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Analysis of the Impact of Hindu Personal Laws on Marriage and Succession of the Surrogate Child

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Indian society is a diverse society with different religions, cultures and customs being practised by different people in different parts of the country. In Indian jurisprudence, legislators have acknowledged this diversity by keeping laws governing family aspects of a person such as marriage, adoption, inheritance and divorce different for different sets of people and at the same time enacting few secular legislations to govern people outside those sets or for the people from those sets who want to be governed by secular laws. In various religious laws, the Hindu personal laws are amongst the most codified, updated and liberalised personal laws in India. In medical science, surrogacy is broadly recognised as two types: traditional surrogacy and gestational surrogacy. In both types, different roles of parents are played by different people. Prior to the enactment of the Surrogacy Act position of the surrogate child with respect to personal laws was a very grey area, filled with a spectrum of probabilities depending upon the method in which surrogacy has taken place. The relation of the surrogate child through the intended mother and the intended father for the purpose of the marriage and the inheritance was immaterial in the eyes of the Hindu Marriage Act and the Hindu Succession Act. After the enactment of the Surrogacy Act, the position of the surrogate child has been changed and the surrogate child is deemed as a naturally born biological child with all rights and privileges. This article analyses in detail the position of the surrogate child prior to the enactment of the Surrogacy Act with respect to Hindu marriage and inheritance laws and the effect of the Surrogacy Act on the position of the surrogate child.

Keywords: *surrogacy, inheritance laws, marriage laws, succession, sapinda relationship.*

INTRODUCTION

India is a very diverse country with different religions coexisting simultaneously. The unique feature of Indian jurisprudence reflects the same diversity with different civil laws governing different sets of people at the same time a parallel secular law governing any person outside the scope of such religion-specific laws. Indian laws regulating family affairs are still governed by respective religious or customary laws or different religions are governed by different codified laws. In family laws, Hindu personal laws are extensively codified, updated and liberalised laws. Major components of family laws or personal laws are marriage, divorce, adoption and inheritance. Hindu personal laws govern more than 70% of citizens in India. Hindu law recognises marriage as a sacrament and not as a contract between husband and wife. Hindu religious laws as observed in Mulla's Hindu Law recognise two purposes of adoption providing a son who can offer funeral cake and liberation water to the father and his ancestors and another purpose is securing an heir and perpetuating the family name.¹ With the advancement of science and technology, adoption is not the only method of getting offspring, surrogacy has provided another option to infertile couples. Surrogacy or Assisted Reproduction Therapy (ART) has not been categorically spelled in Hindu personal laws. This article attempts to trade in this less charted territory in Hindu personal law prior to The Surrogacy (Regulation) Act 2021 (hereinafter 'Surrogacy Act') and after the enactment of the Surrogacy Act in marriage and inheritance aspects.

DIFFERENT TYPES OF SURROGACIES AND THEIR EFFECT ON PARENTAGE

An arrangement between a couple or an individual on whose behalf a woman agrees to bear the child and give birth to the child is called surrogacy. Surrogacy is often a remedy for a couple who cannot bear or conceive a child due to defects in reproductive systems, a couple who is in 'union' or 'marriage' other than traditional heterosexual marriage or a sole person who wishes to have a child and become a single parent. This article will review the position of a surrogate

¹ Satyajeet A Desai, *Mualla Hindu Law* (24th edn, Lexis Nexis 2021)

child and possible parents from a heterosexual couple's viewpoint. Broadly there are two different types of surrogacies recognised.

Traditional Surrogacy: Traditional surrogacy is an option where a female partner in the couple is unable to conceive or carry a child whereas the male partner is fertile. In such a situation another woman i.e. the surrogate is artificially inseminated using male sperm.² Traditional surrogacy gives three parents one is the biological mother, the second is the biological father and the third is the mother who raises such a child also called as the intended mother.

