

CHAPTER - VI

JUDICIAL FINDINGS

Surrogacy arrangement is considered as the last option to the problem infertility, however due to lack of suitable legislation, it has most often produced social, ethical and legal problem in the society at national as well as in international level. Though it is a boon for childless couple; at the same time it also creates numerous questions those not able to resolve equivalently and variety of opinion leads to a confusion. As we know, the major functions of the Judiciary are to interpret and apply laws to specific cases/ disputes that come before it. But due to lack of uniformity in law, different countries have adopted diverse approaches regarding permission, prohibition and regulation. And in the absence of clear legal provisions on issues of parentage, citizenship, nationality and the rights of parties in surrogacy arrangements problems increases rapidly and solutions dwindled.¹ Besides domestic surrogacy, these abuses became rampant and surrogacy market developed in India as a cheaper destination for foreigners for commissioning surrogacy in comparison to the other countries. Therefore it is a big responsibility in the hands of judiciary to resolve the disputes by harmonizing the rights of the parties concerned to the surrogacy arrangements.

This chapter basically concerned with findings of the judiciary on various legal issues of various jurisdiction arising out of surrogacy arrangements, whereby

¹ Anil Malhotra & Ranjit Malhotra, *Surrogacy in India: A Law in the making- Revisited* 45 (Lexis Nexis, Haryana, 2nd Edition, 2016)

it became as an essential part of development of law on surrogacy. While law remained a silent observer, exercising extra-ordinary jurisdiction by the judiciary invoked various innovative solutions to protect the rights of the parties considering the best interest of the surrogate children. Thus, in the growth and development of surrogacy the judiciary has been also playing an important role.

6.1. Judicial Findings on Surrogacy of Various Jurisdictions

Firstly going to discuss some famous cases of commercial surrogacy, where the judiciary has sets some the principles to settle such disputes of conflicting interest of parties concerned. These are -

6.1.1. *Baby Cotton Case*²

This is the UK's first reported case of surrogacy, where a surrogate mother namely Kim Cotton agreed to carry and give birth to a child for an infertile anonymous couple from US in exchange for 6500 pound on 4 January 1985. After few hours from birth of the surrogate child, the surrogate mother had voluntarily left the child in the hospital.

In this case, the husband of the commissioning couple preferred a proceeding and sought for the care and control of the child be entrusted to him and his wife. The matter came before the Court on 8 and 11 January 1985. And after considering the best interest of the surrogate child, the court granted the care and control of the child to the plaintiff with leave to take the child out of jurisdiction.

² 191 (1985) FLR 846

The court also directed that the ward ship was continued until further order and there would be a specific order for non disclosure or publicity which might lead to the identification of the plaintiffs.

The birth of Baby Cotton via international commercial surrogacy led to a public outcry, and the surrogate mother Kim Cotton being accused of selling a child which gave rise to the Surrogacy Arrangements Act 1985. Though the case is not concerned with the legality of commercial surrogacy arrangement but it gives new direction to the ward ship jurisdiction by modifying the application of exiting ward ship law i.e. the Child Act and thereby allowed the child to go with the commissioning American couple. Actually as per the law the child can be recalled to England as long as it is 18 years. Thus the case set new guidelines for the surrogacy arrangement.

6.1.2. *Baby M Case*³

The *Baby M* case is the first case of Traditional Surrogacy arrangement in which the surrogate mother refused to bestow the baby to the intended parents in 1986.

In this case, William Sterns (plaintiff) the intended father and Mary Beth Whitehead (defendant), the surrogate mother entered into a surrogacy contract, for carry and gives birth to a surrogate child through artificial insemination using intended father's sperm. In exchange Sterns would pay \$10,000 to Whitehead and \$7,500 to the Infertility Centre of New York, which arranged for the surrogacy.

