

8 RMLNLUJ (2016) 148

Judicial Response to Surrogacy Arrangements

by
Richa Saxena*

I. INTRODUCTION

Surrogacy arrangement is an agreement between a woman (surrogate) who voluntarily agrees to carry a child of others (intended parents) for full term with intention to give the child to them on birth and intended parents or individuals in return of payment (commercial surrogacy) or sometime in love and affection (altruistic surrogacy). Such arrangements may be traditional surrogacy¹ or gestational surrogacy², depend upon the genetic material used by either intended mother or the surrogate, or international surrogacy arrangements³ or domestic surrogacy arrangements, depends upon the fact that intended parents and surrogate belongs to different countries or are native of same counties. Such arrangements are though boon for the childless couples and individuals but it also raised various complex issues over the parenthood and custody of child. At one hand, the process is questionable on the ethical, social or moral ground and on the other hand it also left some legal questions unanswered, or if answered, there is variety of opinion which leads a confusion about the justification of the process. Different countries have adopted different approaches either to permit, prohibit or regulate it. Domestically, it creates confusion over the parental right between the surrogate mother and the intended parents, the dues or the health care treatments or the nature of agreement, role of the intermediaries (ART clinics, Brokers etc.). Similarly internationally, it creates confusion over the custody of child and nationality of the child, human rights issues, and applicability of foreign laws etc. A number of cases have arisen as a



Page: 149

result of conflicting interest of the surrogate mother and intended parents. Some of the judicial decisions which sets the principles to settle the dispute in case of birth of child through surrogacy are discussed here as a part of development of law on surrogacy. Some of the issues of surrogacy arrangements, which came to judicial scrutiny in these cases are

1. Enforceability of surrogacy contract and custody of the child.
2. In case of gestational surrogacy who is the legal mother of the child, either surrogate mother or the intended mother.
3. Surrogate child who is born through donated gametes have legal parents or not?
4. In case of donated gamete, child's legal parents are gestational parents or intended parents or the genetic parents?
5. For welfare of the child commercial surrogacy should be allowed or not?
6. Whether the surrogate mother has right to change her mind to give the baby to the intended parents after birth of the child?
7. Legitimacy of surrogate child in India and the legality of commercial surrogacy in India.
8. A surrogate child in India by the foreigner intended parents through an India Surrogate is Indian Citizen or not?

9. Whether the surrogacy Contracts can be enforced in absence of specific law for the sake of welfare of the child.
10. Where surrogacy is prohibited, child born through the surrogacy arrangements out of the country, such child can get the citizenship of the country where surrogacy is prohibited.
11. Intended parents may deny parenthood after birth of the surrogate child for whom they arranged surrogate and donated gametes or not?

Each of these issues are discussed here in detailed in following cases.

A.C (A Minor) (Wardship Surrogacy), In re (Baby Cotton Case)⁴

This is first reported surrogacy case of Britain, where a child was born through surrogacy arrangement, and the surrogate mother had left the child immediate after the birth in the hospital, later intended parents has taken the child from the order of the Court. A British women entered in to surrogacy arrangement through an agency and in response to payment give birth



Page: 150

to the child of an American childless couple. The wardship proceeding initiated by the intended father and the Court given it to him.

It was held by the court that in ward ship proceeding the first and foremost concerned is best interest of the child. The ethical moral and social implication of the procedure through which birth given to the child is not important here to decide the best interest of the child. The Court observed the physical and financial competence of the intended parents and reached to the conclusion they were highly qualified and financially able for the well-being of the child. In such circumstances it was held by the Court that there is no better option for the child to give him in there care and concern.

Accordingly care and control were granted to the intended parents with leave to take the child out of the jurisdiction. The ward ship was continued until further order and there would be specific order and there would be no disclosure or publicity which might lead to the identification of the plaintiffs.

This was the beginning of the development of the law on surrogacy. Though the case is not concerned with the legality of commercial surrogacy arrangement, but it gives the new direction to the ward ship jurisdiction. The Court modified the application of ward ship law which was prevailing at that time i.e. The Child Act and allowed the child to go with the American couple. In theory the child can be recalled to England as long as it is under 18. However for all intends and purposes, and in the light of realities of the situation, this ward ship order serves as a form of adoption without the formalities of adoption and without the legal severance of all ties with the biological mother, the surrogate mother. Under the Child Act, 1989 regime, in effect since Oct 1991 the 'inherent jurisdiction of the court' is more likely to be used to deal with matters involving local authorities, but the ward ship jurisdiction appears in some measures, to have survived the 1989 Children Act Reform⁵. Thus the case set the new guidelines for the surrogacy arrangement and is followed by the Surrogacy Arrangement Act, 1985.

