



Jus Corpus Law Journal

Open Access Law Journal – Copyright © 2021 – ISSN 2582-7820
Editor-in-Chief – Prof. (Dr.) Rhishikesh Dave; Publisher – Ayush Pandey

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Case Comment: Baby Manji Yamada vs Union of India: Birth of an unfulfilling Judgement

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Received 19 June 2021; *Accepted* 01 July 2021; *Published* 05 July 2021

INTRODUCTION

Baby Manji Yamada was born on 25th July 2008 in Anand, Gujarat. What makes this fact so special is that despite having Japanese parents, the baby was born to an Indian surrogate. The hiring of a surrogate – or a “womb for rent” – has become a common practice in India, especially in areas like Anand, which are known as the “hubs” for commercial surrogacy.¹ The people engaging in such contracts are usually well-off couples who are unable to bear a child, most of whom travel from different countries solely for this purpose. In *Baby Manji Yamada v Union of India*, Manji Yamada’s parents, who were from Japan, opted to take the commercial surrogacy route as well.² Following matrimonial disputes between the parents, they separated, and only the father remained willing to adopt the baby. However, the father’s visa expired before the birth of the baby, compelling him to return to Japan. The problem, in this case, arose when the NGO Satya took issue with baby Manji’s parental status and the lack of clarity

¹ Sujana Suresh, ‘Baby Manji Case Analysis and Surrogacy in India’ (*Ex Gratia Law Journal*, 2010) <<https://exgratialawjournal.in/blawg/women-and-law/baby-manji-case-analysis-and-surrogacy-in-india/>> accessed 14 June 2021

² *Baby Manji Yamada v Union of India* AIR (2009) SC 84

regarding surrogacy laws and filed a PIL for the same. Visa restrictions disallowed the father from returning, so the baby's grandmother travelled to India to handle the adoption process and the ongoing case involving the baby instead. The grandmother countered the PIL by filing a petition; it was argued that neither did the PIL carry any element of public interest nor did the NGO have any locus standi to file a habeas corpus petition. In its final decision, the court allowed baby Manji to return to Japan along with her grandmother. Although this case holds immense importance in leading the change towards recognizing surrogacy as a valid means of having a genetic child for parents who cannot have their own, the judgement majorly fails to provide relevant details regarding surrogacy guidelines in India. This paper aims at analysing the various ways through which the judgement remains unfulfilling and the gaps that the judgement has failed to bridge.

SURROGACY THROUGH A LEGAL LENS

Surrogacy is an arrangement that is seen as a boon to all the parties involved. As said in a report by the Indian Council of Medical Research (ICMR), "the parents construct the child biologically, while the child constructs the parents socially."³ Those families who cannot bear a child for any reason, or who do not wish to go through the process of pregnancy but still wish to have a child find their wish fulfilled, and on the other hand, the surrogate either has money to gain from the arrangement or gets the gratification that comes with fulfilling a said wish for a family. Looking at surrogacy from this angle, it seems to play the role of a savior to both parties. Considering the importance that surrogacy holds for both the surrogate and intended parents, it is then a matter of the utmost importance that there be legal safeguards to all of their rights with respect to each other. At the time, there were barely any legislations surrounding surrogacy and commercial surrogacy was at no point before this case illegal in India. In 2005, the ICMR released the National Guidelines for Accreditation, Supervision & Regulation of Assisted Reproductive Technology (ART) Clinics in India after years of research and debate amongst medical professionals. However, it is to be noted that these guidelines

³ 'Guidelines For Accreditation, Supervision & Regulation Of Art Clinics In India' (*Indian Council of Medical Research, National Academy of Medical Sciences (India)*, 2005)

<https://main.icmr.nic.in/sites/default/files/art/ART_Pdf.pdf> accessed 14 June 2021

had no legal backing; any attempt to enforce it would be lacking necessary statutory buttress, and the usage of the same would be left to the discretion of the clinics.

WHY THIS JUDGEMENT MUST BE CRITICISED

The case stands out due to the fact that it does nothing to stand out. Where it could have addressed major points of public policy with respect to the parties involved, the court chose not to do so. Such a situation had previously remained unheard of in India despite the prevalence of surrogacy arrangements. Factoring in the aspect that courts had failed to take cognizance of surrogacy guidelines/laws in India for many years prior to this case, it only seems right that the apex court is mindful of this and provides an elaborate judgement that is inclusive of all the necessary elements. Being the first such case to be brought up in the apex court, the judgement did not have any case to refer back to. As such the onus falls upon the court to ensure that all facets of the case are discussed at length – especially those which heavily lack legal backing, such as surrogacy guidelines in India. One party whose rights, in particular, are not taken into account is the surrogate. When the court discusses surrogacy at length, it cannot fail to consider the rights of the surrogate. Surrogacy and surrogates are intrinsically linked – one cannot comment upon surrogacy laws without talking about the rights of surrogates. Without any proper surrogacy laws in place, the exploitation of surrogates is only a notch away from becoming commonplace.

