

# Contractual Aspect of Surrogacy in India

## Abstract

An agreement enforceable by law's a contract. An agreement is enforceable if it gives rise to legal obligations. Thus contract is a combination of an agreement and its enforceability. Law of contract deals with the law relating to general principles of contract. It include the study of formation of the contract, the essential and legal rules for a valid contract, remedies for breach of contract and the discharge of contract.

**Keywords:** Agreement, Contract, Obligations, Precedents, Surrogacy, Public Policy

## Introduction

Surrogacy arrangements between the parties are dealt with surrogacy agreement in which parties settle their terms and conditions regarding surrogacy. As there is no law on surrogacy yet in India, it is difficult to recognise the exact nature of surrogacy arrangement. Some consider it as an industry, some as service and some see it as a contract for certain purpose. Presence of certain guidelines but absence of specific regulation makes surrogacy transactions more complicated and complex. It also pose challenges towards court in defining rights and obligations of concern parties of the arrangements. Right now as there is no law on surrogacy, these arrangements are comes under the purview of Indian Contract Act, 1872. In the present research paper, researcher has tried to examine the legality of surrogacy arrangements and the extend up to which these types of arrangements comes under the purview of Indian contract Act and enforceable in court of law.

## Review of Literature

P P S Gogan in his book, "Textbook of Mercantile Law" (2002) says that the Indian Contract Act, 1872 deals with the general principle of contract. Without it, it would be difficult for court to determine and enforce the exact nature of rights and obligations of the person. According to him, the law of contract determine the circumstances under which a promise or a agreement shall be legally binding upon the person making it. He further said, law of contract provides the remedies which are available in a court of law against a person who fails to fulfil his contracts and other conditions under which the remedies are available.

Kush Kalra in his article, "Surrogacy Arrangement Legal and Social Issues has elaborately examine the nature of surrogacy arrangements in respect of Indian Contract Act. He elaborately examine question that whether the contract of surrogacy stands violative of section 23 of the Indian contract Act or not.

## Aim of Study

The aim of present research paper is to examine the extend upto which surrogacy arrangements comes under the purview of Indian Contract Act, 1872.

Surrogacy arrangements between the parties are dealt with surrogacy agreement, in which parties settle their terms and conditions regarding the surrogacy. As there is no law yet on surrogacy, therefore these agreements come within the purview of Indian Contract Act, 1872. Section 1 to 75 of the Indian contract act deals with the general principles of the law of contract. These principles apply to all kinds of contracts irrespective of their nature. There is also a provision for special contract, which is contained in section 124 to 238. These special contracts are indemnity, guarantee, bailment etc. It means that if any agreement fulfils all the conditions mentioned under Indian contract act then it becomes a contract. However it is matter of examination that up to what extent surrogacy agreement fulfils these criteria?



## Neerja

Research Scholar,  
Faculty of Law,  
University of Lucknow,  
Lucknow

A contract may be defined as an agreement between two or more persons which can be enforced in a court of law. Section 2(h) of the Indian contract act, 1872 states that, "An agreement enforceable by law is a contract." An agreement is enforceable, if it gives rise to legal obligations. Thus contract is a combination of an agreement and its enforceability.<sup>1</sup> Law of contract deals with the law relating to general principles of contract. It include the study of formation of the contract, the essential and legal rules for a valid contracts, performance of contracts, breach of contracts, remedies of contract and the discharge of contract.<sup>2</sup> The law of contract deals with the law relating to the general principles of contract. Without the law of contract, it would be difficult to determine and enforce the rights and obligations of the persons. The law of contract determines the circumstances under which a promise or on agreement shall be legally binding upon the person making it. It also provides the remedies which are available in a court of law against a person who fail to fulfil his contracts and other conditions under which the remedies are available. Law of contract creates jus in personam means that under the law of contract, the right is available only against particular persons.<sup>3</sup>

Section 2(h) of the Indian contract act, 1872 provides that a contract is an agreement enforceable by law. Thus, an agreement which is enforceable only can become a contract. In order to become enforceable, section 10 of the Indian contract act lays down certain conditions of enforceability. According to section 10 of the Act, "All agreement are contract if they are made by the free consent of the parties competent to contract for a lawful consideration and with a lawful object and not hereby expressly declared to be void." Thus a valid contract must have the following essentials-

1. Agreement-legal agreement;
2. Competence of parties;
3. Free consent;
4. Lawful consideration;
5. Legal object;
6. Not expressly declared void; and
7. Compliance with legal formalities.