B. A v. C⁶

This is a case of enforceability of surrogacy arrangement where surrogate, a prostitute, agreed for artificial insemination of semen of intended father in return of 500 pound, changed her mind after birth of the child and denied to give the child to intended father and forgo the money. After the birth of the child the natural and

biological father started wordship



Page: 151

proceedings to obtain custody of the child. The Court reject to enforce surrogacy contract and denied father access to the child.

Ormord LJ described this contract as a quite bizarre and unnatural agreement and called the arrangement 'sordid little bargain'. The Court of appeal refused to enforce such an 'irresponsible, bizarre and unnatural arrangement and denied the father access to the child. The reasoning of the Court was that such agreement has no use to the child because contact with father serves no purpose to the child except financial assistance to him. If father would be allowed to visit the mother's house or meeting the child somewhere else, the position of mother become handicapped and handicapping her position handicaps the child" (p 458)⁷.

The relevance of the case is that it alarmed the State that such commercial contracts should not be enforceable for the best interest of the child and also to the dignity of the women.

C. RP (Minors) (Wardship: Surrogacy)⁸

This is the first case of traditional surrogacy in Britain in which twins born out of surrogacy arrangement and the surrogate mother who is genetic mother also denied to give the children to the genetic father. The issue in the case was that weather the surrogate mother has right to change her mind under a surrogacy arrangement and thus whether she can be compelled to hand over the baby to the commissioning parents.

The Court give the custody of the child to the mother on the basis of natural need of child that They have to be in care and protection of natural parents. The Court carrying out a balancing exercise and decided that its duty in deciding the case was to have the welfare of the child as it paramount consideration. The Judge said that it was not important to rule upon the validity of the agreement and any question of rejecting the agreement as being against public policy was not relevant to the present case. The only relevance of this being a surrogate agreement reflected so adversely on the character and moral outlook of the custodians as to disqualify them both entirely. The Court awarded care and control of the babies to their mother. The ward ship proceedings were terminated.

The case is important and its significance is that it first time ruled that for the best interest of the child surrogacy contract may not be enforced.



Page: 152

These three case of the mid-eighties prepared the ground in Britain on the prohibition on the commercial surrogacy and the British Parliament then make a law named the Surrogacy arrangement Act, 1985 which ban payment in surrogacy arrangements. Later The Human Fertilization and Embryology Act, 1990 was enacted to provide the detailed procedure for the surrogacy arrangements which provide the scheme for the issuance of the parental orders to avoid the parenthood and custody conflicts in such arrangements. Thus only altruistic surrogacy arrangements are permitted in the Britain.

D. Baby M, In re case⁹

This is first case of traditional surrogacy from America (1987). The conflict of custody of the child born through the surrogacy contract raised between the surrogate mother and the intended parents when surrogate mother refused to give the child to the intended parents after birth. Validity of the Surrogacy Contract and custody of the child was the issue in this case. In facts of the case a surrogate was agreed to give birth to the child of intended parents where wife was infertile and to terminate her parental rights after birth as the intended parents may adopt the child after birth in return of money. Later after birth of the child surrogate in love and affection with the child refused to give the child to intended parents. The trial Court held surrogacy contract was valid and ordered for the termination of parental rights of the surrogate and immediate adoption of the child by the intended parents. The trial court reached to the conclusion on the ground of best interest of the child and held that specific performance of the contract cannot be permitted unless it is required for the best interest of the child. The New Jersey Supreme Court held that Surrogacy Contract is invalid and illegal because it is in conflicts with the law and public policy of the State. The custody of the child was given to the natural father in the interest of the infant and surrogate mother was held the natural mother of the child and has given visitation right to the child. The decision of Court can be summarised as follows.

- (a) On the point of State's law it was held that the child's custody can be surrender for adoption is only in the manner provided in the statute and only to whom provided in the statute that is to approved agency not to private person. The surrogacy contract was agreed before the conception of child and natural mother's consent to surrender of the child is irrevocable in the contract is against the provisions of the New Jersey Law.
- (b) On the point of public policy it was held that Surrogacy Contract is violative to public policy of brought up of children by their natural



parents and they should remain with their natural parents and unnecessary separation form the natural parents should be avoided.

- (c) The custody, care, companionship, and nurturing that follow birth are not parts of the right to procreation; they are rights that may also be constitutionally protected, but that involve many considerations other than the right of procreation. It means the constitutional right of procreation (of the intended mother) includes within it a constitutionally protected contractual right to destroy someone else's right of procreation (surrogate mother).
- (d) Custody of child has to be given in the best interest of child and interest of the child to be decided on the basis of sound financial and social status of the family.

