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Privileges and Responsibilities in Surrogacy Law of India

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ABSTRACT

With the passage of the time life style of an individual has changed drastically. This life style had a great impact on the health of the individual which led to the many issues related to the health; infertility is one of those problems that is increasing with time among the individual. For the couples who are facing the issue of Infertility, Surrogacy came as boon for them. It is the advancement in the technology that has surprised us that now a Child can be made outside the Human Body in the Labs. Technologies always come with the Legislative Backing as without proper law technology leads to the exploitation. India on 25 January, 2022 has passed two laws related to regulation of the Surrogacy Procedure i.e., Surrogacy (Regulation) Act, 2021 and Assisted Reproductive (Regulation) Act, 2021. Now, it can be proudly said that this process is not orphan any more. In the Surrogacy Procedure there are three main parties i.e. Intended Parents and Surrogate Mother that carry out the procedure of Surrogacy. Rights and Duties of these three parties are not expressly laid down in the Act instead one has to find the intention of the Legislature while interpreting the provisions and need to find their own privileges and responsibilities to perform.

I. INTRODUCTION

Surrogacy is the process through Surrogate Mother gives birth to the Child for the Intended Parents through the process of Artificial Insemination. If the Couple is infertile or is having any issue in carrying the Child due to medical reasons they can opt for the Surrogacy Procedure through which they can give the birth to Child having the same biological genes as of there. This whole process is conducted in the Assisted Reproductive Labs and Clinics the expertise over there fertilizes the sperm and egg outside the Human Body and after the fertilization the Child is transferred to the Surrogate Mother. All the parties have certain Rights and Duties that they have to oblige with. For the development of the human civilization and smoothly working of the society in the terms of the brotherhood it is important that every individual must be vested with certain right and duties, former he needs to enjoy and the latter needs to be obeyed.²

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² Dr. NY Paranjape, *Studies in Jurisprudence and Legal Theory*.

Peaceful society is the result and the outcome of these privileges and responsibilities that is fulfilled only when both works together. Where Right is that interest that is recognized and protected by a rule of justice on the other hand Duty is an obligation whose violation will be wrong. Rights are clearly protected under the acts and somewhat the obligation and imposition of the duty on oneself also protect the rights of the other. Austin had clearly stated that Rights that is equally provided to all and it allows everyone to do that act whereas stating about the Duties he properly clarified that if someone doesnot oblige by his or her duty it will give rise to penances.

II. INTENDED PARENTS

Basic motive behind the marriage is the continuity of the lineage. But sometimes due to medical reasons a Couple is unable to bear the Child which is termed as Infertility. It is believed that it is the duty of the Husband to provide the Child to Wife and a Woman is respected as only when she is having the Child. In order to construct the Child of their own genes and to fulfil social obligation the couple can opt for Surrogacy. The couple who due to infertility issues cannot bear the Child but want to have the Child is termed as Intended Parents.

RIGHT TO BE INTENDED PARENTS

➤ **AS A PART OF RIGHT TO REPRODUCTION:** Right to Procreation is the Fundamental Right that has International recognition as well. It is the choice of the individual to procreate the Child under the reproductive choice. Right to Reproduction is equally provided to all one can procreate the Child through natural method or through medical advancement or technology. The responsibility to raise the Child is on the Couple itself.

➤ **AS A PART OF RIGHT TO FOUND A FAMILY AND SPACING OF CHILDREN:** Every individual tends to have the family genetically related to them which law openly allows. Under various International Convention it was clearly discussed that an individual can have the family of their own and can have any number of the Child they urge to. But later it laid to the increase in population sue to which birth rate needed to be controlled.

➤ **AS A PART OF PRIVACY and PERSONAL LIBERTY:** Every act of the procreation is of the personal choice of the individual Article 21 of the Indian Constitution provides about the Right to Privacy and Personal Liberty it covers within itself the Right of the Reproduction as well. No matter what the process a couple take to procreate it is their choice to keep the process private.