Further section 23 of the Act laid down that, "every agreement, of which the object or consideration is unlawful, is void." Thus to a contract whose object or consideration is unlawful is unenforceable. In regard to free consent and competency to contract surrogacy arrangement stands valid. But to what extend surrogacy agreement fulfil the criteria of lawful consideration, object and the intention of the parties to create legal obligation is a matter of examination and decisions of the court. Some scholars observed that the real problem in surrogacy transaction is the difficulty to recognise the exact nature of it. Some view it as an industry, some as a service and some see it as a contract for certain purpose. Presence of certain guidelines but absence of certain uniform regulation makes such transactions more complicated and complex.

An agreement is a promise forming consideration for each other, and a promise is said to be made by the two parties when one person to whom

the proposal is made signifies his assent thereto. In this way an agreement is an accepted proposal. It implies that there must be at least two parties one of them making the offer and the other accepting it. No one party can make the proposal and at the same time accept it the terms of the offer must be defined and it acceptance must be absolute and unconditional. The acceptance should also be in the manner or mode prescribed. It must be communicated to the offeror. In order to become a contract, an agreement must be enforceable and thereto, the intention of the parties must be to create legal obligation between them. If there is no such intention of the part of the parties, there is no contract between them. "An agreement of a social, domestic, religious or moral nature is not enforceable at law and therefore cannot form a contract."

Mercantile Law, King Books Educational Publishers 1684, Nai Sarak, Delhi, and P.4.

In *Balfour v Balfour*<sup>4</sup> court held that an agreement, which the parties declare not to be binding also do not constitute a contract. Where the parties expressly agreed that the agreement is not entered into a formal jurisdiction in law, cannot be said to be contract because here the intention to create legal obligation is absent<sup>5</sup>.

Now the point of concern is that, that how can court calculate the intention of parties in surrogacy arrangements when there is no law in India relating to surrogacy? Yet courts generally take the help of legislation relating to the subject matter of dispute of the parties to ascertain the legal obligation between the parties. But there is no help in this case, there is no law on it and Indian contract act is available only for general type of cases. The only help which can be sought is through section 70 of the Indian contract Act. Section 70 obligation of person enjoying benefit of non-gratuitous act:- Where a person lawfully does anything for another person, or deliver anything to him, not intending to do so gratuitously, and such another person enjoys the benefit there of the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

In surrogacy cases, the rights and liabilities of parties as well as the future of child are involved. Secondly, sometime when there is no legal provision in support of case, then courts decide the case on temporary guidelines which would apply to that case only and become a precedent for other like cases. But it does not provide the permanent solution because every case is different on facts in issue. In surrogacy cases as there is no law on it, it become very difficult for court to ascertain that whether there is any legal obligation between the parties of arrangement or not.

#### **Consideration Must Not be Illegal, Immoral or Opposed to Public Policy**

An agreement to be enforceable at law must be supported by consideration. Consideration means something in return. Both the parties must get something in return for the promise. Consideration is the price for the promise. A contract without consideration is not enforceable at the law and void. Consideration may be in cash or kind. Even the loss,

responsibility or detriment suffered by one party, or profit, interest or benefit accruing to other party are good examples of consideration<sup>6</sup>. Consideration may be past, present or future. It must be real and lawful. However law recognise certain exceptions in an English case *Currie v. Misa*, the term consideration was defined as "some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given or undertaken in order"<sup>7</sup>. Section 2(d) of the Indian contract act, 1872 defined the consideration as follows: "when at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing or promises to do or to abstain from doing something, such act or abstinence or promise is called consideration for the promise." According to section 23, the consideration of a promise must not be unlawful; otherwise the contract would be illegal. Thus consideration must be lawful. A consideration would be illegal if (i) it is forbidden by any law e.g. to bribe etc. (ii) it is of such a nature that, if permitted it would defeat the provision of any law, or (iii) it is fraudulent, or (iv) it involves or implies injury to the person or property of another, or (v) if the court regards it as immoral or opposed to public policy; or (vi) if it is immoral.<sup>8</sup>