This case first time brought in to light the unfortunate consequences of the use of Artificial Reproductive Arrangements i.e. surrogacy arrangements and leads to the conclusion that unregulated use of such technologies causes suffering to all. Those who are involved in the arrangements, i.e. surrogate mother and her family, natural father and his wife and most importantly the child are the poor victims. Though surrogacy is provided an opportunity to infertile but it may cause conflicts over the established fact of motherhood and custody of the child. If the State has to address the surrogacy the interpretation of facts in the case is useful to attend the various issues regarding the surrogacy arrangements.

E. Procureur General v. Madame X¹⁰

This is the first surrogacy case from the France where a surrogacy agreement was entered in between a childless couple from France and an American woman. The American Court had allowed, in accordance to the Law of Jefferson County, the termination of natural mother's rights and surrender of custody. Articles 311-14 of the Civil Code of France provides that 'filiation is governed by the personal law of mother on day of the birth of the child'. Consequently, the American Law was the personal Law of the mother and would apply to the relationship of mother and child. It decided that American judgement was not in conflict of the French law view on public policy, thus it could not prevent the couple for applying for adoption in France.

The Court of appeal allowed the couple for adoption in France. The issue before the highest Court was that weather the adoption order made by the court of appeal in favour of the intended parents was consistent with the



Page: 154

provisions of the Civil Code dealing with the welfare of the child and best interest of the child in adoption cases.

It was held by the highest Court of France ('*Cour d Cassation*') that all surrogacy arrangements, paid or voluntary, are illegal in that they constitute a sort of disposal of the human body which is not authorised by the law and which is contrary to public policy¹¹.

Cour d Casstion decided that any agreements, even altruistic one, by which a women binds her selves to conceive and bear a child in order to give it up at birth are contrary to two public policy principles, i.e. neither the human body nor the civil status of persons may be subject to private agreements. The first principle the human body is not subject to private agreements ("*l'indisponibilite du corps humain*") is derived from the idea that the body is not the standard thing, and as such, should not be subject to traditional contract law and party autonomy. In surrogacy cases neither the body of the surrogate nor the body of the new born child should be subject to a contract. This concept may similarly apply in the context of child trafficking and non-regulated adoption. Second principle is that legal status of a person may not subject to private agreement ('*l'indisponibilite deletat des personnes*')¹².

The relevance of the decision is that it ban surrogacy arrangements in France completely. With that effect Article 16-7 was inserted into the Civil Code of France provides that "Any agreements relating to the procreation or gestation for a third party are void".

F. Johnson v. Calvert¹³

This is another relevant American case on the Gestational Surrogacy (1993) decided by the California Supreme Court in which first time Surrogacy Contract was held valid. The decision with 6-1 majority was in contrast of the Baby M case, because the intended parents were held as natural parents. The case takes the question of maternal rights one step further than the celebrated Baby M case in New Jersey, in which the surrogate mother was also the genetic mother. Surrogate were called here in this case 'a home for an embryo'. Determination of natural mother in case of gestational surrogacy and validity of surrogacy agreement were the issues before the Court.



Page: 155

It was held that husband and wife (whose gametes were used for zygote) are the natural parents of the child born and this does not in contravention to State's federal Constitution and public policy. The decision of the Court can be summarised as follows

- (a) The intended mother who contributed the genetic material for the child and have intention to procreate the child as her own is the natural mother of the child. A surrogate who is gestating a child is not the natural mother because she have never intention to raise the child as her own after the birth. She is performing only important services to bring the child in this word on account of intended mother.
- (b) Surrogacy contract is not against the public policy and this matter is better decided by the legislature.
- (c) The determination of best interest of the child is important in the determination of parenthood in the case of gestational surrogacy. The best interest of the child is the best care of the child, including protection from abuse and provides best physical and psychological support to the child, only the good financial status of parents is not sufficient for that.

The relevance of the case is that in this case the gestational surrogacy arrangements issues were discussed with sensitivity first time and it turns the debate of legality or illegality of surrogacy arrangements in to the 'welfare of the child.' The decision of the case is important as it held that such arrangement are not decided as against the public policy, because such matter better to deal with the legislature to decide in accordance to the will of the people. It is not the matter where Court issues order that is against the public policy and held it is not against the public policy and valid. This it widens the scope of the use of the new reproduction technologies especially the surrogacy arrangements and unfortunately promote the interference of third persons in to the private matters as a facilitators 'surrogates' and the also turn these issue from family to contract.