Looking at the extent to which this case deals with commercial surrogacy, it seems distasteful that the court failed to acknowledge the rights of surrogates. Around the time of this case, the reproductive tourism industry in India stood at 2.3 billion USD and continued progressing rapidly⁴, this is owing to the cheap healthcare and flexible laws that existed at the time. Intending parents travel to India from various countries in order to opt for a fairly easy commercial surrogacy procedure. Indian surrogates usually hail from weak economic backgrounds who involve themselves in surrogacy arrangements as a means to earn large sums of money. However, surrogates are often conditioned into living out their pregnancy months in the same space as the other surrogates, without having the freedom to meet their

⁴ Priya Shetty, 'India's unregulated surrogacy industry' (2012) 380 *The Lancet*, 1633–1634

families too often. They find themselves in a position of having their liberties severely curtailed by surrogacy agencies and clinics, to the point that they control “what the surrogate eats, drinks, how much exercise she gets; in short, they run her life.”⁵ This can be seen as sheer exploitation of the surrogate, which although may not be the norm as of now, is slowly normalized due to the lack of any regulation. The court hinted towards the exploitative nature of surrogacy by making references towards surrogacy becoming a booming business involving surrogates that belong to low-income families, but neither did the court take cognizance of this issue nor did it elaborate upon the missing laws that could have dealt with the same. Instead, the court delegated the responsibility of deciding on the legality and other modalities of surrogacy arrangements to the National and State Commission(s) for the protection of child rights.⁶ Moreover, the court also neglected in stating a reason for not delving into the locus standi of NGO Satya. All these aspects make the judgement feel very rushed.

THE ISSUE SURROUNDING CONTRACTUAL AGREEMENTS

We can see the court favoring the contractual arrangement over anything else.⁷ The mere existence of such a contract is assumed to vitiate the question of the legality of commercial surrogacy itself. It is as though the issue of the legality of commercial surrogacy has taken the backseat in this case. However, relying on such a contract bears with it its own risks, which can be seen in the later case of *Jan Balaz v Anand Municipality*, wherein the absence of legislation to guide the court, they chose to recognize the surrogate as the natural mother.⁸ Especially when the intended parents and the surrogate are from different countries, the different laws binding each of them come into play. As such, even an extensively drafted contract in the lack of legislative safeguards can leave the parties involved, especially the surrogate, in a vulnerable spot. It also cannot be ignored that carrying a child in one’s womb carries with it extensive psychological consequences and it becomes too easy for the surrogate

⁵ *Ibid*

⁶ Jwala D Thapa, ‘The ‘babies M’: The relevance of baby Manji Yamada v. Union of India (UOI) and in the matter of baby “M”’ (2011) 2 Journal Of Indian Law And Society 19

⁷ Shriya Misra, ‘Commercial surrogacy – The need for regulation’ (*Legal Services India*, 2014)

<<http://www.legalservicesindia.com/article/1188/Commercial-Surrogacy.html>> accessed 15 June 2021

⁸ *Jan Balaz v Anand Municipality and Ors* AIR (2010) Guj 21

to get attached to the child, even if not their own genetic offspring.⁹ Without legislation to dictate the limits and the extent of the rights of the parties involved, and with the contractual agreement being given utmost importance, these psychological consequences too are often ignored. A similar insensitivity towards the rights of the surrogate is shown in proposed legislation post *Baby Manji Yamada*, with the most recent one being the Surrogacy (Regulation) Bill, 2019. By severely restricting the scope of surrogacy and outright banning commercial surrogacy, the Bill fails to take into account the fact that some women depend on such arrangements for their income and that exploitation of women can take place even within an altruistic surrogacy arrangement.¹⁰

CONCLUSION

While the court goes into detail about what surrogacy means, the types of surrogacy procedures, etc., it fails to delve into the grey area within which lie the surrogacy laws of India. They fail to consider the multiple facets which lie within this case, including the rights of surrogates in India, or the protection of the child, and show a one-dimensional view of a multi-dimensional problem. This case has come to be seen as the catalyst for the change in surrogacy laws, despite it not providing any groundwork for the same. While the decision of the court to allow the paternal grandmother to take away the baby is not one to be disputed or discouraged, the logic leading up to it is rather arbitrary and leaves a lot of gaps to be filled. When a case is built upon no legislative foundation, solely focusing on the final judgement may lead to there being more discrepancies. The judgement displays a surprising lack in providing concrete reasons for upholding the legality of surrogacy, especially considering there had been no development regarding surrogacy laws in India before this case. It skirts the broader points of law concerning the legality of surrogacy without laying any guidelines or restrictions of their own, or even directing the legislature to do so despite being aware of the social consequences inherently present with such arrangements.

⁹ *In the Matter of Baby M*, 217 NJ Super 313 (1987)

¹⁰ Ranjit Malhotra, 'Highlights and brief analysis of the Surrogacy (Regulation) Bill, 2020 and suggested potential safeguards' (International Bar Association, 2020)
<<https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=B5C65969-4901-49A9-82CF-8DC4C8BEB1E2>>
accessed 15 June 2021