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Altruistic Surrogacy Contracts: Legal Analysis of the Surrogacy (Regulation) Bill, 2019 and its Legal Implications

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Abstract

In India, the most recent development in the field of surrogacy is the passing of the Surrogacy (Regulation) Bill, 2019 by the Lok Shaba in August, 2019, which is yet to be passed in the Rajya Sabha. This Bill bans commercial surrogacy and only legalizes surrogacy that is altruistic in nature. This leads us to a question whether a contract between a surrogate mother and the intended parents is required even in the case of altruistic surrogacy. The paper is a detailed study of the altruistic surrogacy contract and highlights the need and the nature of such a contract. This paper questions the legality of an altruistic surrogacy contract and also emphasizes on the consequences that could be faced by either party in case of absence of a contract. As there is no current law which governs altruistic surrogacy or surrogacy agreements in particular, it would be appropriate to examine altruistic surrogacy in the light of the Indian Contract Act, 1872, Law Commission Report and Indian Council of Medical Research Guidelines.

Keywords: Free consent, Indian Contract Act, 1872, Lawful consideration, Specific performance, Surrogacy (Regulation) Bill, 2019

1. Introduction

The right to reproduce and have a family is a fundamental right within Article 21 of the Indian Constitution. Moreover, the right to

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have and protect a family is recognized by many international covenants. Article 16 (3) of the Universal Declaration of Human Rights states that a person has the right to have a family and the same is entitled to be protected by the society. Article 17 and 23 (1) of the International Covenant on Civil and Political Rights also provides the right to have a family, privacy regarding it and ensures protection against interference with the honor and reputation of the family.¹ However, this right cannot be enforced by an infertile person as he is incapable of having a biological child. The question also arises regarding those belonging to the LGBTQ+ community, who are incapable of having a child of their own. In such cases, to ensure that a person is not deprived of his right to have a child, the concepts of adoption and surrogacy have been developed.

Adoption refers to the act of legally taking someone else's child and raising the child as their own. In adoption the couple does not have any biological relationship with the child. On the other hand, surrogacy, as defined in Merriam Webster Dictionary is "a practice where a woman becomes pregnant and gives birth to a baby in order to give it to someone who cannot bear a child of own". Traditional, Gestational, Commercial and Altruistic are the various types of surrogacy. The use of surrogacy can be traced back to Biblical times and to the birth of Kauravas in the Indian Mythology.²

2. Need of Altruistic Surrogacy Agreements

India has recently become the 'Surrogacy Market' of the world but ironically, there is no well-established legislation to deal with surrogacy. The most recent progress in the legal arena concerning surrogacy is the passing of the 'Surrogacy (Regulation) Bill, 2019'³ by the Lok Sabha. But it cannot be considered as a concrete law as it is yet to be passed by the Rajya Sabha and receive the assent of the

¹ L.Yu. Fomina, *Protection of the Right to Respect for Private and Family Life*, 19, ERS, 98 (2016).

² Hiranmaya Nanda, *Surrogate Motherhood: A Ray of Hope*, 5, IJAR (2015).

³ Surrogacy (Regulation) Bill, 2019, Bill No. 156 of 2019.

President. Moreover, the Bill is criticized for violating various constitutional provisions, as it allows only altruistic form of surrogacy and is applicable only to Indian citizens. The Bill was placed before the Rajya Sabha in the 2019, winter session of the Parliament. However, due to the objections raised by the members, it was referred to a 23-member committee for a report on the Bill⁴. The committee is directed to consider various aspects and provisions of the bill and prepare a report by the next Parliament session.

Due to the absence of a regulation and a formal law, there is nothing that legally establishes the rights and responsibilities of the parties involved in altruistic surrogacy. Hence, this gives rise to the need for an informal system to govern the process of surrogacy.⁵ The surrogacy contract can be defined as a mutual agreement between the intended couple and the surrogate mother which denotes the need for Assisted Reproductive Technique of Surrogacy and other rights and duties of both parties.⁶ The contract lays foundation and governs the whole procedure of surrogacy. It considers the interests of both parties and avoids any kind of conflict or exploitation.

The Assisted Reproductive Technology (Regulation) Bill⁷ based on ICMR (Indian Council of Medical Research) guidelines specifically through Section 34(1) makes it mandatory for the surrogate mother and the intended couple to enter into a surrogacy agreement which shall be legally enforceable. The Law Commission of India in the 228th Report recommended ban on commercial surrogacy and provided that any altruistic surrogacy arrangement between the parties shall be administered by the contract that they enter into.⁸ To comply with the rules and regulations, as well as for the mutual

⁴ Surrogacy (Regulation) Bill, 2019, Bill No. 156 of 2019.

⁵ Sandeep Kulshrestha, *Indian Surrogates: Whether Laws Provide Room for It?*, 2, IJIRMF, 208 (2016).

⁶ PyaliChaterjee, *Role of Law Relating to Commercial Surrogacy in India and Protection of Surrogate Mother*, 6, IJRSR, 6187 (2015).

⁷ THE ASSISTED REPRODUCTIVE TECHNOLOGIES (REGULATION) Draft BILL, 2010, Acts of Parliament.

⁸ Lokesh Vasita, *Altruistic Surrogacy: Is It a Viable Option?* 1, JJFL 88, 90 - 93 (2018).

benefit of the persons involved in surrogacy, it is required to have a surrogacy contract.

