood

One major criticism against the surrogacy contracts is that it promotes commodification of motherhood. This criticism is based on the premise that when resources are allowed to be exchanged through contract, it requires that the resources be commodified. In case of surrogacy contracts, the surrogate woman agrees to procreate through surrogacy and hand over the resulting child to the intended parents. Thus it is a contract which decides the initiation of procreation and its continuation and culmination with the handing over of the child to the intended parents. Hence it is criticized that surrogacy contracts, commodify the reproductive ability of a woman.

This objection is often assumed to apply solely to commercial surrogacy because it involves payment of compensation to the surrogate woman for her service.

The critics argue that surrogate motherhood creates a market for gestational and genetic services because the infertile couples or individual search for a surrogate woman and avail her procreative services for helping them in begetting child. Thus surrogate motherhood treats the ability to procreate as a tradable commodity. It focuses upon the particular services provided by the surrogate mother and thus fosters a “commodification” of parenthood. This commodification of the reproductive act may prove to be harmful to the identity and the dignity of a woman. These critics point out that, the surrogate mother has been reduced to the status of an ‘incubator’.

---

or ‘breeder machines’\(^{64}\) or ‘rented wombs’\(^{65}\). Further, the surrogacy arrangement may in the long run lead to institutionalizing of female body as property. According to critics this would be violative of the principle of inalienability of the human body. This principle of inalienability of human body has been invoked in France to justify the prohibition of all forms of surrogacy arrangements\(^{66}\). A person cannot make his or her body available either for non-commercial or for commercial purposes\(^{67}\). Treatment may be performed on the human body but only where it is medically necessary for the person concerned\(^{68}\). Accordingly, surrogacy arrangements, whether paid or unpaid, are unlawful\(^{69}\). Thus a person can have a proprietary right to their body; however any attempt to sell their body or body parts in the marketplace is ethically wrong\(^{70}\). Due to the involvement of technological assistance, money and other arrangements between various persons for begetting a child, it is feared that the surrogacy contracts would commodify and devalue parenthood\(^{71}\).

It is also argued that a woman’s reproductive ability is an intrinsic capacity or property of the woman and should not be commodified in the open market. It creates the danger that woman’s attributes such as height, eye colour, race\(^{72}\), athletic ability,


\(^{71}\) *Supra* n.62 at p.409.

beauty, or intelligence will be commercialized\textsuperscript{73}. Surrogates with better quality will command higher prices by virtue of those qualities\textsuperscript{74}. If human beings can be bought and sold, then they have a market value and can be treated as mere objects by themselves or other people. According to Kant, it is always wrong to treat people as mere objects, since human beings have inherent moral worth and dignity\textsuperscript{75}. Although objects can be treated as commodities and can be assigned a market value, human beings cannot be treated as commodities and should not be assigned a market value. Human beings have an unconditional or absolute value. Thus, commodification of human beings is inherently wrong because it violates human dignity and worth\textsuperscript{76}.

The supporters of surrogacy argue that, the use of one person for the benefit of another does not necessarily mean that, the person is treated as a commodity and the dignity and worth of an individual is reduced in such situations. For example, in every country abortion laws permit abortion of foetus if it is necessary to protect the life of the mother. Thus the performance of abortion does not mean that the dignity and worth of the human foetus is reduced. Likewise there are various other instances in which one person may enter into contractual agreement and agree to give up certain aspects of his autonomy. For example, athletes often have to submit to drug tests\textsuperscript{77}, an employee enters into a contract with an employer to perform a work for a stipulated number of hours and under certain conditions, etc. Due to this reasoning it is argued by the supporters that surrogacy contracts do not convert a woman’s reproductive ability as a commodity and reduce her inherent dignity and worth. A surrogate simply agrees to carry a child for compensation and hand it over to the intended parents after its birth. The legal toleration of surrogacy presupposes that the “woman’s body is hers


\textsuperscript{76} See, Kass L., “Organs for Sale? Propriety, Property and the Price of Progress”, 107 The Public Interest

\textsuperscript{77} Supra n.70 at p.116.
and hers alone unless she consents to some particular use of it\textsuperscript{78}. Further, the strict adherence to the principle of inalienability of human body would mean that donating blood, bone marrow, the donation of gametes, organ donation between living persons and medical research on human beings, etc., would all be unlawful. However all these are permitted by law subject to reasonable restrictions\textsuperscript{79}.

It is also submitted that, there is no reason to criticize that a surrogacy contract is commodification of motherhood and is legally and morally wrong. This is due to the fact that, there are various instances where the abilities and capacities of individuals are used for the benefit of themselves as well as for others. For example, a model uses her face and physique, a construction worker uses his physical strength and the professional utilizes his intelligence, character and motivations in the same manner a surrogate woman uses her womb\textsuperscript{80}. It is pertinent to point out here that, every individual can use his body in whatever way he wants as long as it does not interfere with the rights of others\textsuperscript{81}. In case of a surrogacy contract, a woman uses her womb and begets a child for another, and this arrangement does not interfere with the right of any other person. On the contrary every surrogacy contract seeks to fulfill the basic human right of an individual to beget a child.

It can be argued that, any attempt to prohibit the surrogacy contracts on the ground of commodification would amount to a violation of the basic human right to be a surrogate as well as the right to be an intended parent. It has been discussed in Chapter V that, right to be a surrogate is derived from the right to life and personal liberty and right to procreation; right to privacy which includes the right to make decision to bear or beget a child; right of an individual over her body; and the right to enjoy benefits of scientific progress. Likewise it has been discussed in Chapter IV that every individual has a right to be an intended parent and to procreate with the help of another. Therefore surrogacy cannot be prohibited on the ground that it

\textsuperscript{78} Supra n.75.
\textsuperscript{79} Supra n.69.
\textsuperscript{80} Supra n.74 at pp.412-413.
\textsuperscript{81} Supra Chapter V.
commodifies motherhood. However surrogacy contracts can be regulated through appropriate legislations in order to avoid its misuse.

6.5.2 Baby - Selling and Commodification of Child

One of the serious objections regarding the legality of surrogacy contract is that, commercial surrogacy is a form of baby selling. This objection is based on the premise that the payment of compensation to the surrogate mother is similar to a consideration in contract, and the intended parents are purchasing the child. This objection was highlighted by the Waller Report of Victoria in 1984. The Report criticized commercial surrogacy and stated that such arrangements as “agreements for the sale and purchase of a child, the buying and selling of children has been condemned and proscribed for generations. It should not be allowed to reappear”.

The basis for such criticism against surrogacy contracts and specifically against commercial surrogacy is that, like baby-selling, commercial surrogacy places a child in a home without considering whether the prospective parents would be suitable to raise the child. Instead, money is paid to the surrogate in exchange for the baby and her parental rights, and thus, the couple has bought a baby. To examine the issue whether commercial surrogacy contract amounts to baby selling one needs to look into the meaning of ‘sale’.

---


83 Victoria is a state in the south-east of Australia.

84 In May 1982 the State of Victoria appointed a Committee to consider the social, ethical and legal issues arising from in vitro fertilization. This Committee is popularly known as Waller Committee and its report (Waller Report) was published in August 1984. See, Louis Waller, Victoria- Committee to Consider the Social, Ethical and Legal Issues Arising from In-Vitro Fertilization, Govt. Printer, Melbourne, (1986).