➤ **AS PART OF RIGHT TO ENJOY BENEFITS OF SCIENTIFIC and TECHNOLOGICAL PROGRESS:** Science never fails to surprise us not even in this case. Everyone should have the equal access to the technology in all the fields without any discrimination. This technology is also available to every individual without any discrimination. If any discrimination occurs it will be the violation of the FR. and its violation can be enforced in the Court.

STANDARDS FOR BEING INTENDED PARENTS

As the Surrogacy Procedure was the one of those Technology that was exploited a lot. So, when the law was drafted it was kept in mind that only those who are in need can avail these services. The Intended Couple in order to avail the Surrogacy Procedure have to obtain the certificate from the concerned authority and the certificate will only be obtained on the fulfilment of the following conditions:³

➤ Surrogacy service can only be availed by the Couples who are married and are between ages of 23 to 50 years in case of female and 26 to 55 years in the case of male on the day of Certificate.

➤ They should not have any surviving Child either biologically or through adoption or through earlier surrogacy. If a Child is mentally/ physically challenged or suffers from any illness that cannot be certified by the appropriate authority with due medical certificate from a District Medical Board.

PRIVILEGES OF INTENDED PARENTS

➤ **RIGHT TO HANDPICK SURROGATE MOTHER:** Surrogate Mother had a vital and most important role in the process of the surrogacy. She is the one who is going to carry the Child for the nine months. And it is that period where Child starts learning and getting the traits of the mother. So, it is very important to choose the Surrogate Mother wisely. The nature, the health of the Child should be of paramount consideration in considering the Surrogate Mother.

➤ **RIGHT OF PROFICIENT COUNSELLING:** Surrogacy is highly technical procedure which includes the advanced technology and should be carried with due attention and care. So, before carrying out any Surrogacy Process it is important to know about the outcome, the risk involved in it and medical side effects as well through the professional counselling. A man from Germany came to India and after coming in India he came to know

³ 3 Sec 4(c), *the Surrogacy Regulation Act, 2021*.

about the advancement of the technology in the procedure of Surrogacy and ART treatment. He was unmarried but wanted to have his own child so he thought of going for Surrogacy and after the proper counselling he was suggested for Gestational Surrogacy which came out to be fruitful.⁴

➤ **RIGHT TO WITHDRAW THEIR CONSENT:** For the accomplishment of any Contract the Consent that too free consent plays the vital role for the accomplishment of the Surrogacy Procedure. Before the implantation of the embryo in the Surrogate, Intended Couple can withdraw their consent.⁵ But once the procedure of the Surrogacy has started there is no way of coming back they have to oblige by the Surrogacy Agreement. Nor they can undergo the process of the Abortion for the termination of Pregnancy.

➤ **RIGHT TO INFORMATION and VISIT SURROGATE MOTHER DURING PREGNANCY:** During the process of the Surrogacy the treatment that is carried out on them should be clearly conveyed to them. And they should be allowed to visit the Surrogate as many times as they wish too. They can also choose the environment that is fit and adequate for the environment of the Child in accordance with the parents.

➤ **RIGHT TO CUSTODY and PARENTAGE OF CHILD:** Child born through the process of the Surrogacy shall after the delivery be given to the Intended Parents. The birth certificate of the Child should carry the name of the Intended Parents only. Surrogate Mother cannot have right on the Child. It doesn't matter that the Child is born with any physical abnormality or any kind of mental abnormality. Order for Parentage and Custody of the Child should be passed by a Court of Magistrate of First Class on application made by an Intending Parents or Surrogate Mother which is treated as Birth Affidavit.⁶