Even if in the near future, when a concrete legislation is established to govern the entire process of altruistic surrogacy, the need for a surrogacy contract shall not be undermined. In altruistic surrogacy, the parties involved are personally related, so they prefer to solve the dispute by themselves, without involving any third party or adjudicator. In such scenarios, a surrogacy contract plays a prominent role in resolving disputes and would be a supplement to the existing laws. In this way, surrogacy contract reduces burden of the Courts and at the same time provides legal status to the entire process of altruistic surrogacy.

3. Altruistic Surrogacy Contract and Indian Contract Act, 1872

Though altruistic surrogacy contracts are necessary, there is no law that explicitly provides for the validity and enforceability of surrogacy contracts. Dealing with the question of what other aspects to be considered while determining the enforceability of surrogacy contract, the foreign Courts in *Paternity of FTR, In Re*⁹ and *Baby S, In Re Case*¹⁰ held that along with the provisions of the contractual law of land, even the best interest of the child shall be considered, when the contract of surrogacy is in question.

In India, as a general principle all agreements are governed by the provisions of the Indian Contract Act, 1872. This implies that even the altruistic surrogacy contracts shall meet all the requisites of a valid contract provided under the Indian Contract Act, 1872. In this way, the Indian Contract Act, 1872 provides legal recognition to the entire altruistic surrogacy process. There is no explicit regulation dealing with surrogacy contracts in India. The Law Commission in the 228th Report explicitly stated that surrogacy agreements are to be treated at par with other contracts and their enforceability

⁹ IN RE: the Paternity of F.T. R. David J. Rosecky v. Monica M. Schissel, 2013 Wi 66, 35, 349 Wis. 2d 84, 833 N.W.2d 634.

¹⁰ In Re: Baby S. v. S.S., 2015 PA Super 244.

depends on the fulfilment of provisions of the Indian Contract Act, 1872. The judiciary also from the first case of Baby Manji in the year 2008, observed surrogacy agreements from the viewpoint of Contract Act and held it to be valid.

The essential elements of a valid contract under Indian Contract Act, 1872 are specified under S. 10 of the Act.¹¹ S.10 reads as follows:

All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with lawful object and are not expressly declared to be void

Only if the surrogacy agreement fulfills these conditions will it be valid and enforceable in a Court of law.

3.1. Free Consent

Consent as defined under Section 13 of the Indian Contract Act, 1872 means that the parties to the surrogacy contract shall mutually agree in the same sense to all the terms and conditions as specified in the contract. Consent of the surrogate is not just a requirement under the Indian Contract Act, 1872 but is also mandatory under Section 6 of the Surrogacy (Regulation) Bill, 2019.¹² But, for a contract to be valid and enforceable, what is required is not just consent but free consent of the parties. Free consent is defined under Section 14 of the Indian Contract Act, 1872 as free from coercion, undue influence, fraud, misrepresentation and mistake.¹³

In the case of surrogacy agreements, generally, there is free consent from the intended couple but what has to be determined is whether there is free consent from the surrogate mother. In case of altruistic surrogacy, the surrogate mother is close relative of the intended couple, it cannot always be presumed that there is free consent.

¹¹ §10, Indian Contract Act, 1872, Act No. 9 of 1872, Acts of Parliament, 1972.

¹² Rebecca Furtado, Surrogacy Contracts and the Indian Contract Act, IPLEADERS, June 28, 2016, available at <https://blog.ipleaders.in/surrogacy-contracts-indian-contracts-act/> (last accessed on 29th October, 2019).

¹³ §14, Indian Contract Act, 1872, Act No. 9 of 1872, Acts of Parliament, 1972.

Recently, a case has been reported that the daughter-in-law was forced by her husband and in-laws to carry the surrogate child of her sister-in-law to compensate the less dowry that she had brought in.¹⁴ In most situations, where there is marital relationship or inter family debt or dowry, there is dominance over the surrogate mother by the family members, resulting in consent by undue influence. Generally, in altruistic surrogacy, the consent is given by the surrogate mother to help the childless couple and to relieve the experience of pregnancy, but however, in some cases the consent is not free and the surrogate mother is subjected to exploitation.

In most cases, surrogates who are a part of commercial surrogacy contracts give their consent keeping in mind the economic benefit. In a study, it was revealed that most of the surrogate mothers were illiterate and belong to economically backward class and entered into surrogacy agreement only due to their husbands.¹⁵

Section 19 And Section 19A of the Indian Contract Act, 1872 state that consent obtained by coercion or undue influence is a voidable contract at the will of the party whose consent was so obtained. In case of surrogacy contracts, going by this provision, the surrogate mother has the option either to fulfil the terms and conditions of the contract or may rescind the contract.

The requirement of consent of surrogate mother in altruistic surrogacy can be analyzed from the point of right over the body. The right over the body of an individual belongs to that person only and no one else. Though this right is not explicitly mentioned anywhere, it is derived from the fundamental rights and is recognized by the judiciary. A.K Sikri, a jurist and a former Judge of the Supreme Court of India, while speaking about reproductive rights in India, emphasized on the fact that it is a woman's right to choose to reproduce or not or to abort in any situation.¹⁶

¹⁴ Saravanan S, *Socio – Ethics of Surrogacy in India and Reproductive Justice*, 6, IFJ, 23 – 31 (2018).

¹⁵ Suketu Shah, *Issues of Surrogacy in India*, 2 IJCH, 173 – 177 (2016).