Gestational Surrogacy: Gestational surrogacy can be of at least three forms. In the first form intended couple donates oocyte and sperm to form an embryo and this embryo is transferred to the surrogate mother.³ The second form is a father donates the sperm and another woman donates the oocyte to form the embryo and this embryo is transferred to the surrogate mother.⁴ In the third type, if the intended couple both are infertile then the oocyte and the sperm is donated by different woman and man and the embryo is transferred to the surrogate mother. In the first type, there are two mothers: one is the surrogate mother and another is the biological mother and one father is the biological father. In the second type of gestational surrogacy, there are three types of mothers one is the biological mother, second is the surrogate mother and third is the mother who intends to raise the child and one father. In the third type of surrogacy, there are three types of mothers same as the second type of gestational surrogacy and two fathers one is the biological father and another is the father who intends to raise the child.

In both types of surrogacies, there are multiple parents involved. Some parents have biological or genetic relations with the child, some parents have relations by the act of giving birth and nursing at an early stage of the infant's life, and some parents have relations by the act of raising and maintaining the child. When we normalise and list possible parents of the surrogate child the list will be as follows:

² Nayana Hitesh Patel et al., 'Insight into Different Aspects of Surrogacy Practices' (2018) 11(3) Journal of Human Reproductive Sciences <https://doi.org/10.4103%2Fjhrs.JHRS_138_17> accessed 15 August 2023

³ *Ibid*

⁴ *Ibid*

- Surrogate Mother - A woman who carries the embryo and gives birth to the child.
- Biological Mother - A woman whose genetic composition forms the embryo.
- Biological Father - A man whose genetic composition forms the embryo.
- Intended Mother - A woman who raises and maintains the child.
- Intended Father - A man who raises and maintains the child.

This list of parents are roles assumed by persons and depending upon the type of surrogacy and sex of the person, one person can play multiple roles in relation to the surrogate child.

POSITION OF THE SURROGATE CHILD PRIOR TO THE SURROGACY ACT

In 2021 the government enacted legislation to recognise and regulate surrogacy. Prior to 2021, surrogacy was a grey area without any definite legislative framework or case laws. Surrogacy has mainly an impact on the marriage and inheritance aspects of personal laws. Each aspect will be considered in detail.

Marriage Laws: The impact of surrogacy on Hindu marriage laws is in relation to the conditions of marriage. Sec 5 of the Hindu Marriage Act, 1955 (hereinafter HMA) provides for conditions of marriage. Marriage between a man and a woman in a degree of prohibited relationship and the Sapinda relationship is not allowed.⁵ Two persons are said to be Sapindas of each other if there is a common ancestor between a man and a woman in five generations of lineal ascendance from the father's side and three generations of lineal ascendance from the mother's side.⁶ When considering the Sapinda relationship all full blood, half blood, uterine blood and relationship by adoption are also included. If a man and a woman are Sapindas of each other or are in a prohibited relationship then, such marriage is null and void in HMA.⁷

Position of marriage condition considered in the case of Sapinda relationship for the surrogate child, the surrogate child has at least three parents and at most five parents. Now we will

⁵ Hindu Marriage Act 1955, s 5

⁶ Hindu Marriage Act 1955, s 3

⁷ Hindu Marriage Act 1955, s 11

consider the position of each parent with respect to the surrogate child and their effect on his Sapinda relationship.

- **Surrogate Mother:** The surrogate mother has no relationship with the child with genetic material. Only possible relationships can arise out of uterine blood relationships. Uterine blood is defined in the Major Law Lexicon⁸ as '*Two persons are said to be related to each other by uterine blood when they are descended from a common ancestress but by different husbands*'. When this definition is considered, it gives the essence that for relation through uterine blood a common genetic composition is required. Therefore, lineal ascendants of a woman with the role of the surrogate mother alone need not be considered for the Sapinda relationship or prohibited relationship for the purpose of HMA.
- **Biological Mother:** The biological mother shares genetic composition with the surrogate child. Even if the role of the intended mother and the biological mother is being played by the same woman or not, her lineal ascendant needs to be traced as the concept of 'uterine blood' will come into the picture for the purpose of HMA.
- **Biological Father:** The biological father like the biological mother shares genetic composition with the surrogate child. Whether or not the role of the biological father and intended father are played by the same person lineal ascendant of the biological father needs to be traced as the concept of 'half-blood' comes into effect for the purpose of HMA.
- **Intended Mother:** A woman playing the role of the intended mother alone does not share any genetic composition with the surrogate child therefore, her lineal ascendants need not be traced. But at the same time if the intended mother legally adopts such a child, then her lineal ascendant needs to be traced for the purpose of HMA.
- **Intended Father:** A man playing the role of the intended father alone does not share any genetic composition with the surrogate child and his position is the same as the intended mother. But if such an intended father adopts such a child his lineal ascendant needs to be traced to determine whether the condition for marriage is satisfied or not for the purpose of HMA.

