Judicial precedents & Policy making on Child care leave in Surrogacy in India

Introduction –

Contemporary Legislative & Judicial developments on Surrogacy in India -

Surrogacy is practiced as commercial, overseas permitting surrogacy for all including national, foreigners, same sex, singles, under medical tourism policy since year 2002 in India. In the absence of legislation, there is a national level medical guidelines on surrogacy by the premier national medical authority, Indian Council of Medical research ICMR, Ministry of health & family welfare Government of India in the year 2005. The Supreme Court of India formally legalized commercial surrogacy in a case pertaining to Japanese intending couple permitting overseas or transnational surrogacy in Baby Manaji Yamnda vs Union of India in the year 2008 leading to formulation of Assisted reproductive technologies (Regulation) Bill 2008. This bill has been revised in the year 2010, then in the year 2013 respectively. At present there is the ART Bill 2014 is the fourth revised draft of ART Bill since its first ever formulation in the year 2008 which is placed before the legislative body for deliberation, awaiting enactment. During this pendency of Bill in order to better regulate overseas surrogacy by foreign nationals in India, the Ministry of Home affair issued Home Ministry Guidelines 2012 excluding foreign same sex partners, singles from commissioning surrogacy along with other restrictions in India in the year 2012.

At present there is public interest litigation namely Jayashree Wad Vs Union of India.

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6 Assisted Reproductive Technology (Regulations) Bill 2013, §2 (zj), (Tentative Draft) Date Jun. 27, 2013, Legislative Department, Ministry of Law & Justice, Government of India [hereinafter ART Bill 2013].
India before Supreme Court of India seeking prohibiting on commercial, overseas surrogacy for foreigners in India for reason related to exploitation of poor Indian women. The final verdict is awaited. During this interim period of litigation, there is a prohibition on clinics to undertake, offer surrogacy services to foreigners, overseas couples.

Amidst these legal developments and legal wrangling, the judiciary through its pronouncements in four successive cases at different state high courts namely in K. Kalaiselvi vs Chennai Port Trust (Madras High Court), P. Geetha vs The Kerala Livestock Development Board Ltd (Kerala High Court), Rama Pandey vs Union Of India & Ors., (Delhi High Court) Dr. Hema Vijay Menon v. State of Maharashtra (Mumbai High court) respectively granted child care leave for the women commissioning surrogacy after granting legal recognition to the commissioning or intending mother as the legal mother on same equal footing as adoptive mother. The two of the recent ones are briefly discussed herein.

It is highly pertinent to consider that none of the four revised draft of ART bill even mentioned the provision of “child care leave for the intending mother or intending father or intending parents” or the surrogate mother. Equally it is significant to note that the judiciary is advancing a right based perspective, seeking to extend the exercise, realization of right to privacy family formation for all sections of society through beneficial interpretation of laws despite the absence of legislation on the same.

In the after math of these progressive judicial decisions the central government of India ushered beneficial child care leave policy for the central government employees using surrogacy for bearing child, attainment of parenthood by granting leave to both the intending mother and the intending father as well as for the surrogate mother for the same. Some of the most breakthrough provision is to provide child care leave to surrogate mother as equally as the intending mother and to grant paternity leave to the intending father.

9 Writ Petition (Civil) 95/2015.
10 WP(C) No. 8188/2012.
11 2015 (1) KLJ 494.
12 WP(C) No. 844/2014.
see also,
Hence there is development, evolution of Child care leave in case of surrogacy through government policy and judicial precedents. These landmark legal developments are discussed summarily below.

**Judicial Precedents -**

(i) Delhi High Court (HC) - *Rama Pandey vs Union Of India & Ors, 2014*[^14]

Delhi High Court grants “Maternity leave” to central government women employees having a child through surrogacy.

Brief facts - The petitioner named R. Pandey is a central government employee entered into a surrogacy arrangement leading to birth of surrogate twins the petitioner applied for grant of maternity leave along with surrogacy agreement and the birth certificate of the surrogate children. But this leave was not granted on the ground she wasn't the biological mother. The petitioner being aggrieved, filed, a writ petition under Article 226 of the Constitution to claim the same.

Delhi High court directions:

The Delhi HC held that “a commissioning mother is similarly circumstanced, as an adoptive mother” or “an adoptive parent is no different from a commissioning parent, which seeks to obtain a child via a surrogacy arrangement”. Thus entitled to similar child care leave. The HC held that denial of leave would be detrimental to both mother and child”[^15].