¹⁶ Sohini Dey, *Women have the right to decide on pregnancy: SC judge*, THE BETTER INDIA, February 13, 2017, available at <https://>

In the absence of free consent, the nature of the altruistic surrogacy contract is voidable. However, the question that remains unanswered is whether this is temporary or permanent. For example, a couple enters into a contract with a surrogate mother, who is the sister-in-law of the intending mother. The surrogate mother conceived through artificial insemination. After five months of pregnancy, the surrogate mother challenged the validity of the contract in a Court of law on the ground that her consent was due to coercion and undue influence of her in-laws. Since the nature of the contract is violable, it is the option of the surrogate mother if she wants to continue the contract or rescind it. The law remains silent on the consequences of the surrogate that chooses to rescind the contract with regards to the child inside the womb.

Section 3(vi) of the Surrogacy (Regulation) Bill, 2019 and the 228th Law Commission Report states that abortion shall be done in accordance to the provisions of Medical Termination of Pregnancy Act, 1971.¹⁷Section 3 of the Act provides for instances when a pregnancy can be terminated by a registered medical practitioner. However, the provision makes no mention of a 'Court order' or a 'voidable contract'. Therefore, the interplay between the two laws is one that would be potentially problematic. Whether or not a Court is competent enough to permit abortions is a hotly debated topic—if the Court could pass such an order, the grounds under which it was passed or the standard of reasonability applied would be another point of contention.

Another important aspect to be evaluated for free consent is in case of mistake. The Indian Contract Act, 1872 provides for mistake of fact and mistake of law. Section 20 of the Act states that if there is mistake of fact on the part of both parties, then the contract is void. According to Section 21, mistake or ignorance of a law is not an excuse. The same question arises again as to what happens if the contract is challenged when the child is in the mother's womb. A situation might arise where the intending couple as well as surrogate mother might be in mistake of fact regarding the age of

www.thebetterindia.com/86720/supreme-court-judge-aksikri-women-right-decide-pregnancy/ (Last accessed on 1st November, 2019).

¹⁷ IN RE: the Paternity of F.T. R. David J. Rosecky v. Monica M. Schissel, 2013 Wi 66, 35, 349 Wis. 2d 84, 833 N.W.2d 634.

the surrogate mother. Another important fact that needs to be determined is if the age of the surrogate mother is an 'essential fact' for the contract. If a couple, after passing of Surrogacy (Regulation) Bill, 2019 enter into a commercial surrogacy agreement with a surrogate mother and claim that they were unaware of the law, then such contract is void by virtue of Section 21. Since most of the surrogate mothers in case of commercial surrogacy are poor and illiterate, there is a high possibility of ignorance of law leading to their exploitation.¹⁸ But the unanswered question is regarding custody and parental rights of the child and the compensation to the surrogate mother.

3.2. Competency to Contract

Like any other contract, even for an altruistic surrogacy contract both the parties to the contract shall be competent to enter into the contract. Section 11 of the Indian Contract Act, 1872 deals with who are competent to contract. In addition to these, the Surrogacy (Regulation) Bill, 2019 provides for certain qualifications for the surrogate mother as well as for the intending parents.

Section 4 (b) of the Bill deals with issuing the eligibility certificate to the surrogate mother and states that for a woman to be a surrogate mother, she should be married and have a baby of her own. With respect to age, it provides that the surrogate mother shall be between the ages of 25 to 35 years. Another additional qualification is that the surrogate mother shall be a close relative of the intending couple. Moreover, clause III of the aforesaid provision restricts a woman from being a surrogate mother for more than one time. Section 4 (c) of the Bill provides for eligibility criterion for the intending couple and states that the intended couple should be married for at least five years and the female should be between the age of 23 to 50 and the male should be between the age of 26 and 55. The intending couple shall not have either biological or adopted or surrogate child living at that time.¹⁹

¹⁸ IN RE: the Paternity of F.T. R. David J. Rosecky v. Monica M. Schissel, 2013 Wi 66, 35, 349 Wis. 2d 84, 833 N.W.2d 634.

¹⁹ Ruchita Chakraborty, *A Contract Beyond Contractual Framework: A Study of the Legality of Surrogacy Contracts in India*, 1 IJR, 58 – 66 (2016).

Certain loopholes and questions arise with respect to these provisions in the Indian Contract Act, 1872 as well as in the Surrogacy (Regulation) Bill. The minimum age for the intended couple as well as the surrogate mother is fixed and this can be considered as discrimination as there is no such restriction on a couple to have their own biological child. In India, Article 14 of the Constitution states that “the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.” Article 15 states that “the State shall not discriminate against any citizen on the grounds only of religion, race, caste, sex, place or birth or any of them.” When these two provisions are read together, it can be interpreted that if the State makes a law which discriminates people on any of the above-mentioned grounds, it violates the fundamental rights and such law shall be void.

However, these provisions do not include discrimination of age and the reason for setting the age limit is based on the welfare principle of the child, so that the intended couple are in a position to comply with all the needs of the child born. As seen in the case of *CW v. NT and Anr.*²⁰, and many other cases, the surrogacy agreement was interpreted based on the welfare of the child and held that for all legal provisions of surrogacy and surrogacy contracts, the welfare of the child ought to be of paramount consideration. In this case the surrogate mother refused to give the custody of the baby to the intending couple on the found that she grew attached to the child. The Court observed that the surrogate mother and the child had developed a very strong emotional bond and the mother is catering to all the needs of the child. If the baby is removed from the custody of the surrogate mother then she will suffer emotional disturbance and harm so the Court ordered residence and custody in favour of the surrogate.