➤ **RIGHT TO MATERNITY and PATERNITY LEAVE FOR INTENDED PARENTS:** With the empowerment of the Women and equal opportunity among them all in the working sector women are joining the workforce. Various judicial pronouncements had stated about the Maternity Leave. Intended Mother should also be given the benefit of maternity leave as she is also the new mother may be she has not given the birth to the child but she is emotionally and mentally attached to the child and for the rest of the life she is the one who needs to take care of the child. In this case,⁷ there was a woman who was working in the Chennai Port Trust and she got a Child through Surrogacy the question arise here that whether the

⁴ *Dr. Norman Witzleb v Jyotshana Mandal and Anr., Decided on 18 November, 2011*

⁵ Section 22 (4), *the ART Act, 2021*

⁶ Section 4 (iii), *the Surrogacy Regulation Act, 2021.*

⁷ *K Kalaiselvi v Chennai Port Trust, Decided on 4 March, 2013*

woman will be allowed to Maternity Benefit or not? In order to look after the newly born baby, she had applied for maternity leave. But she was informed that she is not entitled to maternity leave. But, the Court had submitted that petitioner is the undoubtedly the mother of a minor girl child and she is entitled to develop a bondage with the child. In the interest of the Child, the petitioner is entitled to have the leave granted in her favour.

RESPONSIBILITIES OF INTENDED PARENTS

➤ **TO REFRAIN FROM SEX SELECTION and IMPROVEMENT OF NON – MEDICAL CHARACTERISTICS:** Sex-selectivity leads to the female feticide. Keeping in the mind of the birth ratio the Pre-Natal Diagnosis is banned in India. In one of the case,⁸ Petitioner came to India to avail the service of the Surrogacy in India. In the scan they came to know about the twins. They wanted to have the Child of both the gender in order of this they made an application to determine the sex of the Child. Which was refused by the Court as it was against the PNDT Act.

➤ **TO ACCEPT CHILD AFTER BIRTH:** A child who is born through the Surrogacy process shall be provided all the rights of the Legitimate Child who is born in the wedlock and all the other privileges should be provided to Child as it is provided to the Child born to sexual intercourse.⁹ It is the duty of the Intended Parents to provide all the rights to the Child as the Child is the Natural Child.¹⁰ If there is exploitation of the Child like they abandon, disown or exploit the child who is born through the ART shall be punished with a fine which for the first time shall not be less than Rs. 5 Lakh/- and fine which may extend upto Rs. 10 Lakh/-. For the subsequent offence the imprisonment shall not be less 3 Years but it may extend upto 8 Years and Fine shall not be less than Rs. 10 Lakh/- but which may extend upto Rs. 20 Lakh/-.¹¹

➤ **TO HIRE LOCAL GUARDIAN:** It is the duty of the Intended Couples who are not in India but are Indian Citizen or are in the service sector to provide the local guardian for the daily need of the Surrogate and to keep a check on the medical guidance, appointments and reports.

➤ **TO BE THE DONOR:** Being the donor lessen the chances of the exploitation of the Child born through the Surrogacy Procedure. If it possible one partner should act as Donor so it will create the love and affection between the Intended Parents and Child.

⁸ *Amy Antoinette Mcgregor and anr. v Director of Family Welfare, Decided on 24 Oct, 2013*

⁹ *Ashish Wadhwa and Anr. v. Chaphala Haladar and Anr, Decided on 20 December, 2021*

¹⁰ Section 3, *the Surrogacy Regulation Act, 2021*

¹¹ Section 33 (1) (a) (2), *the ART Act, 2021*

➤ **SELECTION OF CLINIC:** It is the duty of the Intended Couple that they shall not seek any aid from such Clinics that do not fit criteria of Surrogacy Procedure. If they take any path that is not legal in India it will lead to the path of exploitation. If any person do it or go against the procedure they shall be punishable with the imprisonment for 5 years and fine which may extend upto Rs. 5 Lakh/-, for subsequent offence they shall be punished with the imprisonment of 10 year and fine which may extend upto Rs. 10 Lakh/-.¹²

III. SURROGATE MOTHER

Surrogate Mother is the delegate of the Intended Mother who cannot carry the Child inside her own body. Woman can be Surrogate only if she wishes to be she can't be made to carry Child under force or undue influence.