A ‘sale’ can be defined as, ‘an act of meeting prospective buyers and providing them with goods or service in return of money or other required compensation’\(^86\). Every sale thus includes, ‘an exchange of goods or services for money’\(^87\). In a surrogacy contract the surrogate woman is being paid compensation for handing over the baby to the intended parents. Thus there is an exchange of baby and parental rights for money in surrogacy contracts. However an important question to be answered is whether such an exchange involves an exchange of commodity, i.e. can a baby, or the parental rights to a child, be considered as “goods”? Generally, “goods” are defined as things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid. Thus goods must be, both existing as well as identified before any interest in them can pass. Goods which are not both existing and identified are “future” goods. A purported present sale of future goods or of any interest therein operates as a contract to sell.

In a surrogacy contract, no child exists at the time of the contract and the parties to such an agreement have no parental rights. Hence the definition of “goods” is not satisfied because not only is the child non-existent, but also the surrogate mother has no parental rights to the child. Now the question arises that if the child is non-existent at the time of the contract can the surrogacy contract be treated as a contract to sell future goods? In order to contract to sell a future good, one must have a right to the future goods at the time of contract. However the gestational surrogate never has any rights to the child she carries\(^88\). Thus a child is neither an existing good nor a future good and a child born to a surrogate mother thus fails to meet the definition of “goods”\(^89\). Hence a surrogacy contract does not come within the meaning of ‘sale of goods’ as well as ‘contract to sell’. The above reasoning was

---


\(^{87}\) Ibid.


applied by US Court in the *Johnson case* and the Court ruled that there is no sale of baby involved in surrogacy contracts. In India, the law relating to sale of goods is governed by the Sale of Goods Act, 1930. The Act defines a contract of sale of goods as, ‘is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price’. It further provides, ‘where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell’. In both the situations the subject matter of a sale is goods. The definition of the goods is given under the Act as ‘every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale’. In order to be a ‘good’ as a subject matter of sale, such ‘good’ must be in existence. Likewise to constitute an agreement to sell, the seller should have a right over the subject matter of sale. However, as discussed above in case of a surrogacy contract, the subject matter of such contract i.e., the child is not in existence at the time of contract. So also the surrogate mother is not having any parental rights over the future child. Thus by applying the same reasoning as discussed in *Johnson case*, it can be seen that in India also, the surrogacy contracts cannot be considered as a contract for sale or agreement to sell.

In order to justify that surrogacy contract is not a baby selling contract; it is further argued by some authors that in most of the surrogacy arrangements, the intended parents contribute the genetic material for the child. In such cases where there is genetic contribution by the intended parents, the payment made to the surrogate mother should be considered as a payment for her willingness to be impregnated with the embryo created through such genetic material and for carrying

---

92 *Id.*, S. 4 (3).
93 *Id.* S. 2 (7).
the child to full term. Thus the intended parents are the real owners of the child and therefore they cannot purchase a thing in which they already hold an interest i.e. parenthood. In cases where the surrogate mother contributes the genetic material, it may be argued that, she has an interest over the child and relinquishing the same for money is equivalent to baby selling. However, it is submitted that, in such a case the surrogate mother is simply donating her genetic material and the intention is to beget a child for the intended parents. Once the donation is made the donor does not have any interest or right over the donated matter and cannot claim it back. The reason is that, if the right of the donor over the donated material is recognized by law it would adversely affect the various types of donations made in medical field like blood donation, eye donation, kidney donation, etc. Likewise, in cases where genetic material is contributed by anonymous donor, the intended parents who accept such genetic material have the right over it. Therefore, in every case of surrogacy arrangement only the intended parents have the right over the genetic material. Thus it can be concluded that since intended parents already have a right over the genetic material they cannot purchase the resulting child; so also the surrogate mother is not having any right over the child and therefore is not selling the child. Hence it is submitted that a surrogacy contract cannot be termed as a contract for baby selling.

Some authors have also criticized surrogacy contracts as a contract promoting commodification of child. In this context it is submitted that, surrogacy contracts does not amount to commodification of child. This is because a child is not a ‘good’ or ‘commodity’ for sale. It is to be noted here that, the word commodity is a generic term for a class of goods. It indicates any marketable item produced to satisfy wants or needs. It is used to describe a class of goods for which there demand is, but which is supplied without qualitative differentiation across a market and in fact it is difficult to identify from where it was produced. It is submitted that a surrogate child does not come within the meaning of a commodity as the child is not a class of goods. It is accepted that a surrogate child is begetted to satisfy the desire of another

95 *Supra* n.88 at p.20.
individual; however a child is not produced in mass like any other commodity. In fact every surrogate child is unique and different from the other and begetted only to satisfy the desire of a particular intended parents/parent. Therefore, a surrogate contract cannot be termed as commodification of child. Professor Epstein also argues that surrogacy contracts do not commodify children. He states that, a commodity is typically meant for consumption and does not have a unique subjective value. In other words, a commodity may be perfectly substituted with another unit. However a baby is unique and cannot be perfectly substituted\textsuperscript{97}. Thus the term ‘commodity’ is inappropriate to describe the relationship of a parent to a child and hence it is impossible for a surrogacy contract to commodify a child\textsuperscript{98}. Thus it can be safely concluded that a surrogacy contract, whether altruistic or commercial is neither a contract for baby selling nor an agreement to sell and nor a contract for commodification of child.

\textbf{6.5.3 Potential for Economic Exploitation}

Another major criticism specifically against commercial surrogacy contracts is that, it would lead to exploitation of poor women who may be induced to become surrogates because of their own financial need or their families\textsuperscript{99}. It is argued that surrogacy contracts open up the possibilities of economic exploitation of poor women who may be forced to act as a surrogate for the rich due to economic necessity\textsuperscript{100}. This argument is based on the idea that economic necessity could force some poor women to enter into surrogacy agreements which they otherwise would not have entered. Large sums of money could entice such women to become surrogates without truly understanding the nature of the process\textsuperscript{101}. With the increasing incidents of surrogacy, the middlemen or brokers also come into picture to provide information


\textsuperscript{98} Supra n.89 at p.1237.


\textsuperscript{101} Supra n.72.
to the intended parents as well as clinics regarding the availability of surrogates. It is argued that, such a practice has the potential to cause exploitation of surrogate women as they mostly belong to poor families, are illiterate and are not aware of their legal rights.\textsuperscript{102}

The term exploitation means, when women consent to a transaction which is either harmful or unfair to her, and does so because some aspect of her character or circumstances is used against her by the other party (or parties) to the agreement.\textsuperscript{103} Harm occurs when the surrogate is traumatized by the experience of handing over the child she has carried for nine months or suffers any harm or injury during the surrogacy pregnancy or during childbirth. It is submitted that, prior to the surrogacy arrangement, the women is aware of the fact that she has to hand over the child after birth to the intended parents. In fact, the sole purpose of surrogacy is to beget a child for another. Therefore, it cannot be criticized that the surrogate woman would be traumatized by the experience of handing over the child she has carried for nine months. It is accepted that some of the surrogate woman may generate an emotional bond with the child they carried and may undergo trauma. It may also be due to the feeling of shame or guilt regarding the act they have done. This can be taken care of by providing proper counseling and guidance prior to the initiation of contract as well as during surrogacy pregnancy.\textsuperscript{104}

Regarding the criticism that, the surrogate woman may suffer harm or injury as a result of surrogacy process, it is submitted that every pregnancy involves an inherent danger to the woman. Likewise there are many activities which have an inherent danger but are not prohibited. For example, working in military, police, working in underground mines, working in certain factories, etc. But these activities are not prohibited due to the danger involved in them. Moreover in every surrogacy contract, the parties are free to make provisions to deal with any unwarranted situations causing harm or injury to the surrogate women. The parties can fix the

\textsuperscript{102} Supra n.27.
liability as well as make provisions for insurance policy in favour of surrogate in case of any harm or injury to the surrogate woman. Thus the possibility of a harm or injury to the surrogate woman is not a ground to negate the validity of a surrogacy contract.