Another important aspect to be considered is the clause that the intended couple shall be married for at least five years before opting surrogacy. This acts as restriction for widow, widower and couples who are involved in live-in relationship. The widow or widower who have been married for a period of more than five

²⁰ *CW v. NT and Anr.*, [2013] EWHC 33 (Fam).

years are not eligible to have a surrogate child by virtue of this provision. If they do not want to remarry, but have a child of their own, then the only option available to them is adoption. As per the existing adoption laws in India, even the single adults can adopt, but they are not eligible for surrogacy. By limiting altruistic surrogacy only to married couples, the Bill infringes upon the Right to Equality provided under Article 14 of the Indian Constitution by discriminating based on marital status.²¹ The question that arises here is if such classification is reasonable or arbitrary. For a classification to be reasonable, two tests should be fulfilled:

1. Such classification should not be arbitrary. It should be based on intelligible differentia, meaning that a class of people grouped together is distant and can be differentiated from the left-over group.
2. The classification so made shall have sufficient nexus to the object of the law.

When these two steps are examined in the light of the provisions regarding altruistic surrogacy, it can be said that the classification done is based on the concept of intelligible differentia as the class of people who are grouped together and are governed by the Surrogacy (Regulation) Bill, 2019 are distant from the rest, as the couple is infertile. On the basis of this reason, the classification made in the Bill qualifies the first test but for the classification to be reasonable, even the second test shall be fulfilled. The object of the law here is to provide means for the infertile couple to have genetically related children, but the classification here made is that the couple should be married for a minimum period of five years. As such there is no reason behind providing such classification and there is no connection with the ultimate object of the legislation. In some way, the requirement of five years of marriage defeats the purpose of this law as it restricts the infertile couple from having

²¹ Simran Agarwal and Lovish Garg, *The new surrogacy law in India fails to balance regulation and rights*, THE LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE, available at <https://blogs.lse.ac.uk/humanrights/2016/11/23/the-new-surrogacy-law-in-india-fails-to-balance-regulation-and-rights/> (Last accessed on August 31, 2019).

children. Thus, the overall analysis show that the classification made is not reasonable and conflicts with the provisions of law.²²

In India, recently, homosexuality was legalized but there is no legislation that deals with their marriage. Though they get married, their marriage is not legally recognized which makes them incompetent for surrogacy. However, in other countries surrogacy by gay or homosexual couples is legally recognized. In the case of, *A.G.R. v. D.R.H & S.H*²³, the intended parents were a homosexual male couple. They created an embryo using an anonymous donor ovum and the sperm of one of the husbands. The sister of the other husband carried the embryo to term and originally delivered the child to her brother, but a year later she claimed to have parental rights over the child. Initially the Court recognized her as the legal mother but later on appeal full custody was given to the biological father.

The competency provided in the Bill can be objected to in the light of the provisions of adoption. Adoption in general does not have any limitation as to age nor does it provide for any other requirements such as minimum years of marriage. The argument here is that though the procedure for adoption and surrogacy might be different, their aim is the same, which is to ensure that a person has the right to have children. Both the processes help the childless or infertile couples to build a family. Though both surrogacy and adoption are seen on the same footing, there is inequality in the eligibility criteria. Adoption has flexible age limit and is now applicable for transgenders as well. Similarly, even surrogacy should be made applicable for single-parents and homosexual couples.

²²Simran Agarwal and Lovish Garg, *The new surrogacy law in India fails to balance regulation and rights*, THE LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE, available at [https:// blogs.lse.ac.uk/humanrights/2016/11/23/the-new-surrogacy-law-in-india-fails-to-balance-regulation-and-rights/](https://blogs.lse.ac.uk/humanrights/2016/11/23/the-new-surrogacy-law-in-india-fails-to-balance-regulation-and-rights/) (Last accessed on August 31, 2019).

²³*A.G.R. v. D.R.H. & S.H.*, No. FD-09-1838 – 07 (N.J. Super. Ct. Chi. Div., Dec. 23, 2009).

In the case of *Stephanie Joan Becker v. State*²⁴ the Supreme Court of India permitted a single, 53 year old lady to adopt an orphan aged 10 years, by relaxing the rigid guidelines of Central Adoption Resource Authority on the fact that the proposed adoption would be beneficial to the child. Also, in the case of *National Legal Services Authority v. Union of India*²⁵ the Court recognized transgender as the third gender and held there shall be no discrimination on the basis of sexual orientation or gender identity for any laws in the country. This clearly means that transgenders having been granted a legal recognition as third gender, would be entitled to the rights of adoption, succession, inheritance and other privileges under law. The same should be applicable for surrogacy.

Another criterion that is required to enter into any contract is soundness of mind as mentioned in Section 12 of the Indian Contract Act, 1872. An identical clause regarding the same is incorporated in the Surrogacy (Regulation) Bill by virtue of Section 4 (iii) (b) (V), which makes it mandatory for the surrogate mother to obtain a certificate of medical as well as psychological fitness for being eligible for surrogacy procedures. The difference here is, the provision in Indian Contract Act, 1872 requires soundness of mind only while entering into the contract. A scenario might arise, where the surrogate mother, who is often of unsound mind but entered into an altruistic surrogacy contract when she was of sound mind.²⁶ Such a contract is valid as per Section 12 of the Indian Contract Act, 1872 but it gives rise to questions such as, the validity of this provision with regard to altruistic surrogacy contracts, as it will be against the welfare principle of child. To avoid these legal complications and for efficiency in surrogacy procedure, sound mind is required not only while entering into the contract but throughout the surrogacy procedure. Soundness of mind and psychological balance is an essential requirement for an altruistic surrogacy contract and by this provision, the same is obtained.²⁷

²⁴ *Stephanie Joan Becker v. State*, (2013) 12 SCC 786.