RIGHT TO BE SURROGATE

➤ **LEGAL and HUMAN RIGHT BASIS— RIGHT TO PERSONAL LIBERTY and PRIVACY:** Article 21 of the Indian Constitution states about the Privacy and Personal Liberty. It is the personal liberty of the Surrogate Mother whether willingly she wants to carry the Surrogacy Procedure or not.

➤ **PROPERTY RIGHTS OVER HUMAN BODY and RIGHT TO BE SURROGATE:** Body is the one's own individual property. Whether she wants any treatment to be conducted on her body or not it is her personal choice and nobody can take decision on her behalf.

➤ **RIGHT TO BENEFIT FROM SCIENTIFIC PROGRESS and RIGHT TO BE SURROGATE:** Progress in the Science has left everyone in shock. The split pregnancy has left everyone in the state of the shock. A pregnancy of the other couple can be carried out by the other woman. Before the implantation its risk and future exploitation of Mother and Child can be deducted before. So, with the advancement without adverse effect on health she can be surrogates which protect the Right to Health of an individual as well.

STANDARDS FOR BEING SURROGATE MOTHER

Undergoing the process of Surrogacy is not as easy as it seems to be there are lot of complexities and legal aspects involved in it. If Infertile Couple decides to get a Child through Surrogacy they should fulfil the legal requirement to fit in the frame of the Infertile or Intending Couple as per the Surrogacy (Regulation) Act, 2021.¹³ Surrogate Mother should carry the eligibility

¹² Section 40, *the Surrogacy Regulation Act, 2021*

¹³ Section 2 (zf), *the Surrogacy (Regulation) Bill, 2019*

certificate from the Appropriate Authority. Certificate will be issued to her on the fulfilment of the following conditions:

Surrogate should be married woman having the Child of her own before carrying out Surrogacy Procedure on other. The age criteria for being a Surrogate Mother are from 25 to 35 years of the age. This provision for the age limit was added as because there was 'n' no. of case as of the age on implantation. It was seen that when it was allowed that only family relatives can be the Surrogate Mother for the Intended Parents then the 60 years old granny gave birth to the her own grandchild.

Surrogate Mother can donate her eggs or oocyte but cannot provide her own gamete for the pregnancy. It is illegal to provide gametes for pregnancy or to store it. Willing woman shall act as Surrogate Mother only once in her lifetime. She shall not be forced for conducting the Surrogacy and the Husband of the Surrogate should also give her consent for Surrogacy Agreement.

Surrogate Mother should be medically or psychologically fit for undergoing the Surrogacy procedure.

PRIVILEGES OF SURROGATE MOTHER

➤ **RIGHT TO RECEIVE REASONABLE INSURANCE EXPENSES:** Commercial Surrogacy is banned in India now the only expense a Surrogate gets is Insurance. Insurance shall be made in favour of the Surrogate Mother for the period of 16 months covering post-partum complications. All the expenses of post pregnancy and pre pregnancy shall be by Intended Couple. This Insurance shall be made by Insurance Company or an Agent recognized by the Insurance Regulatory and Development Authority established under the Insurance Regulatory and Development Authority Act, 1999.¹⁴

➤ **FREE CONSENT AND WRITTEN CONSENT:** Consent plays the vital role if the requirements of the act are complete and are accomplished only than the surrogacy agreement will be considered as the valid agreement. So, consent should oblige by the rules of India Contract Act, 1872. Consent shall be obtained from her as per the procedure prescribes and in the language that she understands.¹⁵ Before using any Human Reproductive Material or any treatment of Assisted Reproductive Technology the written consent of the Surrogate Mother and Intended Couple is necessary.¹⁶

¹⁴ Section 4(iii)(a)(III), *Id*

¹⁵ Section 6(1)(ii), *Id*

¹⁶ Section 22(1)(a), *the Assisted Reproductive Technology (Regulation) Bill, 2020*

➤ **RIGHT TO KNOW:** Surrogate Mother has the right to know about the treatment that will be performed on her. Before any procedure is performed on her she must be clearly stated about complexities, side-effects before and after pregnancy.