G. Marriage of Buzzanca, In re¹⁴

This is another case from California which settled the rule of law that when married couples consented to in-vitro fertilization by unknown donor and subsequently transformed in to surrogate, the couple are the legal parent of the offspring. The issue before the Court in the case is a surrogate child born through the donated gamete has legal parents or not. In facts of the case a baby was born through surrogacy arrangements between the couple and a surrogate as a result of implanting an unrelated embryo either of them



in to the surrogate womb. After pregnancy intended parents split up and question arose who is lawful parents of the child. Wife claimed that she and her erstwhile husband were the lawful parents, but the husband disclaimed any liability, financially or otherwise. Surrogate have made claim for the child. The trail Court determined that surrogate baby has no parents. It was held by the Appellate Court that intended parents are the lawful Parents of the child born through surrogacy in case of donated gametes. The decision has following important points

- (a) In case of birth of the child through donated gametes via surrogacy, intended parents are the legal parents of the child.
- (b) In case of embryo created in vitro on consent of married couple and placed in to

the surrogate womb through artificial insemination, the intended mother (wife of the intended father) is the legal mother of the child born through process, neither surrogate nor the donor of the egg.

- (c) The intended parents who were intended to give the birth to the child either genetically related or not to the child are the legal parents of the child. Children cannot be born without parents, those who are responsible to bring them in are not permitted to leave them parentless.

The significance of the case is that in the absence of the genetic connection with the intended parents, this is an extraordinary case for the determination of the legal parenthood and even though without any statutory regulation or precedent. On the basis of the initiating role of the intended parents in the conception and birth of the child, they were held the legal parent of the child for the welfare of the child. The Court also suggested that Legislature has to determine the parental rights and responsibilities of the children born out of Artificial insemination.

H. Perry Rogers v. Fasano¹⁵

The case is concerned with the mistake made by the fertility clinic, where a woman become the gestational mother of another couple's embryo. Two couples were trying to achieve a child through in vitro fertilization at the same clinic at a same time. One of the Perry Rogers embryo mistakenly implanted in Dona Fasano. Fasano gave birth to twins, one of them was her genetic child and other was the genetic child of other couple. The issue of the case is in case of frozen embryo in the lab's test tube, who is the legal parent, the gestational parents or the genetic parents. The Court held that biological parents (genetic parents) are the parents of child and custody of child be given to them.



The decision of the Court can be explained under following heads

- (a) Relied on the decision of the *Johnson v. Calvert* the Court held that the custody of the child has to be given to the intended parents rather than the gestational parents.
- (b) Right to give the visitation of child is exclusive right of the Parents of the child. They may deny the visitation of even the person who has raised and nurtured the child as his own. Though the gestational mother is no biological stranger to the child but the Court rejected their right to visitation.
- (c) The Court though accept the bounding between the gestational parents and the child but reject their visitation right because visitation is the sole right of the legal parents in the case.
- (d) The Court though accept the bounding between the gestational parents and the child but reject their visitation right because visitation is the sole right of the legal parents in the case.

The significance of the case is that it make it clear that in any confusion, gestation alone with knowledge that embryo transfer was mistaken is not enough for creating the parental rights over the child. A woman to whom an embryo was mistakenly implanted and she knew about the mistake shortly after it occurred, don't have any right to seek the custody of child just because the fact of gestation. But in such cases it is moral obligation of those who give the birth to the child due to mistaken implantation to give the child to the intended parents immediately after birth.

I. Aki Mukai Case¹⁶

This is a famous case of surrogacy from Japan in which Japanese Highest Court refused to register the twin children as natural children of the Japanese married couple who were born through surrogacy arrangement between the intended parents and an American surrogate. The interesting thing in the case is that both the Tokyo High and the Supreme Court of Japan not relied on the domestic law of Japan on the issue of surrogacy arrangements and on the parent child relations nor the Courts examine the issues of the best interest of child but both of these Courts applied the principle of Private International Law that whether the foreign judgement is applied in Japan on the matter of parent child relation between the social parents and the child born out of surrogacy arrangements.



Page: 158

It was held by the Japanese Supreme Court that the Nevada Court judgements is incompatible with the fundamental Principles of Japan that mother is only who gives birth to the child.

- (1) The decision of the Supreme Court was supported by the reason that a judicial decision rendered by the foreign Court acknowledging the establishment of a natural parent child relationship between persons who are not eligible for such relation under domestic law of Japan is contrary to public policy of Japan.
- (2) Secondly where woman has conceived and delivered the child by way of Assisted reproduction technology, using another women's egg, the mother of the child is the woman who has conceived and delivered the child, and mother child relationship cannot be established between the child and the woman who has not conceived and delivered the child even if the child is born using the egg donated by that woman, because mother child relation is determined through the blood and a woman who conceive and delivered the child has always genetic relation with the child.

The relevance of the case is that it applied domestic law on the issue of International Surrogacy Arrangements and rejected citizenship to the children born out of surrogacy arrangement. On one hand decision signifies the conflicting position of the children born out of surrogacy arrangements and on the other hand it also indicates towards the need of uniform legal principles on the subject to protect the interest of the innocent children and the intended parents.

J. Manji Yamada v. Union of India¹⁷

This is first Indian case responded to the commercial surrogacy practice in India. It came in to limelight when the Baby Manjhi, who was born via surrogacy arrangement between the Japanese married couple and an India surrogate was in trouble to get legal status and parenthood.