²⁵ *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438.

²⁶ Kulshrestha, *supra* note 5.

²⁷ Jayanthi Bai and Ronak V., *Legal Ramifications of Regulating Surrogacy Contracts under Indian Contract Act*, 3 SSIRJ 163 – 166 (2017).

For being competent to enter into a contract a person shall not be disqualified by law to which he is subject to. The Bill, by banning commercial surrogacy, indirectly disqualifies any person who is not a close relative of the intended couple from entering into surrogacy contract. The Bill also indirectly disqualifies the alien enemy, foreign sovereigns and diplomats as it permits surrogacy only to Indian citizens. However, the question remains unanswered with respect to insolvents and convicts. Allowing these people to be either the surrogate mother or the intended parent would clearly be against the welfare of the child. If a convict or insolvent is a surrogate mother, it leads to deprivation of proper health care and nourishment of the child during the pregnancy. On the other hand, if the intending parent is convict or insolvent, it will have an adverse effect on the child and at times might lead to abandoning of the child too. To avoid such circumstances, it is important to disqualify such person from entering into a surrogacy agreement.

In the light of the above discussions regarding the various aspects of competency to enter into an altruistic surrogacy contract, it is clear that such a contract stands valid in relation to age of majority and soundness of mind. However, the provisions dealing with other factors of competency can be challenged as being violative of the rights provided by the Constitution of India. Moreover, the Bill needs to be modified to expand its scope to persons who need to be disqualified from entering into altruistic surrogacy contracts.

3.3. Lawful Consideration

The next and the most important condition for any valid contract is lawful consideration. Section 2 (d) of the Indian Contract Act, 1872²⁸ defines consideration as:

When, at the desire of the promisor, the promisee or any other person has done or abstained from doing or does or abstains from doing or promises to do or abstain from doing something, such act or abstinence or promise is called a consideration for the promise.

‘Consideration’ is an important feature that draws a line of difference between commercial surrogacy and altruistic surrogacy.

²⁸ §2(d), Indian Contract Act, 1872, Act No. 9 of 1872, Acts of Parliament, 1972.

In commercial surrogacy, the intended couple pays a considerable amount of money to the surrogate mother for her services. But, in the case of altruistic surrogacy, the surrogate mother is not paid any compensation other than the medical expenses and insurance. Now, the question is regarding the lawfulness of consideration by each party to the contract. In commercial surrogacy contracts, the surrogate mother carries the baby and intended couple provides monetary compensation for the services, which qualifies to be a consideration from both parties. But in altruistic surrogacy though the surrogate mother has to fulfil the same obligations as in the case of commercial surrogacy, yet there is no consideration from the intended parents. The validity and enforceability of such contracts can be challenged in this regard. ²⁹

Section 25 of the Indian Contract Act, 1872 provides for exceptions where the contract is valid without any consideration. Since there is no compensation in altruistic surrogacy contracts, they are void as per the first part of this Section. But, as per the first exception, any agreement registered, written and which is out of love and affection need no consideration. Altruistic surrogacy tends to involve a person who is a close relative of the intended couple and doesn't require consideration because it is usually an act of love. Due to this exception, altruistic surrogacy is often referred to as 'gift'.³⁰

However, the exception clearly states that such agreement shall be in writing and should be registered under law. But, neither any law in force or the surrogacy Bill provides any procedure or governs the registration process of such agreements. Since the Surrogacy (Regulation) Bill, 2019 aims to administer the surrogacy procedures in India, it becomes necessary to have some provision with regard to written surrogacy agreements for ensuring the validity under the Indian Contract Act, 1872.

The question to be determined is whether the medical and insurance expenses given by the intended couple amounts to consideration. If it does, then the line of difference between the altruistic surrogacy and commercial surrogacy reduces and the

²⁹ Kulshrestha, *supra* note 5.

³⁰ *Id.*

purpose of altruistic surrogacy is defeated as it would amount to baby selling.³¹ If medical expenses form a part of consideration and are excluded from altruistic surrogacy agreements, then the surrogate mother would be exploited as she has to bear all the expenses herself and this would discourage women to come forward to act as surrogate mother. Hence medical expenses and insurance shall not amount to consideration and the same has been reflected in the Surrogacy Bill as it allows medical expenses and insurance for altruistic surrogacy. As far as the aspect of consideration is concerned, the altruistic surrogacy contracts prove to be valid and can be enforced in a Court of law.

3.4. Lawful Object

Section 23³² deals with the lawfulness of object as well as consideration. It provides five scenarios under which the object or consideration is unlawful. The first of which is forbidden by law. The Indian law permits altruistic surrogacy, but explicitly bans commercial surrogacy, so any commercial surrogacy contract is void and unenforceable.

The next ground is if the object or consideration would defeat the provisions of any law. In commercial surrogacy, the rights available to surrogate mother under the Indian Constitution and other international laws are being curbed and they are being exploited which defeats the provisions and purpose of the laws in force. The objective is to usually to engage in trade relating to the womb or the baby. In altruistic surrogacy, the sole purpose is to enable the intended couple to have a child without violating the rights of any party and hence the object does not defeat the provisions of any law that are in force³³.

The last ground is if the object or consideration is immoral or against public policy. There is a lot of discussion and argument on this aspect as far as surrogacy contracts are considered.

³¹ Surrogacy (Regulation) Bill, 2019, Bill No. 156 of 2019.

³² §23, Indian Contract Act, 1872, Act No. 9 of 1872, Acts of Parliament, 1972.

³³ Vasita, *Supranote* 8.