The critics argue that exploitation may be there if the contract is unfair and the surrogate is induced to accept a smaller financial settlement than she would be able to demand if her bargaining position were stronger. However the supporters of commercial surrogacy claim that the exploitation is not always inherent in the practice of surrogacy contracts. On the contrary the woman may actually be in a position to negotiate favorable terms, given the strong desire of the intended parents for a child. So also, if a surrogacy contract is criticized as economic exploitation only because the surrogate woman is poor and illiterate, then logically it follows that every other contract which a poor and illiterate woman enters into should also be considered as economic exploitation and must thus be prohibited. By applying the same logic a surrogacy contract shall be accepted if the surrogate woman is economically well-off and literate. Hence there is no justification in criticizing a surrogacy contract as economic exploitation just because the surrogate is poor and illiterate.

Further, the intended parents opt for surrogacy procedure to fulfill their long cherished desire of begetting a child. It is not a one-day decision, but a decision which might have been taken after trying other methods of procreation and years of emotional stress. Thus the object of intended parents is to beget a child and they may be ready to spend any amount of money of course depending on their financial position. They would also be very careful in selecting a surrogate woman and would not want to cheat her because they would not like any dispute later which may affect the outcome of the surrogacy. Therefore, they would be very careful in making the terms and conditions of the contract. It is accepted that there can be exploitation by middleman and brokers. However it can be taken care of by proper regulation of surrogacy contract through legislation. The supporters maintain that surrogacy contracts could be regulated so as to minimize the danger of exploitation, and by

---

preventing surrogacy firms from applying undue pressure on women to agree to ungenerous settlements\textsuperscript{106}.

\textbf{6.5.4 Trafficking in Women and Children}

One of the objections against the legality of surrogacy contracts is that it is similar to trafficking in women and children\textsuperscript{107}. Trafficking in women and children is an offence both at international\textsuperscript{108} and domestic levels\textsuperscript{109}. Trafficking is defined as a trade in something that should not be traded in for various social, economic or political reasons. The concept of human trafficking refers to the criminal practice of exploiting human beings by treating them like commodities for profit\textsuperscript{110}.

In India there are various legal provisions for dealing with trafficking in women and children. Most importantly, the Constitution of India, under Article 23 provides that, “trafficking in human beings and begar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law”. However there is no specific definition of trafficking in human beings in India. In the absence of such a definition, the definition of trafficking in human beings at international level can be considered in India also.

\begin{flushleft}
\textsuperscript{109} For example, in USA, The Trafficking Victims Protection Act of 2000; In India, the Indian Penal Code, 1860 (Sections 359-373); Juvenile Justice (Care and Protection of Children) Act, 2000, etc. See for more domestic legislations, Blanka Hancilova and Camille Massey, \textit{Legislation and the Situation Concerning Trafficking in Human Beings for the Purpose of Sexual Exploitation in EU Member States}, International Centre for Migration Policy Development (ICMPD), Austria (2009). \\
\end{flushleft}
The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children\textsuperscript{111} defines human trafficking as:

(a) the recruitment, transportation, transfer, harboring or receipt of persons, by means of threat or use of force or other forms of coercion, or abduction, or fraud, or deception, or the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation or the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;

(c) The recruitment, transportation, transfer, harboring or receipt of a child for the purpose of exploitation shall be considered ‘trafficking in persons’ even if this does not involve any of the means set forth in subparagraph (a) of this article\textsuperscript{112}.

Thus trafficking of women means, the recruitment, transportation, transfer, harboring or receipt of women, by means of the threat or use of force or other forms of coercion, etc\textsuperscript{113}. In a surrogacy contract all these features are absent and thus it cannot be equated with trafficking. The trafficking of children is the recruitment, transportation, transfer, harboring, or receipt of children for the purpose of


\textsuperscript{112} See, The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, 2000, Article 3(a).

\textsuperscript{113} \textit{Ibid.}
exploitation\textsuperscript{114}. It is to be noted that in a surrogacy the child is begetted not for the purpose of exploitation but for fulfilling the long cherished desire of the intended parents to have a child of their own. The surrogate child is begetted with the intention to bring it up like any other child of their own. Hence a surrogacy contract cannot be considered as violative of human trafficking laws.

6.5.5 Prostitution

One of the serious objections to a surrogacy contract is that, such agreements are similar to prostitution\textsuperscript{115}. The critics claim that because prostitution is morally wrong and often illegal, therefore surrogacy is also morally wrong and illegal\textsuperscript{116}. They point out that, there exists a close similarity between the two activities. Firstly, the surrogates are always female and prostitutes are also mainly female\textsuperscript{117}. Secondly, both surrogates as well as the prostitutes permit other people to use their reproductive organs in exchange for compensation\textsuperscript{118}. Thirdly, most prostitutes and some surrogates are forced into their respective situations to earn money\textsuperscript{119}. Fourthly, in both the cases one’s physical service is being offered, and there is no need of a deep personal or emotional relationship for the transaction to be completed\textsuperscript{120}. Fifthly, some of the feminists argue that, the broker in the surrogacy contract, who brings the contracting parties together for a fee, is similar to a pimp in a prostitution racket\textsuperscript{121}.

\textsuperscript{114} Ibid.
\textsuperscript{117} Supra n.88 at p.1237.
Sixthly, it is argued that, surrogacy is similar to prostitution because in both cases once the woman agrees for the act they have no choice over their body.\footnote{See, Andrea Dworkin, \textit{Right-Wing Women}, Perigee Publication, Penguin Group, U.S.A. (1983), pp.181-88; and Beverly Horsburgh, “Jewish Women, Black Women: Guarding against the Oppression of Surrogacy”, \textit{8 Berkeley Women’s Law Journal} 29 (1993).}

The supporters of surrogacy however claim that, any comparison between a surrogacy contract and prostitution is unreasonable. This is because surrogacy process is totally different from prostitution, in its nature, objective and act involved. In prostitution, the prostitute is required to have sexual intercourse with the customer, but in a surrogacy contract, the surrogate is not required to have sexual intercourse with a man in order to carry out their agreement. In prostitution, the prostitute cannot exercise any control over her body and is subjected completely to the will and desire of the customer. However, in surrogacy, the surrogate may be subjected to medical tests and some reasonable restrictions which are imposed only for the purpose of ensuring the normal development and health of the foetus as well as for maintaining the health of the surrogate. In prostitution the objective is to provide few hours of sexual pleasure to the customer, but in surrogacy the objective is to provide a lifetime joy to the intended parents by gifting them a child which they would not have had otherwise. Further it is to be noted that, prostitution is considered as immoral and illegal due to the involvement of sex, however in case of surrogacy there is no such involvement of sex in any form. Hence there is no justification to consider surrogacy contracts as equivalent to prostitution.

\textbf{6.5.6 Slavery and Violation of Human Dignity}

A surrogacy contract, according to certain authors can be characterized as a form of modern slavery. This is because in a surrogacy contract, the surrogate woman has to abide by the conditions imposed on her by the intended parents and the physician. Once a woman agrees to act as a surrogate for another, she has to undergo various medical tests and is bound to refrain from acting according to her wish. In most of the cases the surrogate has to stay in the special accommodation provided by the clinic and subject to supervision by the physician. So it can be considered as
commercial servitude during the period of surrogacy process\textsuperscript{123}. Thus it is similar to the characteristic feature of slavery in which the slaves do not have self ownership and are bound by the orders of the owners\textsuperscript{124}. The critics also point out that such surrogacy arrangement degrades the inherent dignity of a woman as it involves the use of a woman’s body for producing a baby which is handed over to the commissioning parents\textsuperscript{125}. During the term of pregnancy the surrogate mother has to abide by the conditions laid down in the contract and has no right to take any decision affecting her body. The opponents who profess surrogacy as ‘akin to slavery’ also argue that surrogacy involves one person (the intended parents) using another person (the surrogate mother) as a means to their ends. The surrogate mother is regarded as an instrument, for fulfilling the desire of intended parents and not as a person. Thus surrogacy treats women as a means to an end\textsuperscript{126} which is a form of slavery\textsuperscript{127}.