The facts of the case is as Japanese couple Ikufumi and Yuki Yamada travelled to India in late 2007 to discuss with fertility specialist Dr. Nayna Patel their desire to hire a surrogate mother to bear a child for them. The doctor arranged a surrogacy contract with Pritiben Mehta, a married Indian woman with children. Dr. Patel supervised the creation of an embryo from Ikufumi Yamada's sperm and an egg harvested from an anonymous Indian woman. The embryo was then implanted into Mehta's womb. In June 2008, the Yamadas' divorced, and a month later Baby Manji was born to the surrogate mother. Although Ikufami wanted to raise the child, his ex-wife did

not. When Yamada's ex-wife (the intended mother) refused to travel with him to take possession of Manji, he flew to India alone.

The anonymous egg donor (the genetic mother) had neither rights nor responsibilities towards the baby. The responsibility of Mehta (the gestational mother) had ended when the baby was born. It turned out none of the three mothers was legally responsible for Baby Manji, because the contract was not legally binding with regard to parental responsibilities.

In the meantime, Manji's paternal grandmother, Emiko Yamada, had travelled to India to care for Manji in the hospital because her son had returned to Japan upon the expiration of his visa.

When Yamada applies for the document to take baby to Japan, Japanese Embassy in India does not give the Japanese passport or visa because Civil Code of Japan recognises Mother as a woman only who gives the birth to the child. Surrogate children are not recognised in the Code. The woman who has given birth the baby Manjhi was Indian not Japanese, Hence baby Manjhi can't get Japanese passport. In India, Yamada has to adopt the child, even though he was genetic father, Indian concerned law The Guardian and Wards Act provide that single man cannot adopt the baby girl.

Again Indian passport cannot issued to baby Manjhi because that requires the birth certificate having name of both the mother and father. Though the Akansha Fertility Clinics issued a certificate that Yamada was her genetic father but name of mother was uncertain as which name has to be on the certificate Yuki Yamada, Pratiben Mehta or the egg donor. On these ground the municipal corporation of Anand refused to give the birth certificate and referred the case to national level advice. Since Yamada was not Indian, and it was uncertain that her mother is Indian, her passport was not issued by the authority.

The Issue before the Court was legitimacy of surrogate child in India and legality of commercial surrogacy in India. The Court held that Commercial Surrogacy arrangements are legal in India. The Court further held that

- (1) This petition is disposed on the ground that anybody who is relative of the child has grievance with such procedure can file writ, respondent has no locus to file a writ because it is not public interest litigation. Secondly to issues of issuing passport to the baby to go to japan with her grandmother is pending before the Central Govt and Court has not issued any order in that respect.
- (2) There is a National and State Commission on the protection of rights of Child under Commission for protection of rights of Child Act

2005. Any other institution has not the locus to bring the case before the Court.

The case was relevant on the issue related to surrogacy and its commercial practice in India. It was important as it raises public concern over the subject and need for proper legislation on surrogacy strengthen by the demand of people. This Case not only legalise the commercial surrogacy in India but it actually makes a foundation for the proper legislation in India to regulate commercial surrogacy. In response to that Surrogacy Bill 2010 and 2014 was prepared and unfortunately not become the Law.

Recently another bill (surrogacy bill 2016) was proposed by the Cabinet which proposed prohibit commercial surrogacy in India and allowed only married Indian Couple who are medically unfit to procreate.

K. Jan Balaz v. Anand Municipality¹⁸

This is another Indian case which sets the precedent on the conflict of nationality and parenthood of the children born through commercial surrogacy arrangements between the foreign couples and Indian surrogate.

The facts of the case is concerned with twins born with the commercial surrogacy arrangements between a German married couple and an Indian surrogate. The children were conceived with the intended father's sperm and an egg donor from Indian donor. On the birth certificate intended father name was shown as father and surrogate mother name was shown as mother. The Intended parents were unable to secure German passport or visa for the children, so they attempted for the Indian passport. The Gujarat high Court held that since surrogate mother was an Indian citizen, the children could be considered as Indian citizens and would be entitled to Indian Passport. The decision of the Gujarat high court has very far reaching consequences on the issues of nationality and parenthood in surrogacy arrangement. In accordance to that child born out of surrogacy arrangements is an Indian Citizen if surrogate or the egg donated women is an Indian. This decision of the High Court was challenged and pending before the Supreme Court. (*Union of India v. Jan Balaz*¹⁹).

L. Paternity of FTR, In re²⁰

This is another case on surrogacy in which Wisconsin Supreme Court in absence of any law on Surrogacy, held that traditional altruistic surrogacy arrangements are enforceable for the sake of welfare of the child. The



issue before the Court was whether an agreement for traditional surrogacy arrangement and adoption for child is enforceable?