⁸ P Ramanatha Aiyar, *The Major Law Lexicon* (4th edn, Lexis Nexis 2015)

Inheritance Laws: Hindu inheritance laws were codified in 1956 by enacting the Hindu Succession Act, 1956 (hereinafter HSA). Though the law was codified, some aspects of inheritance were left as per customary Mitakshara laws. In 2005 an amendment to HSA was made and a daughter was brought on the same plane as a son in respect to rights, duties and liabilities. The further rule for intestate succession was changed and strictly applied provisions of HAS.⁹ For the purpose of HSA, the children have to be seen as legitimate children, deemed to be legitimate and illegitimate children. Legitimate children are entitled to get property from both father and mother as well as have an interest in ancestral property. Deemed to be legitimate children are eligible to succeed from father and mother as well as father's share in the coparcenary property.¹⁰ Whereas illegitimate children have the right to property from their mother only.¹¹ Inheritance rules are also different in Hindu law based upon the sex of the property holder; the property of a male person devolves into different sets of people with different hierarchies whereas the property of a female person devolves into different persons.¹² If we consider all aspects of Hindu customary laws of succession and HSA it has a very complex architecture.

Devolution of property upon the surrogate child: In the case of a surrogate child to determine property devolving upon him there is no need to distinguish the child's sex. As per the 2005 amendment of HSA both daughter and son are coparceners in Hindu joint family property. Now in the case of surrogacy prior to the Surrogacy Act question arises out of the multiple roles of parents that have been identified earlier and from whom the surrogate child will succeed property. For this purpose, we have to see a pair of parents rather than individual roles.

Traditional Surrogacy: In traditional surrogacy surrogate mother who is also the biological mother and the biological father who is also the intended father, form the genetic composition of the surrogate child. Though there is no relation as such of surrogate mother and biological father, neither there is any reason to bring a presumption of marriage¹³ by invoking the Indian

⁹ Hindu Succession Act 1956, s 6

¹⁰ Hindu Marriage Act 1956, s 16

¹¹ P Ramanatha Aiyar, *The Major Law Lexicon* (4th edn, Lexis Nexis 2015)

¹² Hindu Succession Act 1955, s 8

¹³ Indian Evidence Act 1872, s 114

Evidence Act, 1872 (hereinafter Evidence Act). For the purpose of HSA, such a child is an illegitimate child between the surrogate mother and the intended father. As per Hindu law surrogate child is an illegitimate child and has an interest in his/her mother's property only. If the intended mother adopts such a child his/her all bonds with surrogate mothers in relation to property inheritance cease and he/she becomes a legitimate child of the intended father and intended mother. He/she now has an interest in a Hindu joint family as well as can inherit from the intended father and the intended mother.

Gestational Surrogacy: For gestational surrogacy all three types of gestational surrogacy need to be examined separately.

If the intended father and mother have donated sperm and oocyte respectively, the surrogate child has the genetic material of both mother and father and he has no relation with the surrogate mother for the purpose of HSA. In such cases, the surrogate child can be said to be a legitimate child of the intended mother and father and he/she has coparcenary rights in the intended father's Hindu joint family and '*spes successionis*' interest in both the intended father's and the intended mother's separate property.