³ 109N.J. 396, 537 A.2d 1227 (N.J. 1988)

Whitehead became pregnant and gave birth to a baby girl named Baby Melissa on 27 March, 1986, at that time she experienced emotional difficulty surrendering Baby M to the intended father. And it became clear that Whitehead could not return the child. For what Sterns seeking legal intervention for enforcement of surrogacy contract and a verified complaint seeking specific enforcement of the contract. The complaint also sought for injunctive relief to obtain custody, termination of parental rights of Whitehead and an order allowing Sterns to adopt Baby Melissa. Then Whitehead fled to Florida with Baby M.

The trial court had held that the surrogacy contract was valid and enforceable; so awarded the custody of Baby M to the plaintiff, terminated Whitehead's parental rights and issued an order requiring the Whitehead to surrender Baby M to Sterns. Although the court permitted Whitehead limited visitation rights as she is the biological mother. Therefore Whitehead preferred an appeal before the New Jersey Supreme Court.

In 1988, the New Jersey Supreme Court had held that surrogacy contract is void because it is against public policy of the state and considering the welfare of the child the custody of the surrogate child was given to the biological father and his wife. The court also held that as Whitehead, the surrogate mother was the biological mother of the child; the court has given the visitation rights to the child.

6.1.3. *Jhonson v. Culvert*⁴

This is another notable case on which the Supreme Court of California held that commercial surrogacy contract as a valid one.

In this case, Marak and Crispina Culvert were the intended parents and Anna Johnson was the surrogate mother signed into a contract providing that an embryo created by the sperm of Marak and the egg of Crispina Culvert would be implanted in Anna Johnson in exchange of \$10,000. And according to the contract Johnson agreed to relinquish all parental rights over the child, would be delivered to the intended parents. Accordingly on 19 January, 1990, the zygote was implanted and unluckily, during pregnancy the relation between parties to surrogacy contract was deteriorated and give raise to lawsuit, whereby the intended parents seeking declaration that they were the legal parents of the unborn surrogate child. On this issue, the Californian Trial Court held that Marak and Crispina Culvert were the child's genetic parents, on the grounds that Johnson was a host rather than a mother to the child as the Uniform Parentage Act 1975 preferred genetic parenthood more than gestational parenthood. However the California Supreme Court upturned the ruling as because the Uniform Parentage Act did not provide any clear explanation as regards the genetic mother and gestational mother. So it determined firmly on the basis of essentials of contract law. Therefore the California Supreme Court ordered Johnson to perform the contract by relinquishing the child.

⁴ 851 P.2d 776, 782

6.1.4. *Jaycee B. Case*⁵

In this case, Jaycee was born as a result of a gestational surrogacy contract in between Luanne and John Buzzanca, the intended parents in one side and the surrogate mother in other side to carry and gave birth to a child. The intended parents had decided to implant an embryo through IVF created by using donated gametes. But unfortunately, Luanne and John Buzzanca separated from each other and the question arose regarding Jaycee's lawful parents. Luanne had claimed that she and her former husband John Buzzanca were the lawful parents; however John Buzzanca disclaimed any responsibilities. And the surrogate mother had also made no claim. Therefore, the trial court concluded that Jaycee had no lawful parents and the court declined to make a transitory child maintain order because it found that the unborn child was not yet a child of the marriage.

However in contrary to the conclusion of the trial court, the Court of Appeal held that intended parents are the lawful parents as it was sufficient to establish that the husband admitted signing the agreement for all purposes, which caused the child's conception.