In the fact of the case there were two childhood female friends continued their friendship and bounding from long time after their marriage. One of them was suffering from disease and unable to carry child, other offer her to be a surrogate. The plan of surrogate birth was materialise and surrogate had provide both egg and womb. She agreed to relinquish the child and terminate her right parental rights. The intended parents were agreed to pay for all expenses associated with the pregnancy, and to assume physical and legal custody of the child immediately after birth, as well as legal parental rights. Shortly after the baby of FTR surrogate mother expressed her intent to renege on the contract styled as 'parentage agreement'. Despite her intent to renege, however, she allowed intended mother to take the baby home from the hospital. Since the birth to the three and half year baby was brought up by the intended parents as Court appointed them temporary guardians pending resolution of the controversy over parental rights and custody. Surrogate mother has given a few hours of visitation per month.

The lower courts had a hard time with this question because there is neither a Wisconsin statute on point, nor any State case law addressing the enforceability of surrogacy agreements. Wisconsin Supreme Court held that traditional surrogacy arrangements are enforceable as long as they are for the best interest of the child. The court ended its opinion with a call to the legislature to enact a statute addressing the enforceability of surrogacy agreements.

In absence of any law to deal with surrogacy arrangements in the State it is held

that surrogacy arrangement is only enforceable in the best interest of the child. In this case the contract between the parties if held against public policy then it would be against the interest of the Baby FTR, who was in very well custody parenthood of her intended parents after the birth.

This case actually creates a confusion as Court ruled that traditional surrogacy contracts are enforceable but it refused to enforce the termination of the gestational mother's parental rights. In accordance to English law birth mother is a legal mother. If the Gestational Mother is still legal mother then intended mother cannot adopt the child. If she voluntarily terminate her rights over the child, intended mother has the way to get the legal motherhood of the child. But if she hold that right, the parental tie cannot be established between intended mother and the child. Legal parenthood is essential as it secures number of other rights for the child for example inheritance rights and social security rights.



Secondly, the Court enforced the surrogacy arrangements under public policy of the best interest of the child. But concurring opinion of the Justice is also important which states that surrogacy contracts are unique contracts and it is not justified to treat is as common contracts as it may involves exploitation, coercion, emotions etc. Thus surrogacy agreements should be subjected not only to the usual contract analysis, but also to an in-depth public policy analysis that would take into account the particular issues that different surrogacy arrangements may involve.


M. Baby S, In re Case²¹

Again an American case of change of mind of an intended mother who entered in to surrogacy contract for baby via her husband's sperm and unanimous egg donor before the birth of child and disowned that healthy baby on birth. The issue before the court was whether the provisions of surrogacy agreement between the parties attempting to create parentage of the child by contract are valid and enforceable in Pennsylvania.

In the facts of the case a television personality Sherri Shepherd and her ex-husband Lamar Sally conceived a baby using Shelly's sperm, a donor eggs and a surrogate womb. Shepherd and shelly split in the middle of the pregnancy, and shepherd disavowed the child born in August 2015. Shepherd and Sally was entered into a 23-page contract with the surrogate to serve as a gestational surrogate for them, using a purchased egg. Shepherd had refused to see the child and was not present when he was born. Because of Shepherd's absence, surrogate was named as mother on the birth certificate and now has financial obligations she is unprepared to deal with. Though on split of Shepherd and Sally, surrogate filed a petition seeking to enforce the terms of contract and declaration that Sally and Shepherded are legal parent of the child she carries and for them to be listed on the birth certificate of the child. In response Shepherd flied a new matter and argued that surrogacy arrangements are void and unenforceable as against the public policy. The trial court upheld the validity of surrogacy contract and held Shepherd was in breach in denial of legal parentage of the child. Appeal was made against the trial Court decision in the Pennsylvania Highest Court. It was held by the Court that Surrogacy contract are valid and enforceable and not against the public policy. The Court explains that

The standard of deciding case on the public policy is high. The public policy term is vogue and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interest. In the absence of a plain

indication of that policy through long governmental practice or statutory enactments, or of violations of obvious

 Page: 163

ethical or moral standards, the Court should not assume to declare contracts...contrary to public policy. The courts must be content to await legislative action.


This decision has some far reaching consequences on the commercial surrogacy contracts as one hand it turn surrogacy contract in to mere commercial transaction which is in fact a unique kind of contract of conducting relation of parent and child mere commercial transaction and on the other hand it warned the intended parents that it is not allowed to withdraw the consent of taking custody of the child after birth and denied the responsibilities towards the child later.