It is submitted that, in case of slavery a slave does not have any freedom and can be used, sold or bought by the owner. However in case of surrogacy contracts, the surrogate woman is not sold or bought by the intended parents. On the contrary in surrogacy contracts, the woman herself agrees to act as a surrogate and accepts the duties imposed by the intended parents. More importantly, the conditions and duties imposed on the surrogate woman are reasonable and only to the extent required for ensuring the welfare of the child in the womb. The surrogacy contract does not violate the inherent dignity of women and in fact not only mentions about duties of a surrogate but also provides various rights of surrogate woman. Therefore, if the surrogacy contracts are considered as slavery, then every other contract in which an individual agrees to perform some duties for another based on certain terms should

\begin{itemize}
\item \textsuperscript{123} See for more, \textit{supra} n.27 at p.1036.
\item \textsuperscript{126} This principle was first formulated by Immanuel Kant, who argued that one must never treat another person merely as a means to one’s ends but rather as a means in themselves.
\end{itemize}
also be considered as slavery. Thus a surrogacy cannot be equated with any form of slavery.

Regarding the objection that surrogacy contracts treat women as a means to an end\textsuperscript{128}, it is pertinent to point out here that though treating an individual as a means to an end is unethical; nevertheless it is permissible in certain situations. For example, it is permissible to employ another person to perform some service for a reward\textsuperscript{129}. In day to day life there are many situations where a person may employ another person to perform some service for him like, construction of home, cleaning, looking after a garden, etc. There is nothing wrong with these arrangements as long as the person performs the service by free consent and there is no exploitation. Therefore it is submitted that surrogacy contracts should not be considered unlawful merely on the ground that, it uses the surrogate woman for begetting a child for another.

\textbf{6.5.7 Positive Eugenics}

The next objection to a surrogate contract is that, such contract may lead to promotion of positive eugenics. The word eugenics is used to indicate the practice of hereditary improvement of the human race by controlled selective breeding\textsuperscript{130}. It is concerned with promotion of optimal mating and reproduction by individuals considered as having desirable or superior traits\textsuperscript{131}. The criticism that surrogacy contracts may lead to promotion of positive eugenics is based on the fear that, in a surrogacy the intended parents select the surrogate woman on the basis of positive attributes she offers such as height, eye colour, race, intelligence, and athletic ability,


\textsuperscript{129} Supra n. 127.


etc. It is argued that surrogacy procedures give an opportunity to the intended parents to select the desired qualities and traits of the surrogate child with the help of genetic engineering. So if the surrogate baby does not have the desired characteristics, some surrogacy contracts mandate abortion\textsuperscript{132}. It is feared that since the intended parents pay a huge amount of money for the surrogacy procedures and in case of commercial surrogacy also pay money to the surrogate woman, they may want a perfect child with particular characteristics. For this purpose they may go into the market and purchase an embryo produced by the sperm and egg of persons possessing characteristics desired by them, and then contract with a surrogate to carry the embryo. They may also screen the embryo and modify its genetic makeup to ensure desirable characteristics for the child\textsuperscript{133}. Therefore, it is argued that permitting the commercialization of such technologies would encourage and legitimize the practice of eugenics among the more economically privileged members of society\textsuperscript{134}. It is also stated that even altruistic surrogacy contracts may also promote positive eugenics\textsuperscript{135}.

It is submitted that, the practice of positive eugenics is not a valid ground to prohibit surrogacy contracts. The reason is that, positive eugenics also exists in other institutions like marriage. For example, the decision to marry a particular person is often based on preference for certain characteristics like race, color, caste, religion, and physical attributes\textsuperscript{136}. One of the objects of such a selection is to continue these traits through the progeny. Therefore, when the selection of partner with desirable characteristics is allowed in marriage, there is no justification to prohibit the selection of surrogate as well as the donors with desired characteristics in case of surrogacy. However, it is pertinent to point out here that, the positive eugenics can be allowed


\textsuperscript{134} Supra n.27 at p.1050.

\textsuperscript{135} The procedure involved in surrogacy is same in both commercial and altruistic surrogacy contracts; the only difference is compensation to the surrogate mother. Thus the intended parents in altruistic surrogacy contracts may also go for a perfect child with desired characteristics. See for more, Mac Fadden, “Surrogate Motherhood - Refusing to Relinquish a Child” in J. A. Scutt (ed), \textit{The Baby Machine: Commercialization of Motherhood}, Mc Culloch Publishing, Sydney (1988), p.71.

only to the extent of selection of surrogate mother or donors with desirable characteristics. It cannot be allowed to the extent of manipulating the embryo for begetting a child with desirable characteristics as well as to select the sex of the child. Any such attempt would amount to creation of designer babies and hence appropriate laws should be enacted to prevent such practices.

6.5.8 Immoral and Opposed to Public Policy

All types of surrogacy contracts are generally criticized on the ground that they are immoral and opposed to public policy and hence void and unenforceable. A contract which is immoral and opposed to public policy is considered as void and unenforceable in India. In this context it is necessary to examine the meaning of the terms ‘immoral’ and ‘public policy’.

An act is considered as immoral if it is not adhering to ethical or moral principles or is conflicting with generally or traditionally held moral principles. In India, a contract is said to be lawful only if it satisfies all the essential ingredients of a contract and is made for a lawful object. Section 23 of the Indian Contract Act, 1872 provides that every agreement of which the object or consideration is unlawful is void. The Act also states that, the object or consideration is unlawful if the contract is immoral. Thus it is essential to identify whether the object of a surrogacy contract is moral or immoral. The word ‘immoral’ is not defined in the Indian Contract Act, 1872. However, the Supreme Court has discussed this term in Gherulal Parakh v. Mahadeodas Maiya and Others. The Court has stated that, the word “immoral” is very comprehensive and varying in its contents and no universal standard can be laid down. The Court observed that, the provisions of Section 23 of the Indian Contract Act indicated that the Legislature intended to give that word a

138 Ibid.
141 Id. at p.409
restricted meaning. The limitation imposed on it by the expression “the Court regards it as immoral” clearly indicated that it was also a branch of the common law and should, therefore, be confined to principles recognized and settled by courts. The Court further identified that all judicial decisions confined immorality to sexual immorality. Therefore, it can be stated that in India, the word immoral under Section 23 of the Contract Act, 1872 refers only to sexual immorality. In surrogacy contracts there is no sexual activity between the surrogate woman and intended parent/parents and hence a surrogacy contract is not immoral in India.

Regarding the criticism that a surrogacy contract is opposed to public policy and therefore illegal, it is necessary to look into the meaning of the term ‘public policy’. It is an accepted fact that all agreements which are opposed to public policy are null and void142. The term ‘public policy’ refers to “that principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against public good”143. ‘Public policy’ encompasses those principles designed to protect the welfare of the people. It is a well recognized principle of contract law that a court may choose not to enforce a contract if it violates public policy144. There are two basic reasons why a court will not enforce a contract or a portion thereof which offends public policy. Firstly, by refusing to enforce the contract, the court hopes to deter others from making similar agreements. Secondly, the court does not want to assist the promisee by permitting him or her to use the judicial system to enforce a contract that violates public policy145. Thus public policy is the principle which declares that no man can lawfully do that which has a tendency to be injurious to the public welfare. It is a principle of law, under which freedom for contract or private dealings is restricted by the law for the good of the community. The Supreme Court has stated that, the primary duty of a court of law is to enforce a promise which the parties have made and to uphold the sanctity of contracts which form the basis of

society, but in certain cases, the court may relieve them of their duty on a rule founded on what is called the public policy\textsuperscript{146}.