In *Baby M case*³⁴, Mrs. Stern was considered unfit for pregnancy as she suffered certain disease. Mr. and Mrs. Stern decided to have a child through surrogacy and entered into a surrogacy agreement with Mrs. Whitehead, a registered surrogate. The terms of the contract were such that Mrs. Whitehead was obligated to carry the baby for the entire term of pregnancy for a sum of \$10,000 and after the birth handover child to the intending parents. It was agreed that the Sterns would be the natural and legal parents of the child born and Mrs. Whitehead would have no parental rights. However, after the birth of the child Mrs. Whitehead refused to give the custody of the child to the Sterns and they were forced to file a lawsuit. The question before the Court was which party shall get the custody of the child and if surrogacy contracts are valid. To decide on the first question the Court considered the “best interest of the child” principle. It observed that the Sterns were educated with a good financial capability whereas, the Whiteheads did not have stable finance condition and the family environment was not healthy for the growth and development of the child. Moreover, Mrs. Whitehead was one who violated the terms of the contract so the Court ordered for specific performance of the contract as a remedy to the Sterns. With regard to the question of validity of surrogacy Courts, the trial Court held that surrogacy contracts are valid in accordance with the existing laws and can be enforced. Mrs. Whitehead, aggrieved by the decision of the trial Court, preferred an appeal to the Supreme Court of New Jersey. The Apex Court affirmed with the decision of the inferior Court regarding the custody of the child, but reversed the decision of validity of surrogacy agreements and held that the contracts are void as they are against public policy.

In the case of *Johnson v. Calvert*³⁵, a surrogacy contract was entered into by Mr. Mark and Ms. Crispina as intending parents and Ms. Anna as the surrogate mother. However, disputes arose between the parties as the intending parents discovered that Ms. Anna concealed the fact that she previously has miscarriages and Ms.

³⁴ In re Baby M, 217 N.J. Super. 313, 525 A.2d 1128 (N.J. Super. Ct. Ch. Div. 1987).

³⁵ Johnson v. Calvert, 851 P 2d 776 (1993).

Anna was aggrieved as her insurance policy formalities were not completed by Mr. Mark. Ms. Anna demanded for the payment of agreed sum of money or she would not give the custody of the baby. Both the parties filed independent suits claiming the custody of the child. After the birth of the child, to determine the maternity and paternity, the Court ordered for DNA tests. According to this, Mark and Crispina were found to be the parents of the baby, but Anna contended that the woman giving birth was the mother under the California law. On the other hand, the contention of Crispina was that she has a biological and genetic relation with the baby which makes her the legal mother. The Court resolved this conflict in the existing law by relying on the intention of the parties and held in favour of Mark and Crispina as this baby would not be born if it was not intended by them. The Court also considered and relied on the clauses of the agreement entered into by both the parties and held that “the agreement is not, on its face, inconsistent with public policy.”

This case made a very significant observation that public policy is a very vague term and covers a large domain, so it is important to look into the legislations and the precedents while determining if a contract is against public policy. If there is no statutory enactment or a moral and ethical code of conduct regarding such contracts then they cannot be declared to be against public policy. In such cases, the Court specified that the contract shall be valid till proper legislation is made in that regard. But what is to be considered is that all the above-mentioned cases are of commercial surrogacy and the same cannot be applied to altruistic surrogacy.

In *Paternity of FTR, In re case*³⁶, an altruistic surrogacy agreement was entered into by two childhood friends as one of them was suffering from a disease and was incapable of carrying a child. The Court in this case took a different approach and held that the validity of surrogacy agreements will depend on the best interest of the child and will differ from case to case. The Court further held that if the agreement in any manner is against public policy then it should affect the best interest of the child and in such cases the surrogacy contract would not be enforceable. It can be said that,

³⁶ Chaterjee, *Supranote* 6.

globally, there is no uniform notion on whether surrogacy agreements are valid or are against public policy. The stance regarding the validity of surrogacy agreements changes from time to time and from country to country.

The Indian Courts have mostly favoured commercial surrogacy and legalized them in a number of decisions. In the case of *Baby Manji Yamada v. Union of India*³⁷, the Court held that commercial surrogacy is legal and this indirectly gave enforcement to surrogacy agreements. In this case a Japanese couple came to India and entered into an agreement with a surrogate in the state of Gujrat. Unfortunately, the intended couple got divorced before the birth of the child and this led to the questions of the parentage and nationality of the child. M/s SATYA, an NGO filed a writ petition in the High Court challenging the legality and enforcement of surrogacy contracts and the High Court dealing with this, ordered for the production of the bay in the Court. The grandmother of Baby Manji filed a writ against this order in the Apex Court. The Supreme Court while addressing this observed that there was no complaint filed regarding the child and there is no involvement of public interest in this case. The Court observed and defined commercial surrogacy as:

9. Commercial Surrogacy" is a form of surrogacy in which a gestational carrier is paid to carry a child to maturity in her womb and is usually resorted to by well off infertile couples who can afford the cost involved or people who save and borrow in order to complete their dream of being parents. This medical procedure is legal in several countries including India where due to excellent medical infrastructure, high international demand and ready availability of poor surrogates it is reaching industry proportions.

Even in the case of *Jan Balaz v. Anand Municipality*³⁸, the Court held that surrogacy agreements are valid and enforceable under the Indian Contract Act, 1872. The Court emphasized on having a legislation to administer rights and duties of the parties to surrogacy contract and In Vitro Fertilization (IVF) clinics. In the

³⁷Baby Manji Yamada v. Union of India, (2008) 13 SCC 518.