The Delhi HC enumerates the legal basis for grant of leave to commission mother under the existing leave rules, The HC identifies the legal void that the term “maternity leave” is not defined under the existing central government services rules1972 (Rule 43 - maternity leave) in the absence of such definition, there is nothing in law central services leave rules which bars or impairs such maternity leave for women attaining maternity through surrogacy, rather there is scope for inclusion of the same. The Delhi HC fills up this legal void by including commissioning mothers who are central government female employee having child through surrogacy under such leave Rules.


The HC held lays down the precedent that “a woman who is under central
government service as employee having a child through surrogacy is entitled to
maternity leave” thereby extending similar entitlement or benefit to all central
government female employee across the country to be followed in future cases.

Delhi HC lays down guidelines seeking childcare leave in case of surrogacy:

- A female employee seeking such leave is allowed to make an application
  at the pre-natal stage for maternity leave under sub-rule (1) of Rule 43,
central government service rules 1972 on grounds of attaining maternity
through surrogacy with necessary supporting documents including
surrogacy agreement, ART clinic medical documents and birth certificate
of child.
- Where both the commissioning mother and the surrogate mother are
  employees, who are otherwise eligible for leave one on the ground that she
is a commissioning mother and the other on the ground that she is the
pregnant women a suitable adjustment would be made by the competent
authority.
- The grant of such maternity leave including the leave timing and the period
  of leave is left to the decision of competent authority who is required to
grant the same after scrutiny of such application, material documents as
submitted before them.
- Maternity leave may be sought at the pre-natal stage or at the post-natal
  stage, but in case of former there is a greater scrutiny and the leave may be
 denied
- In case the application for grant of leave is made for the post-natal stage,
  the general rule permits “ordinarily grant of such leave”, unless there are
“substantial reasons” for declining the same.
- In case of denial of leave either the pre-natal or post-natal leave the
  competent authority would pass a reasoned order specifying reasons for
denial of such leave with regard to the material placed before it.

(ii.) Mumbai High Court - *Dr. Hema Vijay Menon v. State of Maharashtra, 2015*\(^{16}\) - Mumbai High Court held “woman attaining having a child through
surrogacy was entitled to maternity leave for 180 days”\(^{17}\).

\(^{16}\) 2015 SCC OnLine Bom 6127.
\(^{17}\) Apoorva Mandhani, Women who obtain baby through surrogacy entitled to maternity leave: Bombay HC
Facts - Petitioner Central Railway (CR) employee applied for maternity leave before the birth of the surrogate child under Rule 551(C) Railway Services (Liberalised Leave) Rules, 1949 before the CR Board for taking care of a child born through surrogacy. The Railways board, maintained that there is no such provision on maternity leave for a mother having child through surrogacy and directed the petitioner to apply for child care leave. Following the birth of twins, this CCL was also subsequently rejected. The CR imposed a condition that in case of denial of CCL it would amount to leave without pay. The petitioner challenged this refusal by filing petition against the employer CR seeking the same before the Bombay High court.

Mumbai high court directions –

The term “mother” to include within itself a “commissioning mother securing a child through surrogacy” under the Railway service (leave) Rules, after observing that “there is nothing in Rules 551(C), (E) of Child Adoption Leave and Rules, that would disentitle maternity leave to a women who has attained motherhood through surrogacy procedure.”

- A “woman having a child through surrogacy was entitled to maternity leave for 180 days” and directed the Central Railway to grant the same to its woman employee.
- “There should be no discrimination among women in entitlement to maternity leave on the ground using surrogacy to attain maternity”.
- Grant of maternity leave to commissioning mother is in consonance with the objective, meaning of maternity leave. The purpose, meaning of maternity leave is inclusive of pre-natal, post-natal periods, the grant of this leave pertains to the post-natal aspect of maternity leave wherein in terms of post-natal maternal functions the commissioning mother is similarly situated and performs similar functions as any other natural or biological mother, the commissioning mother performs all the post-delivery motherhood functions including to receive custody of newly born child immediately after birth, for taking care, rearing of such new born child taking into consideration the special needs of child during the first year of life as this is crucial for development growth of child and requires maximum attention care, to develop or build emotional bonding or psychological attachment with the child, for breastfeeding of child, thus such leave is in the best interest of child for early care, growth development survival right to life of child. In keeping with these, denial of maternity leave to commissioning mother would result in frustrating the object of providing maternity leave to a mother.

Hence grant of maternity leave to the commissioning mother is held imperative.
Common Inferences from both the judgements by the Bombay and Delhi High court -

These Judicial pronouncements laid down by the Bombay and Delhi High court share a common underlying reasoning or ratio that “a woman having a child attaining maternity through surrogacy or having a child through surrogacy was entitled to maternity leave for 180 days”.