N. Cases decided by the European Commission on Human Rights

The European Court of Human Right is an International Court established by the European Convention on Human Rights. It has jurisdiction to hear the cases of violation of Human Rights Conventions and its protocols. The convention is adopted with in the Council of Europe and all members of the Council of Europe are contracting parties of the Convention. The Court is in France, Strasbourg. In last decades there are number of cases of International surrogacy arrangement arises before the Court, challenging the Human rights provisions of the Convention. Some of important decisions are discussed here.

Menesson v. France and Labassee v. France²²

These cases are in response to French Highest Court (*Cour de Cassation's*) decision²³ which denied French citizenship to the twin children of French couple born through surrogacy in California. The *Cour de Cassation* recognised the Mennonson's as legal parent of the twin children but as surrogacy is illegal in France they refused to add the children name to the National Register. The effect was that children do not have French Citizenship and so cannot access the free healthcare and education in France. When they reach the age of majority they will not legally be able to live, vote or work in France or Europe. Similarly in the Labassee's case French Supreme Court denied the French citizenship to the Children born out of surrogacy of the French Couple.

 Page: 164

The '*Cour De Cassation*' clearly rejected the enforcement of surrogacy orders, and even broadly rejected any legal consequences that surrogacy agreements might have in French Law. As a result, the children concerned could not be registered in the French civil status records as the children of both French intended parents. The Court actually focused on the status of person which may not be subject to private agreements, which is much less universal and much more specific to the French legal system than the reference to the protection of the human body²⁴.

Both of these case are concern with the refusal to grant legal recognition in France to parent child relationships that had been legally established in the United States between the children born as result of surrogacy treatment and the couple who have the treatment. The issue before the European Convention on Human Right was that the breach of Article 8 of the European Convention on Human rights which provides

right to respect for private and human life.

The ECHR held that there is not a violation of the *parents'* right though there is a violation of the *children's* rights to private and family life.

The Court held that Article 8 applied to both the right to respect to the family life and to the private life. If a family is allowed to live in the state where they can enjoy their family life with the parents and children, without any hurdle or unjustified interference by the State, it is not violation of article 8 of the ECHR.

In case of children's right to respect their private life, their right to 'identity' is very important. Right to identity include the legal recognition of the parent child relation. Parentage is core of the right to identity. Personal identity governed other legal right of the person such as inheritance etc. Thus denial of right to identity is violation of right to respect the private life under Article 8.

The significance of the judgement is that it opens door for the legal recognition to the Children born through surrogacy arrangements. Though it not suggest any comprehensive framework to the international surrogacy law. Conflicts of parenthood of non-biological related children are left unattended.

O. D. v. Belgium²⁵

An International Surrogacy Arrangements case in which Belgian authorities refused to authorise the child's entry into Belgium and the consequent



Page: 165

separation of the child and intending parents, the ECHR did confirm that the ECHR could not oblige States to authorise entry into their territory of children born to surrogate mothers without the authorities having a prior opportunity to conduct certain legal checks.

Significance of the case is that though the ECHR held that there is violation of Article 8 of the Convention, but the Court cannot enforce the Belgium to allow the issues which are prohibitory in the State under domestic law.

Paradiso and Campanelli v. Italy²⁶

This is another important decision of the Court of European Commission of Human Rights, concerned with the refusal of the registration of the birth certificate of the child by the Italian authorities born out of surrogacy arrangement in Russia and subsequent refusal of the child from the intended parents. The child was biologically unrelated to either of the intended parents. The intended parents had not exhausted the domestic remedies to obtain the recognition of the parent child relations in Italy.

Then intended parents apply to the ECHR for violation of Article 8 of the ECHR as refusal to recognise the birth certificate issued by the Russia and removal of the child from their care is violation of right to respect of private life and family life.

The Court rejected the complaint on the ground that intended parents had not exhausted the domestic remedy for establishment of Parent child Relations in Italy. The Court upheld the second complaint and held that order of removal of the child from the care of intended parents though in accordance to Italian law as a preventive measure but it an 'extreme measure' which need to apply only in case of immediate of danger to the child. It was stated to left the child without any formal identity is violation of the Article 7 of United Nations Convention on Rights of Child which provides that no child be disadvantaged on the ground that born through surrogacy. Further the Court stated that the Italian authorities were failed to set up the balance between the state's interest and the Best interest of the child.

The significance of this judgement is that Court held that wherever there is conflict between the State's interest and private interference Court has to stick the balance between these two and where interest of child is in conflict, best interest of child is paramount irrespective of parental relations, genetic relations or otherwise.



Page: 166

The decisions of ECHR in the above mentioned highlight following points

- (1) Genetic tie of the children with the parents is not pre requisite for the family life under Article 8 of the European Convention on human rights.
- (2) The right to identity of a child, determination of genetic parentage is required and refusal to establish the parent child relation is denial of the right to identity which is violation of private life of the child.
- (3) The best interest of the child has to be protected in all surrogacy arrangement, irrespective of other consideration.
- (4) Though these decision does not make any difference in commercial surrogacy and altruistic surrogacy but its persuasive impact must on the States is that they have to immediately regulate the surrogacy arrangement at domestic level to provide the protection to the children born through such arrangements and develop a uniform approach on issues of the surrogacy arrangements.