6.1.5. *Aki Mukai Case*⁶

One of the most recognized cases of surrogacy involves Aki Mukai, a famous Japanese actress. In August 2002, Aki Mukai and her wrestler husband Nibuhiko Takada flew over to Nevada, US for commissioning surrogacy. There in

⁵ *Jaycee B. v. Superior Court* 42 Cal. App.4th 718 (1996)

⁶ (2007) Minshu Vol 61, No 2

US, Aki Mukai and her husband entered into a surrogacy contract with Cindy, an American woman, who agreed to act as a surrogate. For the process of surrogacy, the intended parents had desired to implant an embryo created by using their own ova (preserved) and sperm. Finally Cindy became pregnant and in November, she gave birth to twin baby boys, Banri Tadaka and Yuta Tadaka. After that the couple had planned to obtain the twin's Japanese citizenship through registration the children in Japanese Family Register as their natural children by using their US birth certificate. But their request was denied by the Mayor of Shinagawa on the ground that Mukai was not the birth mother of the twin. Subsequently, the Tokyo Family Court also confirmed the decision of Shinagawa on the same ground.

Then the intended parents went to the Tokyo High Court and the High Court overturned the decision of the Tokyo Family Court and ordered the Shinagawa to register the name of the children. However the Shinagawa aggrieved by the decision of the Tokyo High Court preferred appeal before the Supreme Court of Japan, and again the Supreme Court refused to register the name of the children as natural children of the intended parents on the basis of intended mother is not the mother who gave birth. Thus these children have to live as foreign residents with American citizenship and passport in the custody of japans citizens. It is really a very unwanted and conflicting position for children born out of international surrogacy arrangement; but in this case in absence of uniform legal principles applied domestic law only which not able to protect the best interest of children and interest of intended parents too.

6.2. Judicial Findings on Surrogacy in India

6.2.1. *Baby Manji Yamada v. Union of India & Another*⁷

This is the first case of India on commercial surrogacy arrangement. The fact of the case is that in 2007, a Japanese couple, Dr. Ikufumi and Dr. Yuki Yamada traveled to India to rent a surrogate mother to beget a child for them. And accordingly, they entered into a surrogacy agreement with Pritben Mehta, a married Indian woman having her own children, in Dr. Nayna Patel Infertility Centre in Gujarat, India. The intended parents had decided to implant an embryo into the womb of Pritben Mehta in the supervision of Dr. Patel through IVF, by creating an embryo from the sperm of Dr. Ikufumi Yamada and egg harvested from an anonymous Indian woman. But unfortunately in June 2008, the Yamada couple separated and on 25 July 2008, Baby Manji was born at Anand and due to marital conflict, Yuki Yamada refused to take the liability of the surrogate child as she is not related to the child genetically though Ikufumi wanted to raise the child, so he flew to India alone.

Now the problem arose that though Baby Manji had three mothers the intended mother, the surrogate mother and the genetic mother but none of them claimed parental rights over the baby and in surrogacy arrangement, there was nothing about such situation. Apart from this, there is no existing law also deals with such problem. Ikufumi wanted to take the Baby Manji to Japan. However the Japanese Embassy in India refused to award a passport to the baby as domestic law

⁷ (2008) 13 SCC 518, 2008 (11) SC 150

of Japan only recognizes the woman who gives birth to the baby. The Embassy said that since Baby Manji born in India, she needed an Indian passport and a no objection certificate to leave India.

After that Ikufumi bowed to the Indian govt. for help to adopt the child by him as a biological father of the child, but here also one another problem arose that under the Guardian and Wards Act 1890, single man does not allow adopting a baby girl but guardianship only. So Baby Manji was not allowed to leave hospital with Ikufumi. And though Ikufumi applied for Baby Manji's passport, the issuing authority required a birth certificate before issuing it. And for issuing a birth certificate the names of both father and mother is required. In this regard though Akansha Infertility Clinics certified that Dr. Ikufumi Yamada is Baby Manji's genetic father but the name of mother was not certain, to whose name should be recorded. Subsequently, the concerned Municipal Authority of Anand denied granting birth certificate to Baby Manji. And consequently the failure of production of the birth certificate also leads to refusal to issue passport by the passport authority. Thereafter, Dr. Ikufumi appealed the matter before the Govt. of India with a prayer to issue the birth certificate and affirmed that he is the genetic father of the Baby Manji. As a result, the concerned Municipal Authority of Anand, Gujrat gave a birth certificate, which containing only baby's father name.