³⁸Jan Balaz v. Anand Municipality, AIR 2010 Guj 21.

case of *P Geetha Nagar v. Kerala Livestock Development Board*³⁹, the Court based on the economic growth, identified India to be a surrogacy market and made surrogacy agreements legal. Despite the judiciary being in favour of the commercial surrogacy, it is considered to be against public policy on various grounds such as infringement of rights, exploitation and human trafficking. But the Courts never explicitly determined the validity of altruistic surrogacy contracts. However, the fact that the Bill legally recognized altruistic surrogacy itself shows that it is not opposed to public policy. Moreover, in altruistic surrogacy, the agreement is between close relatives only and the probability of infringement of rights or exploitation is very low and does not affect the public at large, so the question of it being against public policy does not arise.

4. Remedies Available for the Parties

In every contract, there is a possibility that either of the parties might not fulfil the terms of the contract, leading to breach of the contract. In such cases the aggrieved party is entitled to legal remedy against the party who committed the breach. In the absence of any legal remedy in case of breach of contract, the sole purpose of a contract i.e to bind the parties, will be defeated. Generally, when there is a breach of contract, the remedies available to the parties include damages, rescission, specific performance or injunction. But the question is regarding the degree of applicability to surrogacy contracts.

Rescission is a remedy that is available to the aggrieved party, where he approaches the Court of law to discharge him from the obligations mentioned in the contract. In surrogacy contracts, this remedy has minimal weightage as it is less preferred by the parties. Where the intended couple have entered into a surrogacy agreement with the surrogate mother and it was agreed that the medical expenses and the insurance papers will be given after the child is born but later, she commits breach of contract by not giving the custody to the intended couple. The intended couple will prefer

³⁹*P.Geeta Nagar v. Kerala Livestock Development Board*, 2015 SCC OnLine Ker 71.

to pay the medical expenses and get the custody of child than approaching the Court for an order of discharge from the duties. In some way it can be said that rescission is not an effective remedy in case of altruistic surrogacy contracts.⁴⁰

Section 73 of the Indian Contract Act provides for different types of damages – General, Special, Exemplary, Nominal.

The type of damages to be awarded depends on the facts and circumstances of each case and the injury caused to the aggrieved party. General and exemplary damages are relevant in case of surrogacy contracts. If a surrogate mother breaches the contract, then it would be reasonable for the Court to award exemplary damages for the intended couple as they are exposed to high degree of mental and emotional disturbance. In some exceptional circumstances it becomes necessary for the Court to award special damages to the parties of the surrogacy contract. In a case a woman, who was a surrogate mother, was subjected to numerous health problems and later her uterus was removed as a last resort to save her life. After this she was divorced by her husband and was abandoned by her family. In this case the intended couple did not pay for any medical expenses. In this the surrogate mother shall be entitled to the medical expenses as general damages and special damages for her maintenance.

The next remedy available is specific performance. Specific performance is where the Court orders the party to fulfil the obligations and not commit a breach of the contract. In case of surrogacy, specific performance of the contract seems to be the most feasible remedy from the viewpoint of the surrogate mother as well as intended parents⁴¹. If intended couple fails to pay medical expenses or refuses to take the child, the best remedy available for the surrogate mother is specific performance as no other remedy can compensate the intended parents. Moreover, specific performance is not only in the interest of the parties to the contract but also in the best interest of the child.⁴²

⁴⁰Shah, *Supranote* 15.

⁴¹Ruchi Tirkey, *Remedies for Breach of Contract*, 6 IJSER, 42 – 46 (2018).

⁴²Deborah S. Mazer, *Born Breach: The Challenge of Remedies in Surrogacy Contracts*, 28 YALE J.L.F, 211 – 241 (2017).

However, a problem arises as the Courts generally do not order for specific performance in the contracts for service as it would lead to involuntary servitude and violate the rights of the parties⁴³. By ordering specific performance the Court in a way addresses the baby as a “good” and this amounts to baby selling which is completely illegal. Another restriction on the Courts for non-issuing specific performance in surrogacy contracts is Section 14 of the Specific Relief Act, 1963. It provides that specific performance cannot be granted for contracts which are based on personal details. Despite these limitations of specific performance, it is the most appropriate remedy for the breach of surrogacy contracts. To ensure the applicability of specific performance to the altruistic surrogacy contracts, legislation needs to be developed incorporating the provisions which state the exclusive circumstances of tragic breach under which specific performance can be granted.

Though there are several remedies available to the aggrieved party, all the remedies cannot be claimed. The Court will compensate the party for the breach depending on the facts and circumstances of each case, the time of breach and the party that has committed the breach. Before entering into a surrogacy contract, the surrogate mother is scanned and examined if she is eligible for carrying the surrogacy process. If a woman initially agreed to be a surrogate mother, but refused to give consent to any of the scans or other medical procedures involved, the intended parents cannot approach the Court for a remedy, as there is no existing contract. A surrogacy contract is entered into only after the examination and the completion of others. The term of a surrogacy contract can be divided into three phases namely:

- (i) before the implantation of the embryo
- (ii) after the implantation but before the birth of child (pregnancy period)
- (iii) after the birth of the child.

⁴³Abigail Lauren Perdue, *For Love or Money: An Analysis of the Contractual Regulation of Reproductive Surrogacy*, 27 JCHLP, 279 – 311 (2011).

