

Public interest litigation PIL challenging commercial, overseas, same sex, single surrogacy in India – contemporary legal judicial developments.

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Case Title - *Jayashree Wad vs Union of India*¹

Key words – Surrogacy commercial, transnational or overseas, India ART Bill, surrogate motherhood , exploitation, commodification, import, gametes, embryo, trade, trafficking.

A Public interest litigation (PIL) is filed by Jayashree Wad, an advocate on record in Supreme Court (SC) in January 2015.

Prayer sought in PIL from the Supreme Court –

The primary objective of this PIL is to seeks necessary action from the SC towards the following

to prohibit commercial, transnational or overseas surrogacy in India,

to control exploitation of poor marginalised Indian women surrogates in the course of surrogacy,

to prohibit export or import of gametes, embryos in India for using in commercial overseas surrogacy.

to prevent trafficking in human life form in the forms of inter country movement or import or export of gametes, embryos,

to address the legal void or absence of legislation on surrogacy,

to seek enactment of stringent law controlling the same,

to establish commercial surrogacy as unethical against public policy,

among other ancillary issues pertaining to the same.

The main contentions raised in the PIL are summarily stated as below –

Commercial surrogacy and overseas or transnational surrogacy are sought to be prohibited in India for exploitation of poor Indian women acting as surrogate mothers for foreigners,

¹ Writ Petition civil no. 95 of 2015 yr.

In the absence of any legislation on surrogacy, Surrogacy has become a million dollars industry, a business like operation conducted for profit-making or satisfaction of commercial vested interest of doctors, clinics, to satisfy interests of rich or affluent couples.

Surrogacy in commercial form involves *commercialization of motherhood* , *commodification of women's body* as women let on hire their gestational services or wombs to a third party or married couple for commercial purpose or monetary fees.

Motherhood is made into a womb renting business constituting a form of exploitation entailing use of women body (uterus or womb) for commercial returns which is *violative of right to life, liberty, dignity of women under Article 21 of Indian constitution*.

India has become a "*thriving market for surrogacy*" or a *reproductive tourism hub for foreigners*" owing to easy abundant availability of poor Indian women to act as surrogate mothers offering their gestational services at one third or one fifth of the price in other nations or in their respective country coupled with favourable conditions as low medical costs of treatment in India, lax or no laws on surrogacy in India. These foreigners availing surrogacy in India while it is prohibited in their country or too expensive or too strictly regulated or restricted in their country giving rise to legal complexities, exploitation of Indian women surrogates.

The PIL advocating, seeking for ban on commercial surrogacy reiterates and refers to the landmark case of "*Baby M*", *New Jersey, US 1987* where in the New Jersey supreme court struck down "*commercial surrogacy*" as "*a form of human trafficking*" or "*sale of human beings*", the court declined to enforce commercial surrogacy agreement, the PIL also seeks similar direction from the SC to prohibit commercial foreign surrogacy for the same reasoning in India.

The PIL describes the adverse *impact on the physical and psychological health of the surrogate mothers*, the physical health risks arising out of surrogacy and along with mental or psychological health implications, stress, and mental trauma affecting the surrogate mother's mind following the biological and hormonal changes in surrogate mother.

The PIL describes the *disadvantaged, exploitative socio economic background of Indian surrogate mothers*, in commercial surrogacy, women from a particular sections of society belonging to poor and lower middle-class strata are particularly exploited". The women who act as gestational carrier or surrogate mothers are from particularly marginalized class, these women are largely poor,

even some are living below the poverty line, barely literate or educated, thus these women are being exploited, victimized in the process of being surrogate mother.

Lack of information, understanding of surrogacy agreement among Indian surrogate mothers, women resort to be surrogate mothers or gestational carriers without any information, understanding on the risks arising therefrom solely to alleviate their own constrained, stringent economic condition seeking to earn monetary payment in return for the same. There is no consent rather there is economic coercion due to their poverty causing rendering them to be surrogate mothers for the promise of monetary payment.