➤ **WITHDRAWAL OF CONSENT:** Consent is foremost the important step in the Surrogacy if a Woman doesnot give her consent to be Surrogate this procedure cannot start and if the woman gives Consent and later on changes her mind not to do so she has a legal right. But before the implantation of Human Embryo in her womb Surrogate Mother can withdrawal her consent.

➤ **RIGHT TO REMAIN ANONYMOUS:** Information about the treatment of Intending Couple, Surrogate Mother and Donor shall not be disclosed to anyone. The personal detail of the Intended Couple and Surrogate shall not be disclosed to anyone. This information should be kept confidential and for Medical Record only. This is the duty that should be performed by the Clinic or the Bank. *B.K. Parthasarthi v Government of Andhra Pradesh:* The right of reproductive autonomy of an individual as a facet of his right to privacy. —

➤ **RIGHT TO HEALTH:** Surrogate Mother shall have the discharge certificate stating details of ART Procedure performed on her. A woman shall not be treated with gametes or embryos derived from more than one man or woman during only one treatment. She should be given regular check-ups and proper treatment throughout her pregnancy or as per the Contract. If Surrogate Mother demands for the local guardian or someone to look after all her needs she should be provided with that facility also.

➤ **RIGHT TO MATERNITY BENEFIT:** No-doubt, Surrogate Mother will leave all her Rights on the Child after the delivery. So, she has not to take care of the Child but as she carries Child for 9 months she develops a bond with the Child mentally so Maternity Leave to get out of that relationship and keeping in mind about her health Maternity Leave is her Right.

RESPONSIBILITIES OF SURROGATE MOTHER

➤ **PACIFIC AND SOUND ENVIRONMENT:** If we go by Hindu Scriptures as soon as a baby is conceived by a mother he start getting connected and begins learning from the womb itself and he grows while picking up the mother's vibe. We cannot assume a fetus to be a mindless mass or non-existing human. At this very point which is the initial phase of his life he starts receiving his learnings becomes responsive and evolving Human Being. For the day of conceiving till the date of delivery mother should be calm, recite religious scriptures and should be in good mood. In history there are many such stories that describe the learning of the child

starts in the womb of the Mother itself. In Mahabharata Arjuna's son Abhimanyu had learnt the art of fighting (Chakravyuh) while in the womb of his mother listening to Arjuna describing it.

➤ **FULFILL THE CONTRACT/ DUTY TO CARRY THE CHILD FOR THE FULL TERM:** Surrogacy is a Legal Contract between the parties, i.e. Surrogate Mother and Intending Parents. All the requirements of the Contract should be fulfilled by both the parties. Sometimes it happens that Surrogate Mother develops a bond with the Child and later on she refuses to give Child to Intending Parents. By obliging all her duties and giving birth to a healthy child she should fulfil her Contract. Surrogate Mother shall not after the delivery of the child refuses to give Child to Intending Parents. A donor or Surrogate Mother shall relinquish all her Parental Rights over the Child/Children which may be born from her gametes. It is the duty of the Child to carry the Child for the full term. Until and unless there is any medical problem she shall not terminate her pregnancy after the embryo is transferred in her uterus. Surrogate Mother shall not be forced to abort at any stage of the Surrogacy and no Person, Organization, Surrogacy Clinics, Laboratory or Clinical Establishment of any kind shall force her to do so.¹⁷ Cases of Abortion shall be governed as per the Medical Termination Act, 1971.