If breach of contract is committed before the implantation of the embryo then it would be either anticipatory breach or discharge by breach by either parties. The surrogate mother may opt out from the contract or the intending parents might not fulfil their pre insemination obligations such as advance payment which leads to anticipatory breach. In such a case the aggrieved party can either rescind the contract and claim legal action or can consider it still in force and wait till the due date⁴⁴. Section 39 of Indian Contract Act, 1872 defines anticipatory breach and Sections 64 and 79 of the said Act provides that all the benefits received by the party terminating the contract, shall restore all the benefits gained during the course of contract and the aggrieved party shall be entitled to damages suffered due to the breach of the contract. If the breach is by the surrogate mother, then she shall return the advance payments and the insurance shall be cancelled. If the breach is committed by the intending parents, then the surrogate mother can claim for the expenses she has incurred, till the date for the tests and examination. However, in either cases no indirect and adverse damages can be claimed by the parties, as the contract is terminated before the actual surrogacy process is initiated.

Even after the artificial insemination process the contract can be discharged due to frustration. After the implantation of an embryo if the pregnancy is not successful it will automatically discharge both the parties from their obligations as per the doctrine of frustration⁴⁵. This doctrine states that if the contract becomes impossible to perform due to the reasons beyond the control of both parties, then the contract is considered to be discharged by the parties. Neither of the parties can be compelled to fulfil their obligations but a party which has revived benefit shall restore the benefit or adequately compensate the opposite party. In surrogacy contracts, an unsuccessful pregnancy is considered as frustration of contract as the purpose of the surrogacy contract is lost and it is impossible for the parties to fulfil their obligations.

⁴⁴R.K. BANGIA, INDIAN CONTRACT ACT, (14thedition. 2009).

⁴⁵Michael J. Trebilcock, *Critiques of the Limits of Freedom of Contract: A Rejoinder*, 33.2Osgoode Hall LJ, 353-377(1995).

If the pregnancy is successful, then the contract is considered to be in force and leaves a scope for the parties to breach the conditions of the contract. The surrogate mother might engage in certain activities which she is refrained from doing as per the contract or might omit to do certain activities such as attending medical check-ups⁴⁶. In either situation, the surrogate mother is liable for breach of contract. The option available to the intending parents is to approach the Court for damages, but this can be done only after the birth of the child. There can be extreme instances of breach where the surrogate mother might abort without obtaining the permission of the intending couple. In such cases as per the existing law the intending can only claim damages and compensation and there is no other remedy available to them. The Court in these cases shall award damages after duly considering the economic loss and mental trauma suffered by the opposite party. After the embryo is successfully implanted, the intending parents might refuse to pay for the medical expenses or insurance policy of the surrogate mother and the remedy that is available to surrogate mother is to claim for specific performance. Even recession is an appropriate remedy available where the surrogate mother can abort the foetus if the expenses are not paid after repeated warnings.

After the birth of the child the surrogate mother might refuse to hand over the baby to the intending couple or the intending couple might refuse to take custody of the child or pay the entire amount for medical expenses. For the breach after the birth of the child, the most remedy suitable would be Specific Performance as the surrogate mother is legally entitled to receive the medical expenses as agreed upon and no amount of damages can compensate the intending parents for the custody of the child⁴⁷. Moreover, if the intending parents refuse to accept the child for any reason, it will lead to abandoning the child, which is against the best interest of the child and defeats the aim of surrogacy contracts. In order to avoid such circumstances, granting of specific performance is permitted.

⁴⁶Carolyn Sappideen, *The Surrogate Mother - A Growing Problem*, 6 U.N.S.W.L.J., 79 - 102 (1983).

⁴⁷Valerie L. Baker, *Surrogacy: One Physician's View of the Role of Law*, 28 U.S.F.L., 603 - 612 (1994).

5. Conclusion

No doubt, of late surrogacy has become a popular means to reproduction in India but what needs attention is the fact that there is no legislation that regulates surrogacy. In such a situation, the only instrument that can govern surrogacy is the surrogacy agreements entered into by the parties. However, for these agreements to be enforceable in a Court of law, they shall be legal under the Indian Contract Act, 1872. After evaluating each essential of a contract in the light to altruistic surrogacy agreements, it can be said that all the requirements of a valid contract are not fulfilled. The legality of an altruistic surrogacy agreement varies from one case to another depending on the facts and circumstances of each case. The attention has to be drawn to the fact that the essential requirements provided under Indian Contract Act, 1872 need to be modified to fit the altruistic surrogacy contracts. But this might not be possible as modifications done in the existing contract law would have an immense impact on various other contracts.

This left behind the option that a legislation should be developed to deal exclusively with the surrogacy process and the contracts. The current Bill regulates the surrogacy process but fails to provide for an enforcement mechanism for altruistic surrogacy contracts. The new legislation should strike a balance between the essentials of a contract and altruistic surrogacy contracts. For example - it should provide that contracts should be of free consent but also should waive consideration as an essential. The legislation should also revise the competency of intending parents and include single parents and homosexual couples. There is a need to have corresponding amendments in other laws such as Specific Relief Act, 1963 and Medical Termination of Pregnancy Act, 1971. Altruistic surrogacy contracts should be added in the list of situations where specific performance can be granted and will of intending parents or the violation of surrogacy contract by intending parents should be made a ground for termination of pregnancy. Due to the absence of a concrete legislation, even the judiciary struggled to take a firm stand. The current Bill suffers from grave irregularities and they need to be duly addressed by the committee established. If no changes are preferred and the Bill is passed, it would violate the constitutional provisions and the

judiciary would be forced to quash the statute under its power of judicial review. Hence, it is the need of the hour to enact a legislation which regulates surrogacy as well as surrogacy agreements.