In the meantime, due to expiry of visa, Dr. Ikufumi Yamada returned to Japan and his mother, Emiko Yamada, had come to India to look after the Baby in the hospital. As they received the birth certificate of Manji, the grandmother,

Emiko Yamada preferred a writ petition before a division bench of the Rajasthan High Court. And in this case the Hon'ble High Court given certain directions regarding production of Baby Manji were challenged and questioned the *locus standi* of the 'Satya' an NGO to file the petition of Habeas corpus. Hence, the case has raised the various complex issues of legal parentage, nationality and custody of the surrogate child.

After that the court appointed Baby Manji to the NCPCR constituted under the Commission for Protection of Child Rights Act 2005. The Solicitor General argued before the Supreme Court of India that the decision about Manji's passport was being deliberated upon by the Union Government on 15 September 2008. And Yamada's attorney insisted before the court that the guidelines issued by the ICMR stated that babies born through surrogacy to be considered as the legitimate children of their biological fathers. After that, the Rajasthan Regional Passport Authority issued an identity certificate as a part of a transit document without mentioning the baby's nationality, mother's name, or religion, and it was valid only for Japan. On 29 September, the Supreme Court of India, in its decision observed that, in India the surrogacy arrangement is neither invalid nor it is declared valid expressly under the ICA. But it held that commercial surrogacy was legal in India. Finally, the Japanese Embassy issued one year visa to Manji on humanitarian grounds on 27 October 2008.

The Hon'ble Supreme Court of India had made following observations regarding commercial and other forms of surrogacy while dealt with the matter upon the grandmother's claim to custody:

“That there is no law governing surrogacy in India and in the name of surrogacy; a lot of irregularities are being committed. According to it, in the name of surrogacy, a money making racket is being perpetuated. It is also the stand of the said respondent that the union of India should enforce stringent laws relating to surrogacy”.

Furthermore, the Supreme Court of India affirmed that:

“Surrogates may be relatives, friends or previous strangers. Many surrogate arrangements are made through agencies that help match up intended parents with women who want to be surrogates for a fee. The agencies often help manage the complex medical and legal aspects involved. In Surrogacy, the amount a surrogate receives varies widely from almost nothing above expenses to over \$30,000. Careful screening is needed to assure their health as the gestational carrier incurs potential obstetrical risks”.

Besides these, after completely understanding the existing surrogacy practices prevalent in India, the Hon'ble Supreme Court of India has observed some important points in Para.5, Para.6, Para 7, Para.8 and Para.9 of its judgment. These are :

Para.5. *“Surrogacy is a well known method of reproduction whereby a woman agrees to become pregnant for the purpose of gestating and giving birth to a*

child she will not raise but hand over to a contracted party. She may be the child's genetic mother (the more traditional form for surrogacy) or she may, as a gestational carrier carry the pregnancy to delivery after having been implanted with an embryo. In some cases, surrogacy is the only available option for parents who wish to have a child that is biologically related to them. The word "surrogate", from Latin "surrogare", means "appointed to act in the place of". The intended parent(s) is the individual or couple who intends to rear the child after its birth".

Para.6. "In "traditional surrogacy" (also known as the Straight method) the surrogate is pregnant with her own biological child, but this child was conceived with the intention of relinquishing the child to be raised by others; by the biological father and possibly his spouse or partner, either male or female. The child may be conceived via home artificial insemination using fresh or frozen sperm or impregnated via IUI (intrauterine insemination), or ICI (inter-cervical insemination) which is performed at a fertility clinic".

Para.7. "In "gestational surrogacy" (also known as the Host method) the surrogate becomes pregnant via embryo transfer with a child of which she is not the biological mother. She may have made an arrangement to relinquish it to the biological mother or father to raise, or to a parent who is themselves unrelated to the child (e.g. because the child was conceived using egg donation, germ donation or is the result of a donated embryo). The surrogate mother⁵ may be called the gestational carrier".