➤ **DUTY TO AVOID THOSE PRACTICES WHICH ARE ADVERSELY AFFECT OF THE NORMAL DEVELOPMENT OF THE CHILD:** Diet plays a very important role in the healthy pregnancy what mother eats have a direct impact on the Child. Surrogate Mother carries a Child for another couple but she should take care of the child during the 9 months as her own Child. There should be no lackness on the part of the diet when the Woman is acting as Surrogate Mother. She should have all the important Vitamins that are prescribed to her by the doctor. She should not consume or have something that will have negative impact on the Child like alcohol, smoking or drugs. Negligence on her part can risk her life in risk as well as the life of Child. A Healthy Diet is a key to Healthy Pregnancy

➤ **DUTY TO DISCLOSE HEREDITARY OR ANY OTHER COMMUNICABLE DISEASE:** Health is very important factor a Healthy Mother will give birth to the Healthy Child. It doesnot means that at the time of Pregnancy only she must be given best in terms of diet or environment before pregnancy or even before choosing a Surrogate Mother it is necessary to find out her Medical History to avoid any complications in the future. A Surrogate Mother must be shown seronegative and must be tested for HIV Aids before the embryo is transferred in her. In other words she should get herself screened for Sexual Transmitted Diseases. A Surrogate Mother shall provide a written certificate that:

¹⁷ Section 9, *the Surrogacy (Regulation) Bill, 2019*

- She had not gone under any blood transfusion as it has the adverse effect.
- To ensure whether the Surrogate Mother is acting as the carrier for the symptoms of HIV infection it should be provided by Surrogate Mother that to the best of her knowledge had no extra marital affair in last 6 months.
- She should not have any drug intervention through the shared syringe.
- It is also the duty of the Surrogate Mother that she will not have any drug or if she needs blood transfusion she will have it by certified blood bank only.

➤ **ADMISSION TO HOSPITAL:** A Surrogate Mother carries a child which is unrelated to her in terms of biological and genetical reference. When she is admitted to the Hospital as a patient she should provide the full information about the Intending Parents and it must also be mentioned that she is acting as Surrogate Mother. She should not use/register in the name of intending parents as it will give rise to legal issues, particularly untoward event of maternal health, if she dies in the Hospital it will be difficult for the hospital to issue the death certificate.

➤ **INFORMATION ABOUT HEALTH:** When the Intending Parents' wishes to have the Surrogacy as an option to have a Child. They have options to choose that what kind of Surrogacy they want. If they choose Agency Surrogacy as the mode it is bit easy for them to get into procedure and to have eligible Surrogate Mother. But when Independent Surrogacy is taken as the option it is the duty of the Surrogate to give the correct detail about her eligibility to be a Surrogate or not otherwise it will lead to legal complexities. She must be eligible as per Section 4 of the Surrogacy (Regulation) Bill, 2019.

➤ **DUTY TO DISCLOSE DETAILS ABOUT THE FAMILY, MARTIAL STATUS and NO. OF CHILDREN:** Name and full detail about the Husband, Residence and other related details shall be disclosed before carrying out the Surrogacy Procedure. It is the duty of the Surrogate Mother that she should get fit into the eligibility criteria and she should atleast have one child of her own before acting as Surrogate for Intended Couple.

➤ **DUTY TO RELINQUISH TO RIGHT OVER THE CHILD and HANDOVER THE CHILD:** After giving birth to the Child the Surrogate Mother shall relinquish all her rights on the Child and should never try to contact the Child again. She should bear in the mind that the Child she is carrying is for the other Couple and she should just carry the emotional attachment till nine months so that she can give birth to the healthy child.

IV. CONCLUSION

The Rights and Duties are provided by the Law and are protect the interest of the State and

regulate the smooth run of the society which helps other to live peacefully without any exploitation. According to Salmond “there is no duty without the right any more than there can be a husband without a wife or a parent without a child.” Rights and duties are co related to each other in the general sense the word right is the immunity from the legal power. The Rights and Duties are provided by the Law and are protect the interest of the State and regulate the smooth run of the society which helps other to live peacefully without any exploitation.