Financial gain by taking *undue advantage of marginalized socio economic condition of poor surrogate mothers*, in commercial surrogacy, there's exploitation of women from poorer sections of society and their vulnerabilities by the affluent rich class of doctors, couples. There is an element of commercial or financial gain by the doctors, hospitals and institutions involved in the same by taking undue advantage of the marginalized socio economic condition , of these poor women or surrogate mothers , this amounts to exploitation of women for commercial gains,

Trade import of gametes or embryos as a form of trafficking or sale of human life, in order to facilitate commercial, transnational surrogacy, import of human gametes or embryos belonging to couples or donors from foreign countries into India is taking place for implantation in the surrogate mother for bearing children for the foreigner couples in the guise of goods causing trade in human life amounting to trade, sale or trafficking in human beings which is prohibited, penalized by law in India. Trafficking in humans is a punishable offense in India under constitution (Article 23) as well as statutory law namely Indian Penal code.

With regard to this issue of import or trade in human embryo, gametes, the PIL refers to the Commerce Ministry notification December 2, 2013 which allowed import of embryo as 'goods'. The PIL argues that "Human embryo is human being in miniature form, cannot be classified either as 'goods' or 'service'. The notification is thus illegal and requires to be quashed".

At the outset, the PIL seeks to establish larger public interest in prohibiting commercial, overseas or transnational surrogacy, for the purpose of protecting or preventing the poor sections of women from exploitation in all forms physical or psychological, as well as to check commercialization of motherhood, to control trafficking in the form of trade of human embryo or life forms, other exploitative practices in the guise of surrogacy on women, therefore in the larger interest of society women health seeks to ban surrogacy,

Supreme Court directives while adjourning PIL² --

Pursuant to the issues raised in PIL, the Supreme Court issued notice to the concerned government departments namely Ministry of Home affairs, Law and justice, Health and Family welfare, Commerce and External affairs as well as the Medical Council of India (MCI) and the Indian Council of Medical Research (ICMR), seeking the response, perspective of these concerned Ministries on prohibition of commercial surrogacy and prohibition on foreigners commissioning surrogacy in India, alleging exploitation of poor Indian women, the long delayed absence of law & the status of legislation on surrogacy in India to be replied within the stipulated time period of 4 weeks from the date of issue of notice.

In response to the notice, the central government submitted its stand or response by filing an affidavit stating the government seeks to prohibit commercial surrogacy and overseas surrogacy thereby not permitting foreigners to commission surrogacy in India towards this objectives the central government proposed a revised ART Bill 2014 to be produced for deliberation, enactment.

ICMR Circular ban on foreigners commissioning surrogacy in India³ -

Following this government affidavit, The ICMR under the aegis of the Health Ministry, through issue of circular directed all ART centres, fertility clinics “to halt surrogacy for foreign couples for availing surrogacy services in India from the date of issue of the circular with immediate effect” and “not to initiate any surrogacy for foreign intending couples” and “directed all ART centres, fertility clinics to provide surrogacy services only to Indian heterosexually married couples.

The Central Government through its concerned Ministry directed the Foreigner Regional Registration Office (FFRO), Embassy office that “No Indian mission or foreign office shall issue visa to foreign nationals for commissioning surrogacy in India”. The circular also prohibits such Indians including Overseas citizen of India from commissioning surrogacy in India.

This circular would remain in force until Parliament passes legislation regulating surrogacy. The purpose of such circular is to impose stringent control and curbs

² Dhananjay Mahapatra, SC notice to govt on PIL seeking ban on commercial surrogacy, TNN, Feb 26, 2015 available at <http://timesofindia.indiatimes.com/india/SC-notice-to-govt-on-PIL-seeking-ban-on-commercial-surrogacy/articleshow/46376012.cms>(last visited May 5, 2016).

³ Anuradha Mascarenhas, Surrogacy ban for foreign couples sends ART centres in city in a tizzy, Pune, December 25, 2015 available at <http://indianexpress.com/article/cities/pune/surrogacy-ban-for-foreign-couples-sends-art-centres-in-city-in-a-tizzy/#sthash.Xes0f1Ow.dpuf>(last visited May 5, 2016).

on a million dollar commercial, overseas surrogacy industry that raises concerns about exploitation of women.