II. CONCLUSION

The study of these cases reveals that Surrogacy contracts are made enforceable only on one grounds that is welfare of the child. Those jurisdictions where surrogacy contracts are enforceable as per the provision of the law, if conflict of parenthood or nationality arises, welfare of the child is the paramount consideration for the Courts, the court may order for welfare of the child even against the terms of the contract. Where surrogacy contracts are prohibited, the court though may not enforce surrogacy contract but enforce such order which is required for the welfare of the child. Where only altruistic surrogacy is permitted parents mostly adopted route to the foreign nations where either surrogacy is legally permitted or allowed. In such situation the welfare of the child is also ensured either by the order of the concerned Governments or of the Courts. Thus all jurisdictions though have with different approaches on the enforceability of surrogacy contracts and on the commercialization of such practice but they agree at one point, i.e. is best the interest of the child. It is true that child's best interest is paramount in such arrangements, but there are other stakeholders who also have interests in such arrangements. These interests are not only the commercial interest of the surrogates and the intended parents, but emotional and psychological interests of intended parents and surrogate is also involved in the matter. Thus it can be concluded that such moral and social dilemmas which have legal hurdles should be decided not by heated emotions and dated dogmas, but by such public policy decisions which are truly in the best interest of the public.

* Assistant Professor (Law), Faculty of Law, University of Lucknow, Lucknow.

¹ Traditional surrogacy arrangements means a surrogacy arrangements in which the surrogate provides her genetic material (egg) and thus the child born is genetically related to the surrogate.

² Gestational surrogacy arrangements means a surrogacy arrangement in which surrogate does not provide her own genetic material and thus the child born is not genetic related to the surrogate.

³ A surrogacy arrangement entered into by intending parent(s) resident in one State and a surrogate resident (or

sometimes merely present) in a different State.

⁴ 1985 FLR 846.

⁵ Peter De Cruz, '*Comparative Health care Law*', Cavendish Publishing Limited, London Sydney (2011) p. 462 www.Cavendishpublishing.com.

⁶ 1985 FLR 445 (QB).

⁷ Richard Collier, Sally Sheldon, '*Fragmenting Fatherhood: A socio Legal Study*', Hart Publishing, Oxford and Portland Oregon, 2008 p. 90.

⁸ (1987) 2 FLR 412.

⁹ 537 A 2d 1227, 109 NJ 396 (NJ 1988).

¹⁰ (1991) 31 May 1991, J 417.

¹¹ Peter D cruz, *Comparative Healthcare Law*, Cavendish Publishing Limited, London, Sydney, 2001 p. 475.

¹² Louis Perreau-Saussine and Nicolas Sauvage, '*International Surrogacy Arrangements, Legal Regulation at the International Level*, Edited by Katarina Trimmings and Paul Beaumont', Hart Publishing, Oxford and Portland Oregon 2013 p. 125.

¹³ 5 Cal 4th 84, 851 P 2d 776 (1993).

¹⁴ 61 Cal App 141 s0 Cal rptr 2d 280 (Ct App 1998).

¹⁵ 26 AD 2d 67 (NY App Div 2000).

¹⁶ Minshu Vol 61, No 2.

¹⁷ (2008) 13 SCC 518.

¹⁸ 2009 SCC OnLine Guj 10446 : AIR 2010 Guj 21.

¹⁹ Civil Appeal No. 8714 of 2010 (SC).

²⁰ 2013 WI 66.

²¹ 2015 PA Super 244.

²² *Mennesson v. France*, Application of 65192/11, Council of Europe, European Court of Human Rights 26 June 2014 and *Labassee v. France*, Application of 65941/11, Council of Europe, European Court of Human Rights 26 June 2014.

²³ *Procureur General v. Madame X*(1991) *Madame X* case Cass Ass Pleniere 31 May 1991, J417.

²⁴ *Supra* note 13.

²⁵ Application No. 29176/13, 8/7/2014.

²⁶ Application No. 25358/12/01/2015.

Disclaimer: While every effort is made to avoid any mistake or omission, this casenote/ headnote/ judgment/ act/ rule/ regulation/ circular/ notification is being circulated on the condition and understanding that the publisher would not be liable in any manner by reason of any mistake or omission or for any action taken or omitted to be taken or advice rendered or accepted on the basis of this casenote/ headnote/ judgment/ act/ rule/ regulation/ circular/ notification. All disputes will be subject exclusively to jurisdiction of courts, tribunals and forums at Lucknow only. The authenticity of this text must be verified from the original source.