Para.8. *““Altruistic surrogacy” is a situation where the surrogate receives no financial reward for her pregnancy or the relinquishment of her child (although usually all expenses related to the pregnancy and birth are paid by the intended parent such as medical expenses, maternity clothing and other related expenses)”.*

Para.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 in India where due to excellent medical infrastructure, high international demand and ready availability of poor surrogates it is reaching industry proportions. Commercial surrogacy is sometimes referred to by the emotionally charged and potentially offensive terms “wombs for rent”, “outsourced pregnancies” or “baby farms”.*

Para.10. *“Intended parents may arrange a surrogate pregnancy because a woman who intends to parent is infertile in such a way that she cannot carry a pregnancy to term. Examples include a woman who has had a hysterectomy, has a uterine malformation, has had recurrent pregnancy loss or has a health condition that makes it dangerous for her to be pregnant. A female intending parent may also be fertile and healthy, but unwilling to undergo pregnancy”.*

Para.11. *“Alternatively, the intended parent may be a single male or a male homosexual couple”.*

From the above observation, it is apparent that ‘commercial surrogacy’ is a medical practice which is considered to be legal in India due to the factors mentioned in Para.9 of this judgment. However, the fact left behind that there is no statutory codified law governing commercial surrogacy and other arrangements of a similar nature.

6.2.2. *Jan Balaz v. Anand Municipality*⁸

This is another famous case regarding citizenship, legal parentage and custody of the surrogate children born through commercial surrogacy arrangement. In this case, a German couple had entered into a commercial surrogacy arrangement in India with an Indian surrogate to carry and gave birth to child by using sperm of the intended father, Jan Balaz and ova from Indian donor. Finally, the surrogate mother gave birth to twin baby boy- Nickolas and Leonard in 2008 at Anand, Gujarat. Accordingly, the twin registered as children of the intended father and the surrogate mother. The couple then faced the difficulty when they sought to return Germany with the twin as Germany’s state law does not accepted surrogacy as a means to paternity and therefore refused to award visas to the babies. On the other hand, the Govt. of India also refused to grant citizenship to them as they were surrogate children.

Thereafter, Jan Balaz approached to the Gujarat High Court. In this case the Gujarat High Court stated that the surrogate children could be considered as Indian because the surrogate mother was an Indian national, and so on, the surrogate

⁸ 2009 0 Supreme (Guj) 609, 2010 0 AIR (Guj) 21

children are also entitled to Indian passport. The Gujarat High Court stated that a lot of legal, moral and ethical issues arise out of the surrogacy arrangement, but which have no precedent in the country. However, in this case, the crucial point to discuss and observe is the rights of two innocent surrogate babies, amongst the issues related to the rights of biological parents, surrogate mother, or the donor of the ova. In relation to these the Gujarat High Court raised various issues such as,

- a. Is the ova donor is the real mother or the gestational mother?
- b. Can we brand them as legal orphans or stateless babies?
- c. Can we brand them as illegitimate babies?

Afterwards, the verdict of the Gujarat High Court was challenged by the Union Government and refusing to award citizenship to the babies on the view that they were surrogate children and preferred an appeal before the Supreme Court of India.⁹ Then, the judgment of the Gujarat High Court was stayed by the Hon'ble SC of India and the Hon'ble court devised a unique way to facilitate the onward movement of the surrogate children to Germany. Therefore the Hon'ble Supreme Court directed the Central Adoption Resources Agency (CARA) to grant as a one-time remedy the plea of the German couple for adoption of the twin as a special case. After that, the German couple went through the inter-country adoption process and finally Germany authorities agreed to provide the necessary travel document to the babies. But the appeal in this case is still pending in the Hon'ble Supreme Court of India. Few important issues raised in this case are:

⁹ *Union of India & another v. Jan Balaz and others*, Civil Appeal No. 8714 of 2010, Supreme Court of India, 2015 0 Supreme (SC) 1182, 2015 4 RCR (Civ)881, 2015 4 RCR (Cri) 807

- a. Whether in commercial surrogacy the surrogate mother is the only mother of surrogate child? The petitioner raises this issue in view of pain and suffering of the mother undergoes for nine months and the risk along with all psychological and emotional problems.
- b. Whether a lady donates her egg in connection with a commercial surrogacy, can she be said to be the mother?
- c. Whether both “surrogate mother” and “genetic mother” (who has donated the egg) can both be said to be mother of the surrogate child?
- d. Whether commercial surrogacy involved sale of a child in view of the fact that surrogate mother relinquishes her parental right for money?
- e. Whether commercial surrogacy amounts to renting of a womb?
- f. Whether commercial surrogacy is immoral and is opposed to public policy and therefore void Under Section 23 of the Contract Act?
- g. Whether commercial surrogacy as practiced in India amounts to economic and psychological exploitation of surrogate mother?
- h. Whether commercial surrogacy is conflicting with the dignity of Indian womanhood and in this way it violated Article 21?
- i. Whether commercial surrogacy involves trafficking in human beings as it involves sale of a surrogate child, relinquishment of the surrogate’s parental rights for money and involves rent of womb thus violating Article 23 of the Constitution?
- j. Whether commercial surrogacy should be prohibited?

- k. Whether import of human embryo amounts to commoditization of human life and thus violates Article 21?
- l. Whether human rights of a surrogate child born out of commercial surrogate are violated and as such child would face psychological and emotional problems?
- m. Legal system does not seem to have answer the following questions:
 - a) What happens if surrogate dies during child birth?
 - b) What can surrogate do if commissioning couple refuse to take child on the ground that it is abnormal of physical/ mental challenged?
 - c) Case when surrogate refuses to hand over child.
 - d) Remuneration of surrogate.
 - e) Who will bear the medical bills if surrogate falls ill?
 - f) What happens to unused eggs or embryos and who supervises their fate?
 - g) Should surrogacy arrangements be disclosed to child, if so, when?

6.2.3. *Jayashree Wad v. Union of India*¹⁰

The petitioner of this case Jayashree Wad, is a practicing lawyer of Supreme Court of India, has filed a public interest litigation (PIL) seeking ban on commercial surrogacy. Under Article 32 of the Constitution of India the writ was filed to issue a writ in the nature of writ/directions/mandamus to declare that:

¹⁰ W.P(C) No. 95/2015, pending before the Supreme Court of India and the Hon'ble SC connected it with *Union of India & another v. Jan Balaz and others*, civil appeal no. 8714 of 2010.

“(i) The commercial surrogacy contracts are opposed to public policy, unethical and violative of Indian womanhood under Article 21 of the Constitution of India as amounting exploitation of the surrogate woman.

(ii) To prohibit all the doctors, hospitals and other institutions from aiding and assisting in commercial surrogacy.

(iii) To prohibit entry of foreigners for surrogacy.

(iv) The Notification No. 52 (RE-2013)/2009-2014 dated 02.12.2013 issued by the Ministry of Commerce and Industry under section 5 of the foreign Trade (Development & Regulation) Act 1992 regarding the import of human embryo is void and *ultra vires* under the said Act, 1992 as the import of human embryo amounts the human trafficking because human embryo is not the goods, but a human being in miniature form”.