In India, Section 23 of the Contract Act, 1872 specifically states that those contracts which are opposed to public policy are unlawful and void. The Act does not define the expression ‘public policy’ or ‘opposed to public policy’. From the very nature of things, these expressions are incapable of precise definition. The Supreme Court has held that public policy is not the policy of a particular Government but it connotes some matter which concerns the public good and public interest\textsuperscript{147}. In various cases the court has held that, a contract may be against public policy either from the nature of the acts to be performed or from the nature of the consideration\textsuperscript{148}. In the case of \textit{Maharashtra Apex Corporation v. Sandesh Kumar and Others}\textsuperscript{149}, the Court held:

“a contract which has the tendency to injure public interest or public welfare is a contract opposed to public policy. What constitutes an injury to public interest or welfare would depend upon the times and the claims. The social milieu in which the contract is sought to be enforced would decide the factum, the nature and the degree of the injury. The concept of public policy is not immutable, since it must vary with the changing needs of the society”\textsuperscript{150}.

In the case of surrogacy contract there is no injury to public welfare or public interest. Further the nature of surrogacy contract and the consideration involved do not have any adverse effect on the public welfare or public interest. On the contrary, the surrogacy is acting as a boon to a section of the public which is not able to beget a child due to various medical, social or other reasons. Hence, there is no justification

\textsuperscript{148} Shearman J., in \textit{Montefoire v. Menday Motor Components Co. Ltd.}, (1913) 2 K.B. 241.
\textsuperscript{149} A.I.R. 2006 Kant. 138.
\textsuperscript{150} \textit{Id.} at para 7. Also see, \textit{Bhagwant Genuji Girme v. Gangabisan Ramgopal} A.I.R. 1940 Bom. 369.
to criticize surrogacy contracts as opposed to public policy. Thus it can be concluded that the legality of surrogacy contracts either commercial or altruistic are not affected by Section 23 of Indian Contract Act, 1872.

Further, in order to declare a contract as illegal and unenforceable, there should be an extremely powerful justification. This is because every individual has a right to contract freely with another and this right is recognized under the principle of freedom of contract. The freedom of contract has been linked to the principle of private autonomy, long recognized as necessary in our society\textsuperscript{151}. Freedom of contract benefits society by maximizing the welfare of the parties involved and by granting individuals a sphere in which they can act freely. Freedom of contract is an important liberty that recognizes the importance of allowing individuals to reliably order their own affairs\textsuperscript{152}. At the same time freedom of contract is not an absolute freedom and can be restricted on reasonable grounds. The Courts and legislatures are supposed to act with caution when limiting this freedom and care must be taken to see that a proper balance is maintained between individual interest and public interest\textsuperscript{153}. Thus it is submitted that surrogacy contracts can be considered as legal and enforceable. However, it can be regulated through proper legislations in order to avoid any unwarranted use of such contracts.

6.6 Breach of Surrogacy Contracts and its Remedies

The traditional contract law considers a contract as “a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes a duty”\textsuperscript{154}. The very object of entering into a contractual relationship is to ensure that the promises made by the parties to the contract are fulfilled by the parties. This assurance is given by law by creating obligations on the parties to fulfill their promises. A breach of contract occurs when a party thereto renounces his liability under it, or by his own act makes it impossible

\textsuperscript{151} Supra n.144.
\textsuperscript{152} E. Allen Farnsworth, \textit{Farnsworth on Contracts}, Aspen Publishers, New York (2\textsuperscript{nd} edn. – 2001).
\textsuperscript{153} Supra n.144.
that he should perform his obligations under it or totally or partially fails to perform such obligations. The failure to perform or renunciation may take place when the time for performance has arrived or even before that. In case of any such breach on the part of one party to fulfill the promises, the law provides a right to the other party to seek appropriate remedy. Thus the contract law provides provisions for breach of contract and the remedies for the same. This is because a contract being a fountain head of a correlative set of rights and obligations for the parties, would be of no value, if there are no remedies to enforce the rights arising there under. A remedy here means ‘the manner in which a right is enforced or satisfied by a court when some harm or injury, recognized by society as a wrongful act, is inflicted upon an individual’. The law of remedies is concerned with the character and extent of relief to which an individual who has brought a legal action is entitled once the appropriate court procedure has been followed, and the individual has established that he or she has a substantive right that has been infringed by the non-fulfillment of obligation by the other party. Under the contract law the injured party has the following remedies viz. (i) to sue for damages for the loss suffered by the breach; (ii) to sue for quantum meruit; or (iii) in certain circumstances to sue for specific performance.

It has already been stated above that a surrogacy contract can be considered as a valid and enforceable contract under the Indian Contract Act 1872. Similar to any other contract, there are chances of breach in a surrogacy contract also. Thus any non-fulfillment of promise on the part of either the surrogate mother or the intended parents would amount to a breach of such contract and the other party would be

---

156 Ibid.
159 Ibid.
162 Under the provisions of the Specific Relief Act, 1963. For more see, supra n.15 at p.289.
entitled to take action for remedies under the law. However, due to the peculiar nature of surrogacy arrangements it is very difficult to identify an appropriate remedy for any breach in such contract.

In every surrogacy arrangement, the process starts with an initial screening of the surrogate woman. If the woman is considered fit and selected to act as a surrogate, the parties will make a formal contract. Once the contract is entered into by the parties, the surrogacy procedures will be initiated. Firstly, the surrogate will be artificially inseminated with the genetic material of the intended father or anonymous donor or implanted with an embryo created by combining genetic material of intended parents or from the anonymous donor. If in case the pregnancy is not successful, the contract would come to an end. If the pregnancy is successful she is expected to carry the baby to the full term. During the period of nine months she is required to follow certain conditions imposed by intended parents as per the instructions of the physician. After successful delivery of the child, the surrogate mother has to hand over the child to the intended parents and relinquish all her parental rights over the child. The intended parents also have to fulfill their obligations during all these stages such as arranging the physician, providing for the medical expenses, paying premiums to the insurance policy, making payment of compensation, and most importantly to accept the child after its birth. A breach of contract can occur during each of these stages either by the surrogate mother or by the intended parents. In a surrogacy contract, depending upon the stage where a breach has occurred, it can be classified into the following three broad categories.

6.6.1 Breach Prior to Artificial Insemination or Implantation of Embryo

The breach most likely to occur prior to artificial insemination or Implantation of Embryo is a refusal by the surrogate mother to submit to the artificial insemination procedure or Implantation of Embryo. The intended parents could also breach the agreement by backing out prior to artificial insemination. They may either refuse

---

163 Hereinafter referred to as AI or IE.
164 See, Keith J. Cunningham, “Surrogate Mother Contracts: Analysis of a Remedial Quagmire”, 37 Emory Law Journal, 721, (Summer 1988), at p.746; David K. Martin, “Surrogate Motherhood:
the surrogate woman or they may not fulfill their agreed obligations like advance payment to surrogate, or insurance policy or any other obligation agreed to be performed by them prior to artificial insemination or Implantation of Embryo. The breach of surrogacy contract prior to these processes may occur due to an anticipatory breach or due to discharge of contract by a breach on part of any of the parties.