The central Government proposed ART Bill 2014⁴-

Following the court notice, the centre government proposed revised ART Bill 2014 for deliberation, consultation to be enacted. Some of the salient features of ART Bill 2014 are as follows:

Prohibition on foreigners from commissioning surrogacy in India in order to check exploitation, victimization of women.

Permissibility to surrogacy only as an exception for those foreign residents with family origins in India to commission surrogacy in India and avail services of Indian surrogates.

To provide for altruistic surrogacy, Prohibition on commercial surrogacy.

In the course of subsequent court hearings April 2016, the supreme court identified certain issues and sought response from the central government on the legal basis or the authority law or mechanism or the policy under which OCIs are banned from commissioning surrogacy despite the fact of draft ART Bill providing for the same ,

The court inquired from the Government the status of the ART Bill and the consultation undertaken on the same along with its introduction in parliament for enactment

The Government counsel on behalf of the Central government has *refused to relax prohibition on foreigners or OCIs from commissioning surrogacy in India*. The government counsel has enumerated reason for such ban on foreigners and OCI in commissioning surrogacy in India

To *prevent economic, health exploitation of poor Indian women* surrogates by foreigners most of the foreign nationals including OCIs commission surrogacy in India owing to avail gestational services of “cheap surrogate mothers” are available in India.

To avoid *inter country legal differences on surrogacy*, OCIs, foreigners commission surrogacy in India because surrogacy is banned in their respective country or not granted legal recognition in their country

⁴ Hansindia ,ART Regulation Bill, 2014, THE HANS INDIA November 04,2015, available at <http://www.thehansindia.com/posts/index/2015-11-04/ART-Regulation-Bill-2014-184404> (last visited May 5, 2016).

To prevent cases of *stateless surrogate children*, in many cases commissioning surrogacy in India by the foreigners results in denial of visa and citizenship to the surrogate child born to such foreign nationals in India leading to stateless, parentless surrogate child stuck in India. The government maintained that the government does want “bear the burden of stateless surrogate children”

To *avoid same-sex surrogacy in India* in the absence of law granting legal recognition to same sex couples in India, many foreigners who commission surrogacy in India are same sex partners gay and same-sex couples commissioning surrogacy in India is prohibited,

Intervention Pleas filed in PIL –

In the course of hearing of this PIL, there are series of intervention pleas filed before the Supreme Court in this case seeking to contest the proposed government proposed stand on prohibition of commercial, overseas surrogacy in India in the same.

- **Medical Bodies filed a plea for intervention in the PIL *Jayashree wad Vs. Union of India, SC*⁵ -**

(INSTAR), Indian Society for Assisted Reproduction (ISAR) and Federation of Obstetric and Gynaecological Societies of India (FOGSI), Indian Medical Association (IMA) members have all filed a plea for intervention in the PIL before the Supreme Court seeks to challenge ICMR circular directing sudden halt of surrogacy services to foreign couples Health on the ground of being such hasty, undemocratic, non-transparent, pre-empted decision binding on the clinics without any prior intimation, consultation with the concerned stakeholders including the medical bodies. The Medical body sought explanation from the Ministry of Health for the same. The Medical body challenged manner of enactment of ART Bill 2014, the Bill is released, tabled for enactment even before any consultation, non-deliberation, without collecting feedbacks, suggestions from the concerned stakeholders.

The Medical bodies have raised crucial issues on the plight of a number of such couples who are differently situated in the course of ART treatment towards surrogacy including women undergoing hormonal treatment in preparation for egg retrieval extraction implantation to be surrogate mother, along with such surrogate mothers or women who are at different stages of their gestational pregnancy towards delivering surrogate child.

⁵ Nozia Sayyed, Docs move SC against ICMR surrogacy rule, Pune Mirror | Nov 26, 2015, available at <http://www.punemirror.in/pune/civic/Docs-move-SC-against-ICMR-surrogacy-rule/articleshow/49926644.cms> (last visited May 5, 2016).