It is submitted that in order to determine whether the contract of surrogacy stands violative of section 23 of the Indian contract act, 1872, an examination of what the court has regarded as immoral or opposed to public policy must be made. If the court regards the purpose or consideration of an agreement as immoral, it is void. The term 'immoral' depends upon the standard of morality prevailing at a particular time and place and as approved by the court. In general sexual immorality is regarded as immoral act.<sup>9</sup> In *Gherulal Parakh v Mahadeo das Maiya*<sup>10</sup>, the court observed that precedents, English as well as Indian limited the concept of immorality to sexual immorality. Here the point is that wherein conception of the child took place through in vitro fertilization, the aspect of sexual immorality doesn't stand right. But contradictory to this apex court in *Central Inland Water Transport Corporation Ltd. v Brojo Nath Ganguly*<sup>11</sup> has stated that public policy connotes some matter concerning public good and public interest. In *Bhagwan Genuji Girne v Gangabison Ramgopal*<sup>12</sup>, concerning to public policy, the Bombay high court stated that a contract that has a tendency to injure public welfare is one against public policy. This view was also held in *Evanturl v Evanturel*<sup>13</sup> and in *Maxim Nordenfeldt co. V Nordenfeldt*<sup>14</sup>. In *Egerton v Brownlow*<sup>15</sup> and in also *Montefiore v Manday Motor Components Company Ltd.*<sup>16</sup> The court held that it is not shrink form applying precedents on public policy, with firmness and caution

to any new and extra ordinary case that may arise. As a matter of fact the fundamental right to procreation implicit in *Mr. X v Hospital Z*<sup>17</sup> is further through contracts of gestational surrogacy. That if medical technology advances sufficiently enough to artificially further one's fundamental situations must be addressed by law. The surrogacy contracts have been blamed by bring against public policy as they might lead to a plethora of problems in society, but this will only happen if a balanced law is not made in regard to balancing the interests of both the surrogate mother and intended parents.<sup>18</sup>

### Conclusion and Suggestions

After examine above cited cases and facts it can be said that surrogacy contracts has all the essential elements which are required for a valid contract. However Indian contract Act, 1872 specifically provide that the Act is not exhaustive in nature and does not deal with all the branches of contract. But as there is no specific law on surrogacy in India, the Indian contract Act can be adopted for securing the rights and interests of the parties involved in arrangements.

### References

1. P P S Gogan, "Textbook of Mercantile Law", S Chand and Co. Ltd. Ram Nagar (2002), P. 12.
2. P P S Gogan, "Textbook of Mercantile Law", S Chand and Co. Ltd. Ram Nagar (2002), P. 6
3. P P S Gogan, "Textbook of Mercantile Law", S Chand and Co. Ltd. Ram Nagar (2002), P. 11
4. 1919 2 K.B 571
5. See *Campion: Mercantile Law*, King Books Educational Publishers 1684, Nai Sarak, Delhi, and P.4.
6. See, *Campion: mercantile Law*, King Books Educational Publishers, 1684, Nai Sarak, Delhi, p. 5
7. See, *Campion: mercantile Law*, King Books Educational Publishers, 1684, Nai Sarak, Delhi, p. 32
8. See, *Campion: mercantile Law*, King Books Educational Publishers, 1684, Nai Sarak, Delhi, p. 38
9. Kush Kalra, "Surrogacy Arrangement Legal and Social Issues", *Journal of Law Teachers of India*, Vol. 1, Issue no.-1-2 (2010), P.130-131
10. A.I.R 1959 S.C 781
11. A.I.R 1986 S.C 1571
12. A.I.R 1940 Bombay 396
13. 1874 L.R 6 P.C
14. 1893 1C.H 630
15. 1853 4H.L.C 149
16. 1918 2K.B241
17. S.C.C 296 1998
18. *Supra*, note 9