The Indian Contract Act, 1872 under Section 39 deals with anticipatory breach as well as discharge of a contract by breach. It provides that, ‘when a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance’. The consequences of an anticipatory breach and discharge of a contract by breach are mentioned under Sections 64 and 73 of the Indian Contract Act. Section 64 of the Act provides that, ‘when a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is the promisor. The party rescinding a voidable contract shall, if he had received any benefit there under from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received’. Further Section 73 of the Act states that, ‘when a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it. Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach’.

An anticipatory breach can occur in a contract, by the promisor either by refusing to perform the contract, or disabling himself from performing the contract in its entirety, before the due date of performance has arrived. In a situation where the surrogate woman informs regarding her refusal to undergo AI or IE prior to the date

---


165 Supra n.14 at p.238.
on which such procedure was fixed, it can be considered as an anticipatory breach in
the surrogacy contract. So also if the intended parents inform the surrogate regarding
their refusal to accept her as a surrogate for the AI or IE before the date on which
such procedure was to be conducted, it can be considered as an anticipatory breach of
surrogacy contract. So also when the intended parents may inform the surrogate
regarding their refusal or inability to perform the obligations like advance payment to
the surrogate, or to take an insurance policy or any other act agreed to be performed
by them prior to AI or IE, it can be considered as an anticipatory breach.

When a party has made an anticipatory breach of contract, the other party may
put an end to the contract, unless he/she has signified by words or conduct his/her
acquiescence in its continuance. It means that on the anticipatory breach of contract
by one party, the other party has two alternatives open to him/her, i.e.

a. He/she may rescind the contract immediately, i.e., he/she may
treat the contract at an end, and may bring an action for the
breach of contract without waiting for the appointed date of
the performance of the contract.

b. He/she may not put an end to the contract but treat it as still
subsisting and alive and wait for the performance of the
contract on the appointed date166.

Thus, in case of an anticipatory breach by a surrogate woman, the intended
parents can either treat the contract as ended and bring an action for the breach of
contract without waiting for the appointed date for AI or IE; or the intended parents
may not put an end to the contract and treat it as still subsisting and wait for the date
of AI or IE. Generally, in a contract, when the promisee accepts the repudiation of the
contract even before the due date of performance and elects to treat the contract at an
end, he is discharged from his obligation to perform the contract, and also gets a right
to bring an action for the breach of contract, if he so likes, even before the due date of

166 Id. at p.239.
performance has arrived\textsuperscript{167}. Thus if the intended parents accept the repudiation of the contract by the surrogate woman, the intended parents are absolved from performing their part of the obligations and can maintain an action for damages if they want\textsuperscript{168}. In case where the intended parents consider the contract as still subsisting, they may dispute the repudiation and hold the surrogate to fulfill her promise. If the intended parents adopt this option they keep the contract alive not only for their benefit but also for the benefit of the surrogate, subject to the condition that they may recover damages for any loss sustained by them. In such cases the intended parents can approach the court after the due date for the damages. However such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach\textsuperscript{169}.

In cases where there is an anticipatory breach by the intended parents, the surrogate can either consider the contract as came to an end or she can treat the contract as still subsisting and wait for the due date with the expectation that, the other party may perform their duty. If the surrogate adopts the first option and considers the contract came to an end, then she will be relieved from performing any duty and she can approach the court for damages. If the surrogate adopts the second option, i.e. if she is not accepting the repudiation of contract by the intended parents and waits for due date, then after the due date she can approach the court for damages. However as mentioned earlier, the surrogate cannot claim compensation for the remote and indirect loss or damage sustained by reason of the breach\textsuperscript{170}. If the contract is discharged by an anticipatory breach, the parties have a duty to restore to the other all the advantages or benefits they received from the other party\textsuperscript{171}.

In situations where the surrogate woman remains absent or refuses to submit herself for AI or IE on the date appointed for such procedure without any prior information, the surrogacy contract can be considered as discharged by breach by

\textsuperscript{167} Id. at pp. 239-240.
\textsuperscript{168} See, The Indian Contract Act, 1872, S. 73.
\textsuperscript{169} Ibid.
\textsuperscript{170} Ibid.
\textsuperscript{171} Id. S. 64.
surrogate woman\textsuperscript{172}. The intended parents can maintain an action for damages\textsuperscript{173}. Likewise, in situation where the surrogate woman presents herself for AI or IE and the intended parents inform her, either that her services are not required or that they would not perform any obligation agreed in the contract, the surrogacy contract can be considered as discharged by breach by the intended parents\textsuperscript{174} and the surrogate can maintain an action for damages\textsuperscript{175}. Thus it can be concluded that in case of a breach prior to AI or IE in a surrogacy contract, the parties can treat contract as come to an end and claim any damages which they have suffered due to such contract and are obliged to restore all the benefits that they have obtained from other party.

\textbf{6.6.2 Breach after the Artificial Insemination or Implantation of Embryo}

In a surrogacy, the artificial insemination or implantation of embryo may be either successful or unsuccessful. In cases where artificial insemination or implantation of embryo is unsuccessful the contract may automatically be treated coming to an end. But in cases where the pregnancy is successful, the contract continues and the parties should fulfill all the terms and conditions of such contract which they have agreed. Further, during a surrogacy pregnancy, the breach can occur by the surrogate or by the intended parents.

The surrogate woman can commit breach by performing certain activities which adversely affect the development and health of the foetus and are prohibited by the terms and conditions of the contract; or the surrogate may not perform activities which are required by the contract. For example, activities like smoking, drinking, and sexual intercourse may be prohibited by the contract while regular medical checkups and taking proper food and medicines may be required by the contract\textsuperscript{176}.

\textsuperscript{172} Such circumstances are covered under Section 39 of Indian Contract Act, 1872. It provides that when a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance'.
\textsuperscript{173} See, The Indian Contract Act, 1872, S. 73.
\textsuperscript{174} \textit{Id.} S. 39.
\textsuperscript{175} \textit{Id.} S. 73.
\textsuperscript{176} See generally, Carolyn Sappideen, “The Surrogate Mother – A Growing Problem”, \textit{6 U.N.S.W.L.J.} 79 (1983), at p.91.
Any failure on part of surrogate woman to perform these obligations can be considered as a breach of contract. Further the most serious form of breach can be abortion of the foetus by the surrogate against the wish of the intended parents. Intended parents may break the contract by not-fulfilling their obligations towards the surrogate mother. For example, they may not provide the agreed amount, medical expenses, insurance policy as well as any other obligations agreed to have been performed by the intended parents.

If the AI or IE was not successful the surrogacy contract can be considered as frustrated. Frustration of contract may be defined as the occurrence of an intervening event or change of circumstances so fundamental as to be regarded by the law both striking at the root of the agreement, and as entirely beyond what was contemplated by the parties when they entered into the agreement. If an event which could not be foreseen by both the parties occurs, the doctrine of frustration would apply. Frustration signifies a certain set of circumstances arising after the formation of contract, the occurrence of which is due to no fault of either party and which render performance of the contract by one or both parties physically and commercially impossible. Where the entire performance of a contract becomes substantially impossible without any fault on either side, the contract is prima facie dissolved by the doctrine of frustration. It is to be noted that the reason for entering into a surrogacy contract is to beget a child. Therefore, if the surrogate woman is not able to conceive through AI or IE successfully, the surrogacy contract can be considered as frustrated.