- Both these case are significant for establish the right to motherhood with the intending or commissioning mother, by giving legal recognition to motherhood through surrogacy even in the absence of legislation on surrogacy.
- Both these judgements refereed and upheld the previous landmark precedents laid down by in *K. Kalaiselvi vs Chennai Port Trust*, *P. Geetha vs The Kerela Livestock Development Board Ltd.* where in the female employee having a child via a surrogacy arrangement was granted child care leave by the high courts.
- Both these judicial pronouncements similarly invoke Directive Principles of the States policy, Part IV Indian Constitution under Article 39(f), Article 45 State obligation to provide early childhood care, opportunities and facilities to develop in a healthy manner. Similarly, India’s treaty obligation following signing, ratification of United Nations Convention on Rights of Child (UNCRC 1989) Article 6) state obligation to ensure maximum extent possible right to life, survival and development of child.

Apart from judicial decisions this progressive development has trickled down and similarly influenced state government policy making as well. The State government through issue of circular to this effect has initiated similar child care leave policy for its state government female employees using surrogacy.

**Maharashtra State Government- child care leave for state government women employees using surrogacy, January 2016**:

The Maharashtra state government is hailed as the first state in the country to issue a government resolution (GR), State Government Finance Department on January 2016 by granting uninterrupted maternity leave up to 180 days to state...
government women employee having children through surrogacy following from the date of birth of surrogate child granted only once in the employee’s tenure of service. Pursuant to making an application to the concerned authority along with necessary supporting, medical documents or certificates as required.

However, this state level development sets a persuasive precedent to be emulated and similarly incorporated in other states in near future.

**Government of India, Policy making on Child Care leave -**

**Ministry of Labour proposal of 2 weeks of paid leave for women using surrogacy, year 2015**

The Ministry of Labour in the previous year 2015, sought to amend the Maternity Benefit Act, 1961 by introducing series of progressive provisions including that women having a child through a surrogacy to be eligible for 12 weeks of paid leave, this is submitted for legislative (cabinet) approval.

**Central Government of India proposed policy on Child care leave in surrogacy for central government employee, April 2016**: Beneficiaries including intending mother, paternity leave for intending father surrogate mother:

In the wake of these progressive judgements providing for beneficial wider interpretation of the central government service rules on maternity leave by extending the same to include women attaining maternity through commissioning surrogacy, the central government within a time span of less than a year, the central government proposed child care leave to all the central government female employees either as surrogate mother, intending mother as well paternity leave for intending father for the first time ever in India despite the absence of legislation on surrogacy in India.

**Child care leave (CCL) , Office Memorandum issued by the Department of Personnel and Training (DoPT), April 2016**

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The most distinct feature of this Central Government Memorandum is its inclusive, broad scope extends child care leave to both surrogate mother, intending mother for the first time in India for two main reasons firstly to provide for special care for the newly born child, breastfeeding and to build emotional bonding or attachment between the mother and the child. It may be significant to note that the earlier state directives, judicial decisions only granted CCL to the intending or commissioning mother who used surrogacy to have child and not to surrogate mother. There was no paternity leave for intending father before this proposed circular.

- The intending or commissioning mother and the surrogate mother both are granted 180 days or around six months CCL.
- The CCL may be availed only when both the intending mother, surrogate mother are central government employees.
- Male central government employees who are the intending or commissioning fathers using surrogacy are allowed to avail paternity leave for the first time in India.
- Central government female employees are permitted to avail Leave Travel Concession (LTC) reimbursement for travel costs, tickets fare for such travel undertaken while availing such child care leave. (eg. travel to home town, travel to another city.)

**Additional safeguards in CCL for disabled child**-

There are additional provisions in CCL for disabled child, considering this special health needs of the disabled child.

- In case of disable child, a women employee of central government is allowed child care leave upto 730 days or around two years during their entire service and the maximum age limit of 18 years is removed in case of disabled child and CCL is made irrespective of age limit.

It may be noted that this provision may be equally applicable to the disabled surrogate child as any other child.

These rules are yet to be enforced. For details these service (leave) rules are available on the website of the department of personnel and training (DoPT), central government of India. [http://persmin.gov.in/dopt.asp](http://persmin.gov.in/dopt.asp)
End remarks:

While on one side the ART Bill 2014 is being revised, deliberated awaiting long pending enactment, but nonetheless, these court rulings, government of India policy paves way for creating a favourable condition for promoting of surrogacy in India.

The judicial acumen, expertise beneficial, progressive interpretation of Indian judiciary, coupled with policy making of government of India, state development for seeking to uphold the most basic, cherished individual legal and human rights is laudable, praise worthy.