The Medical body met with the Prime Minister's Office (PMO) on this issue to express their concerns in November 2015.

- **A group of surrogate mother filed an intervention plea in the PIL *Jayashree wad Vs. Union of India, SC*⁶-**

A group of surrogate mothers from Delhi , Gujarat and other states in India has filed an application for intervention in the PIL before the Supreme Court challenging the ICMR Circular and Government order which prohibited foreigners from availing surrogacy in India and their plea sought direction from the court to withdraw the ICMR circular on the ground of circular being "discriminatory and unreasonable". The surrogate mother contend that "motherhood should not be divided or discriminated on the basis of caste, colour, creed, nationality or citizenship..."

These surrogate mothers reasoned their decision to be surrogate as a part of their bodily autonomy, choice or decision making pertaining to their body, personhood, that "each woman has the right to take her own decision to become or not to become surrogate mother",

These surrogate mothers expressed their concern as this deprives these women their rights to livelihood by acting serving as gestational carrier or surrogate mother helped them to support their livelihood, fund education for their children and that these poor women pleaded that "they will suffer irreparable loss and injury" if the circular is given effect or if otherwise.

These surrogate mothers challenge the circular on the ground of "breach of principle of natural justice" as these women are the integral part of the surrogacy arrangement, they had neither been prior informed, nor consulted, nor included in the deliberation, enactment of the ART Bill.

- **Overseas Citizenship of India (OCIs) file petition before SC**⁷-

A group of overseas citizens of India (OCIs) filed a petition to challenge the Central government notification disallowing them from commissioning

⁶ Prabhati Nayak Mishra , Surrogate mothers seek Supreme Court's intervention, DNA, 26 November 2015, available at <http://www.dnaindia.com/india/report-surrogate-mothers-seek-supreme-court-s-intervention-2149015> (last visited May 5, 2016).

⁷ Bhadra Sinha, Overseas Indians challenge govt order on surrogacy, Hindustan Times, New Delhi, Mar 18, 2016 available at <http://www.hindustantimes.com/india/overseas-indians-challenge-govt-order-on-surrogacy/story-1X3k8Ku7YEeYK7FSq1BH3H.html>(last visited May 5, 2016).

surrogacy in India on the ground of discrimination on nationality, residence, citizenship.

Latest development on the draft legislation on Surrogacy, ART Bill – Change in legal paradigm, policy making from earlier ART Bill 2014 to Surrogacy Bill 2016⁸-

During the pendency on hearing of PIL, taking after the SC query on the status of the draft legislation on surrogacy, the Government has recently proposed a novel legislative proposal of Surrogacy Bill 2016 as distinguished

The new government narrowed down the proposed Assisted Reproductive Technology Bill (ART) by proposing for a distinct separate, new Surrogacy Bill 2016 solely to address, deal with the issues related to “surrogacy” only in exclusion of other ART Techniques,

Surrogacy Bill 2016⁹-

The Bill address the issues, concerns associated with surrogacy only.

The Bill is aimed at making parentage of such children legal and transparent

The Bill seeks to safeguard the rights and interests of surrogate mothers and children to be born out of surrogacy.

The Bill seeks to prohibit foreigners from commissioning surrogacy in the country to prevent exploitation of women.

The Bill seeks to provide surrogacy only for heterosexually married Indian couples only in India.

This is a new Bill which has not be issued in public domain, nor subject to civil society public consultation.

⁸ Teena Thacker, Assisted Reproductive Technology Bill will focus only on surrogacy May 06, 2016, available at New Delhi, <http://www.asianage.com/india/assisted-reproductive-technology-bill-will-focus-only-surrogacy-863> (last visited May 5, 2016).

⁹ Press Trust of India, Draft Surrogacy Bill to be placed before GoM for consideration, New Delhi May 6, 2016 available at http://www.business-standard.com/article/pti-stories/draft-surrogacy-bill-to-be-placed-before-gom-for-consideration-116050600928_1.html(last visited May 5, 2016).