When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it to the person from whom he received it. Thus in cases where, the surrogate mother is not able to conceive

---

through AI or IE, the surrogacy contract becomes void and the surrogate is bound to return the payment or any other benefits she received from the intended parents as per Section 65 of the Indian Contract Act, 1872. However, it is pertinent to point out here that, while making a contract; the parties are empowered to make express provisions to deal with a contingency. In such cases though the contract will be void, the rights and liabilities of the parties will be decided as per the provisions made by the parties to deal with such a contingency\textsuperscript{180}. Since in a surrogacy there are chances that the AI or IE may be unsuccessful, the parties to a surrogacy contract shall make provisions for dealing with such a situation. This is very much essential to protect the interest of the surrogate woman, because she might have incurred certain expenses or suffered injuries in connection with her participation in such surrogacy procedures. In the absence of such a provision it may not be possible for her to claim any compensation for the loss suffered\textsuperscript{181}.

In case where the surrogate woman breaches the contract after successful AI or IE by performing prohibited activities or not performing required activities, any breaches which do not have an adverse effect on the fundamental object of the contract cannot give rise to a right to the intended parents to rescind the contract. Thus the intended parents are bound to perform their obligations as per the contract even if there are minor breaches on the part of surrogate woman during pregnancy. However, in such cases after the delivery the intended parents can sue for damages due to such breach by surrogate woman. A major difficulty which arises with respect to such a situation is the question of calculation of compensation to be given to the intended parents. It is submitted that, in such cases the court may appoint an expert committee including medical personals and lawyers to determine the quantum of compensation depending upon the effect of such breach on the child delivered by the surrogate\textsuperscript{182}.

\textsuperscript{180} Supra n.15 at p.271.
\textsuperscript{181} In case where the AI or EI is not successful, the surrogacy contract will become void because of the application of doctrine of frustration. No party can claim compensation in such a situation because the circumstances causing frustration is beyond the control of both parties.
\textsuperscript{182} See, Flavia Berys, supra n.12 at p.351.
Further, the surrogate can break the contract by aborting the foetus without informing and without the consent of intended parents. In such a situation two important questions arise i.e. firstly, whether the surrogate woman has a right to abort foetus without the consent of the intended parents; secondly what will be appropriate remedy available to the intended parents in such a case? Regarding the question whether the surrogate has a right to abort without the consent of intended parents, it is submitted that a surrogate cannot claim such a right and if she does so, then the intended parents can claim compensation. The quantum of compensation should be determined by the court taking into account the financial loss as well as mental sufferings of the intended parents. However, if the continuation of pregnancy poses a risk to the life and health of the surrogate mother, the foetus can be aborted\textsuperscript{183}. A surrogacy contract which makes a provision to restrict the right of surrogate woman to abort the foetus in case where the continuation of such pregnancy poses a risk to the life and health of surrogate woman, should be considered as an illegal contract\textsuperscript{184}.

In case the surrogate informs or threatens the intended parents with her decision to abort the foetus, the question arises whether the intended parents can approach the court for an order compelling the surrogate to continue with the pregnancy. Generally when there is a threat from one party regarding his non-willingness to perform, the other party may approach the court for an order for specific performance. However, in surrogacy contract if the surrogate informs or threatens the intended parents with her decision to abort, the intended parents cannot approach the court for an order for specific performance by the surrogate mother because an order for specific performance cannot be awarded in each and every circumstance\textsuperscript{185}. The Specific Relief Act, 1963 deals with the circumstances in which a specific performance can be awarded\textsuperscript{186} and cannot be awarded\textsuperscript{187}. Section 14 of the Act provides the circumstances in which an order of specific performance cannot be awarded. One

\textsuperscript{183} See, The Medical Termination of Pregnancy Act, 1971, S. 3(2) (a) (i).
\textsuperscript{184} Such contracts are considered as opposed to public policy and derogatory to human dignity.
\textsuperscript{185} Specific performance is not available for contracts requiring personal services such as employment contracts because such an order would restrict an individual’s freedom, See, Chappell v. Times Newspapers Ltd [1975] 1 W.L. R. 482.
\textsuperscript{186} See, The Specific Relief Act, 1963, S.10.
\textsuperscript{187} Id. S.14.
such circumstance is, if the performance of a contract is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such that the court cannot enforce specific performance of its material terms\textsuperscript{188}. The carrying of a foetus and delivery of the child is purely based on the personal qualification and volition of the surrogate woman. Thus the court cannot award an order for specific performance in cases where the surrogate threatens or informs about her decision to abort the foetus. However, in case where the surrogate actually aborts the foetus, the intended parents can consider that the contract is discharged by breach and approach the court for compensation.

A breach of surrogacy contract can also occur due to the act of intended parents during the stage after the AI or IE has been performed. This can happen in situations where the intended parents are not fulfilling their obligations such as not providing the agreed amount, medical expenses, insurance policy as well as any other obligation agreed to be performed by them. In such cases the surrogate woman can approach the court for seeking an order for specific performance. Thus the court can issue an order for specific performance of the obligations by the intended parents. However, even after the order of specific performance if the intended parents are not performing their obligation, the surrogate can consider that the contract is discharged by breach and can abort the foetus. However if she wishes she may continue with the pregnancy and can also claim damages for such breach. It is submitted that termination of a pregnancy due to the breach of a surrogacy contract by intended parents should be made legal in India. For this the Medical Termination of Pregnancy Act, 1971 should be amended to include breach of surrogacy contract by the intended parents as a ground for terminating pregnancy\textsuperscript{189}. However, there may be a situation in which the termination of pregnancy may be dangerous to the health and life of the surrogate. In such cases, the surrogate can deliver the child and can be allowed to claim compensation. If the surrogate wants, she can keep the child or if the intended parents are ready to accept the child, the surrogate can hand over the child to them. If the

\textsuperscript{188} Id. S.14 (b).
\textsuperscript{189} In Section 3 after Clause 4 of MTP ACT, 1971. Section 3 provides various grounds in which a pregnancy can be terminated legally.
surrogate keeps the child, she can claim the maintenance expense from the intended parents. In case where the surrogate and the intended parents are not willing to accept the child, the child can be given to any near relative of the intended parents if they are willing or should be placed for adoption or should be handed over to an orphanage. If the child is placed for adoption, the court can issue an order that, the intended parents have an obligation to maintain the child until the adoption is complete. If the child is placed in an orphanage, it should be made as a mandatory obligation of the intended parents to maintain the child up to the age of majority.

6.6.3 Breach after Birth

Breach of the surrogacy contract may occur after the birth of the child either by the surrogate or by the intended parents. The surrogate mother may breach the contract by refusing to hand over the child to the intended parents or by claiming parental rights over the child or demanding more money for relinquishing her parental rights. Likewise, the intended parents may breach the contract by refusing to accept the child after its birth or by refusing to make the payment of medical expenses or the agreed compensation to the surrogate.\(^{190}\)

In cases where the surrogate makes breach of contract, the intended parents can approach the court for specific performance. The Specific Relief Act, 1963 provides that, “when there exists no standard for ascertaining the actual damage caused by the non-performance of the act agreed to be done; or when the act agreed to be done is such that compensation in money for its non-performance would not afford adequate relief”, an order for specific performance can be issued by the court.\(^{191}\) In a surrogacy contract, if the surrogate refuses to hand over the child after its birth, it is very difficult to ascertain the actual damage caused to the intended parents due to the refusal to hand over the child. So also no amount of money can adequately compensate the intended parents for their shattered expectations of having a child.\(^{192}\) Thus the court can issue an order for specific performance. However in such cases,

---

\(^{190}\) Supra n.176.
\(^{191}\) See, The Specific Relief Act, 1963, S.10 (a) (b).
\(^{192}\) Supra n.6 at p.588.
the intended parents should perform their part of the obligations as per the terms of the contract, before approaching the court, since specific performance is an equitable remedy.