A bench of Justice Ranjan Gogoi and NV Ramana issued notices to ministries of home affairs, law and justice, health and family welfare, commerce and external affairs as well as ICMR, MCI and asked them to respond to the PIL.¹¹ On 14th October 2015, the same bench of Justices has recommended the prohibition on commercial surrogacy and import on human embryos. And the Hon’ble Supreme Court has issued notice to the Union Government for filing responses on it also has framed 14 issues those are almost similar with the issues made in *Union of India & another v. Jan Balaz and others*. The issues are:

¹¹ Times of India, New Delhi, “SC notice to govt on PIL seeking ban on commercial surrogacy”, Dhananjay Mahapatra, TNN, Feb 26, 2015, available at <https://m.timesofindia.com>india>.

- a. Whether in commercial surrogacy the surrogate mother is the only mother of surrogate child?
- b. Whether a lady donates her egg in connection with a commercial surrogacy, can she be said to be the mother?
- c. Whether both “surrogate mother” and “genetic mother” (who has donated the egg) can both be said to be mother of the surrogate child?
- d. Whether commercial surrogacy involved sale of a child in view of the fact that surrogate mother relinquishes her parental right for money?
- e. Whether commercial surrogacy amounts to renting of a womb?
- f. Whether commercial surrogacy is immoral and is opposed to public policy and therefore void Under Section 23 of the Contract Act?
- g. Whether commercial surrogacy as practiced in India amounts to economic and psychological exploitation of surrogate mother?
- h. Whether commercial surrogacy is inconsistent with the dignity of Indian womanhood and therefore violated of Article 21 of the Constitution?
- i. Whether commercial surrogacy involves trafficking in human beings as it involves sale of a surrogate child, relinquishment of the surrogate’s parental rights for money and involves rent of womb thus violating Article 23 of the Constitution?
- j. Whether commercial surrogacy should be prohibited?
- k. Whether import of human embryo amounts to commoditization of human life and thus violates Article 21? Whether the notification dated 2.12.2013 of the Govt. of India issued under S.5 of the Foreign Trade (Development

& Regulation) Act is violative of Articles 21 and 23 of the Constitution of India?

1. Whether human rights of a surrogate child born out of commercial surrogacy are violated and as such child would face psychological and emotional problems?
- m. Legal system does not seem to have answer the following questions:
 - h) What happens if surrogate dies during child birth?
 - i) What can surrogate do if commissioning couple refuse to take child on the ground that it is abnormal of physical/ mental challenged?
 - j) Case when surrogate refuses to hand over child.
 - k) Remuneration of surrogate.
 - l) Who will bear the medical bills if surrogate falls ill?
 - m) What happens to unused eggs or embryos and who supervises their fate?
- n. Should surrogacy arrangements be disclosed to child, if so, when?

Consequently, the Govt. of India has submitted affidavit on 4th November 2015 published the notification regarding the commission of surrogacy in India.¹² Subsequently, the Hon'ble Supreme Court has passed an order on 2nd December 2015, for prohibition of commercial surrogacy and the import of human embryo in India. It has also barred the entry of all foreign nationals from entering into surrogacy arrangement in India.

¹² Circular issued by the Department of Health Research, MH&FW, Government of India on 4th November, 2015, regarding Commissioning of Surrogacy- Instructions 2015

The study derived from all of those famous cases that surrogacy contracts are made enforceable only on the ground of best interest of the child. Irrespective of jurisdiction to determine the conflict of parenthood, custody and nationality, the welfare of the child is the paramount consideration of the courts. One more important thing which is realized during the study is made that though approach towards enforceability of surrogacy contract is different from one to another but the court may requires to pass such order which is required for the welfare of the child.

Apart from all those stated day by day some other complex problems are also come in to existence such as posthumous reproduction, which was questioned on rule against perpetuities and the fertile octogenarian.¹³ Retrieval, storage, and the usage of gametes after death raise significant legal, medical and ethical issues because through ART, one can have children at any age, including after they pass away.¹⁴ Besides these some other issues that cropped up where that on the human side of things surrogacy cases raise profound psychological implications, the relationship between consent and informed consent, etc.¹⁵

¹³ Supra note 1, p. 46

¹⁴ Ibid.

¹⁵ Ibid.