Some of the authors have criticized that, compelling the surrogate to hand over the child is unfair. However, it is submitted that requiring the surrogate to perform her contractual obligation through an order of specific performance is not unfair, because the surrogate woman agreed to become a surrogate only after extensive legal, medical and psychological counseling and she was appraised of the ramifications of her service to both herself and the intended parents. The surrogate entered into the contract expecting to be paid of her services while the intended parents entered into it to have a child. Accordingly, the surrogate’s expectations are fulfilled by payment of her fee while the intended parent’s expectations can be fulfilled only through specific performance of the contract, i.e. giving them custody of the child.

In case there is a breach by intended parents, i.e. if the intended parents refuse to accept the child, the surrogate woman can approach the court for specific performance. This is because the surrogate has entered into surrogacy contract only on the basis of the promise that the intended parents would accept the child after its birth. So it is necessary that, the intended parents should accept the child. As per the provisions of Specific Relief Act, 1963 the court is empowered to issue an order of specific performance. This is because the damage to the surrogate due to such refusal cannot be ascertained and no amount of money can compensate for such damages. There may be a situation where the intended parents may refuse to accept the child even after the order for specific performance. In such cases if the surrogate

---


194 Supra n.192 at p.588. Some authors have argued that, ‘If the surrogate breaches by refusing to relinquish the child, this should be treated as a kidnapping. If she demands additional money in exchange for relinquishing the child, this is a ransom because she should have gone to court seeking additional compensation rather than resorting to self-help. See, for example, Flavia Berys, supra n.12 at p. 351.

195 As per Section 10 an order for specific performance can be issued, ‘when there exists no standard for ascertaining the actual damage caused by the non-performance of the act agreed to be done; or when the act agreed to be done is such that compensation in money for its non-performance would not afford adequate relief’. 
or any relative of the intended parents are willing to accept the child, they may be allowed to keep. Otherwise the child may be placed for adoption or given to an orphanage. If the child is placed for adoption, the intended parents should make arrangements for its maintenance till the adoption is completed. In case where the child is given to an orphanage, the intended parents have to provide maintenance for the child till it attains majority. In all cases, the intended parents have to provide to the surrogate, the agreed amount of compensation or any amount to be decided by the court depending upon the circumstances.

Further if the contract involves a breach by the intended parents due to the failure of payment of agreed compensation and other medical expenses, the remedy available to the surrogate is to approach the court for specific performance of contract and compensation and she is entitled to keep the child till the obligations are fulfilled by the intended parents.

It is pertinent to point out that, there may be certain situations where the purpose of the surrogacy contract may be adversely affected in spite of the performance of obligations by both parties to the contract. They are miscarriage, still birth, defective birth or multiple births, etc. Thus an important question which arises in such cases is that, whether the intended parents can refuse to fulfill their obligation towards the surrogate? It is submitted that, such circumstances should be considered as an Act of God\textsuperscript{196} and the intended parents cannot excuse themselves from the fulfillment of their obligations towards the surrogate\textsuperscript{197}.

6.7 Conclusion

Surrogacy arrangements can bring joy to both a childless couple who wish to beget a child as well as to the surrogate woman who enables such childless couples or individuals to have the child of their own. However, considering the peculiar nature of surrogacy arrangement, i.e. involving various medical procedures and lengthy duration of time as well as the obligations to be performed by the parties, such

\textsuperscript{196} This is applicable because those events are not in the hands of surrogate mother.
\textsuperscript{197} See for more, \textit{supra} n.89 at pp.1254-55.
arrangement requires careful consideration of the various factors involved. Factors like, rights and duties of the surrogate as well as the intended parents; consequences of any breach of such duties; and liabilities of the parties in case of any unwarranted situations, etc. must be considered by the parties which entering into such arrangements. For this purpose, the practice of making a formal surrogacy contract can be adopted.

Surrogacy contracts are formal agreements which provide the terms and conditions of a surrogacy arrangement between the surrogate and intended parents. Such contracts are essential to protect the interests of both the parties involved in such surrogacy. This is because nobody can foresee the disputes which may arise between the surrogate and intended parents or the problems which may develop before the initiation of AI or IE, during the pregnancy and after the delivery of child so as to defeat the purpose of such surrogacy arrangement. Thus if all goes well in the surrogacy arrangement, the couple takes home the healthy baby they wanted so badly, and the surrogate mother receives monetary compensation. However, if any dispute arises between the parties, it would lead to court battles between them. Unfortunately in India there is no specific law for regulating surrogacy contracts. In the absence of specific law, the determination of any such dispute based on a surrogacy contract becomes very difficult and may adversely affect the interests and rights of the parties. Such difficulties can be avoided to an extent by applying the general law applicable to contracts in India, i.e. The Indian Contract Act, 1872. Though surrogacy contract satisfies all the essential ingredients of a valid contract as per the Act, there are various criticisms regarding its enforceability on the ground that it would lead to violation of individual dignity, commodification of motherhood and child, slavery, prostitution, baby selling, positive eugenics, and trafficking in women and children. It is also argued that surrogacy contracts are immoral and opposed to public policy.

However, as discussed in this chapter all these arguments cannot be considered as an adequate ground for invalidating a surrogacy contract. Further any attempt to invalidate a surrogacy contract on these grounds is a violation of the individual’s right to freedom of contract, as well as the basic human right to beget a child with the help
of another and the right of a woman to act as a surrogate. However, due to the special nature of surrogacy contracts, more complicated questions can arise regarding its breach and the appropriate remedies for such breach. The breach of a surrogacy contract can occur in any of the three stages of a surrogacy arrangement, i.e. before the initiation of AI or IE, during the surrogacy pregnancy and after the delivery of child. The remedies like damages and specific performance can be availed by the parties depending upon the breach involved.

A specific legislation can resolve all the uncertainties surrounding the surrogacy contracts and provide a proper regulatory framework for dealing with most of the difficulties faced by the parties. It is to be remembered that surrogacy arrangements help to fulfill the long cherished desire of a couple/individual to beget a child with the help of a surrogate. Hence if they undergo hardships to achieve this goal due to the absence of a law, it may be considered as a failure on part of the state to protect the rights and interests of these individuals. Therefore, the state should enact a specific legislation dealing with surrogacy contracts so that there is a greater chance that the end result of the surrogacy will be a happy new family rather than an endless legal battle.
CHAPTER –VII

SURROGATE CHILD AND THE LAW
CHAPTER VII

SURROGATE CHILD AND THE LAW

“Currently, the biggest risk to children in the surrogacy context comes not from the actions of either set of parents but from the uncertain status of the law, which., can lead to the child being subjected to years of litigation to determine who will be considered to be his or her legal parents” …Lori B. Andrews¹.

7.1 Introduction

Children are precious to every country and are the future citizens and pillars of the nation. In every society children are considered as necessary and desirable. Though there is no duty to reproduce, the desire to do so is strong in human beings due to religious, cultural, social, family, personal and legal motives². The desire to beget and rear a child can be so overwhelming as to cause people to go to great lengths to achieve such a goal³. Thus in cases where the couples or individuals are unable to have a child of their own through natural biological process, they may take the help of assisted reproductive technologies for begetting a child. Surrogacy has emerged as the best option for begetting a child, and every year, more and more children are born to surrogate mothers. This increased use of surrogacy has received worldwide attention in recent years and has generated huge debate regarding the protection of rights and welfare of the various stakeholders involved in surrogacy. The diverse issues concerning the stake holders like surrogate mother and intended parents as well as issues relating to surrogacy contract have been discussed in previous chapters⁴. In any discussion on surrogacy, the issues that affect the surrogate

² Supra Chapter I.
⁴ Supra Chapters IV, V & VI.