If the intended father has donated sperm and the biological mother has donated oocyte and the surrogate mother has carried and given birth to the child, in such case intended mother and surrogate mother are not related to such child as 'mother' for the purpose of HSA. As the biological father and biological mother have no relation, such a child can be said to be an illegitimate child for the purpose of HSA, and can only have an interest in the property of his/her mother. Further to complicate the legal position if we assume the surrogate mother is a married woman Sec. 112¹⁴ of the Evidence Act can be attracted to make such a child a legitimate child in the family of the surrogate woman. In such a situation the surrogate child has coparcenary rights in joint Hindu family property of the surrogate mother's husband as well as intestate succession rights in the surrogate mother and her husband's separate property. If the intended mother and intended father adopt such child all bonds of the surrogate child with the

¹⁴ Indian Evidence Act 1872, s 112

biological mother, the surrogate mother and the surrogate father cease and such child will be a legitimate child of the intended mother and intended father for the purpose of HSA.

If a biological father who is not the intended father and a biological mother who is not the intended mother or surrogate mother, donates sperm and oocyte respectively and the surrogate mother carries and births such child, then complexity around such surrogate child further increases. The surrogate child for the purpose of HSA is the illegitimate child of the biological mother and the biological father but at the same time if Sec. 112¹⁵ of the Evidence Act is attracted, he is the legitimate child of the surrogate mother if she is married to another man. In such a situation the surrogate child can succeed the property of his biological mother and coparcenary rights in the property of the surrogate mother's husband's joint Hindu family property and interest in the individual property of the surrogate mother and the surrogate mother's husband. If such a child is adopted by the intended mother and father this child will cease any bond that existed between him/her and the biological mother, the biological father, the surrogate mother and the surrogate mother's husband and will become a legitimate child of the intended father and intended mother.

Inheritance devolving upon the surrogate child is a very complex calculation of probabilities with permutations and combinations depending on the type of surrogacy. Adoption is the only method through which the intended mother and the intended father without biological connection with such a child can call their surrogate son an heir for the purpose of HSA.

Property devolving from the surrogate child: To analyse this aspect, we have to differentiate surrogate children according to their sex. As discussed, Hindu law differentiates heirs and the method by which property will devolve based on whether the child is male or female. The complexity arises for the surrogate child when devolution from him/her is when he/she predeceases his/her parents.

Devolution from male surrogate child: When we consider devolution from the male surrogate child, we need to consider two types of property one is coparcenary property and the second is

¹⁵ *Ibid*

separate property. Hindu coparcenary property is dealt with in Sec. 6 of HSA while individual property has to be dealt with as per Sec. 8 of HSA.

Coparcenary Property: When a surrogate child dies intestate or with a testamentary succession instrument if he has any share in coparcenary property it shall be considered as if it had partitioned just before his death.¹⁶ To avoid further complexities let us consider a joint family property that only consists of a surrogate child and his branch of the family. During partition equal shares will be given to himself, his mother, wife, and son and daughter if any. When we consider the share allotted to himself on his death it will be further devolved as it is a separate property as per Sec. 8 of HSA. For the surrogate child question arises, who will be deemed to be his mother between the three roles of mothers? In my opinion, if the intended mother has no biological relation with the surrogate child, she cannot be said to be a mother. A surrogate mother if she is married attracting Sec. 112¹⁷, can be deemed as a mother for the purpose of HSA. And biological mother is actually the mother of such a surrogate child. So, in such an event, the claim over this share for the mother can be claimed by the surrogate mother depending upon her marital status and the biological mother. If such a surrogate child was adopted by the intended mother, then this question itself nullifies and the intended mother is the sole contender for a share of such property.

Separate Property: When a question arises regarding the separate property of a surrogate child Sec. 8¹⁸ of HSA clearly lays that property needs to be devolved on Class-I heirs and if there is no Class-I heir HSA provides for devolution of property in class-II heirs. In the absence of both scheduled heirs HSA provides for devolving property on agnates and cognates.¹⁹ In Class-I heirs, the mother is listed which needs to be considered in determining intestate succession from the surrogate child. In Class II heir in entry I father is listed, in entry II brother and sister are listed, in entry VI father's widow and brother's widow are listed, in entry IV children of brother and sister are listed, in entry V father's parents are listed, in entry VII father's siblings are listed,

¹⁶ Hindu Succession Act 1956, s 6

¹⁷ Indian Evidence Act 1872, s 112

¹⁸ Hindu Succession Act 1956, s 8

¹⁹ Hindu Succession Act 1956, s 9

in entry VIII mother's parents are listed and in entry IX mother's siblings are listed for succession. The effect of each parent's role in relation to the surrogate child is analysed as follows:

- **Surrogate Mother:** The Surrogate mother playing only the role of a surrogate mother has no relation with the surrogate child for the purpose of Sec. 8 of HSA. In case the surrogate mother is married Sec. 112²⁰ of the Evidence Act can be attracted and such a child will become her and her husband's legitimate child which will make her 'mother' for the purpose of Class-I and tracing Class-II heir of Sec. 8 of HSA.
- **Biological Mother:** The biological mother can claim to inherit property from the surrogate child. Even though such a child will be her legitimate or illegitimate child, she will be still a 'mother' for the purpose of Sec. 8 of HSA. For Class-II heirs' entries II and VI will not be related through the biological mother as the relationship through uterine blood is expressly excluded by an explanation of the schedule.²¹ For entries VIII and IX intestate property to relation through the biological mother will devolve.
- **Intended Mother:** The intended mother has no relation with the surrogate child as a Class-I heir, as well as no person can claim to succeed through her as a Class-II heir. But if the intended mother adopts such a child, all other relations of the surrogate child with persons assuming the different roles of mothers will sever and she is eligible to inherit from him as a Class-I heir and persons specified in Class-II are also eligible to succeed through her.
- **Biological Father:** The surrogate child is a legitimate or illegitimate son of the biological father depending upon the mode of surrogacy. When there is no Class-I heir, the father is eligible to succeed as an entry I in Class-II and entries, IV, V, VI, and VII of Class-II heirs are eligible to succeed through the biological father.
- **Intended Father:** The intended father has no biological connection with the surrogate child and for the purpose of Sec 8 he is not eligible to succeed the surrogate child's

²⁰ Indian Evidence Act 1872, s 112

²¹ Hindu Succession Act 1956

property. But if the intended father adopts the surrogate child, that child's all past relation will dissolve and such child will be a legitimate son of the intended father.

In the case of the surrogate child's intestate succession where the surrogate child holds coparcenary or separate property devolution of such property is very complex and the mode of surrogacy changes the set of parents and this will change the devolution of property upon the surrogate child and devolution of property from the surrogate child.

Devolution from female surrogate child: As per HSA female holds her property absolutely. Whether such property is acquired as a share from coparcenary property or inherited from her mother, father, husband or any other relation it comes in the hand of the female as a separate property. After the demise of females, devolution of property takes place as per Sec. 15 of HSA. This property first devolves upon her children and the husband. If they are not present then such property devolves upon her husband's heirs, thirdly it devolves upon her mother and father, fourthly it devolves upon heirs of the father and lastly upon heirs of the mother.²² When going through various entries in Sec. 15 the children and the grandchildren of the predeceased children are entitled to succeed property irrespective of the origin of the property but when determining other heirs, it is necessary to determine the origin of such property. If the property is inherited from the mother or father property will devolve upon their respective heirs whereas if the property is inherited from the husband or father-in-law property will devolve upon heirs of the husband.²³ Now in light of this construction of kinship in HSA, the intended mother and her heirs or the intended father and his heirs are not eligible to inherit from the surrogate child neither is the surrogate mother or her heirs. If the surrogate mother is assumed as a legitimate mother due to the attraction of Sec. 112²⁴ of the Evidence Act she and her heirs are entitled to succeed property of the female surrogate child. Whereas, the biological mother is a 'mother' for the purpose of HSA and she along with her heirs is entitled to succeed from the surrogate child. The biological father is the 'father' for the purpose of HSA and he along with his heirs is entitled

²² Hindu Succession Act 1956, s 15(1)

²³ Hindu Succession Act 1956, s 15(2)

²⁴ Indian Evidence Act 1872, s 112

to inherit from the surrogate child. The intended mother and intended father along with their respective heirs are eligible to succeed from the surrogate child only if they adopt the child.

POSITION OF SURROGATE CHILD POST THE SURROGACY ACT

The Surrogacy Act was brought in to identify and regulate surrogacy. This Act has criminalised commercial surrogacy services²⁵ and only recognised altruistic surrogacy where the intended mother has no genetic relation with the surrogate child as a valid mode of surrogacy.²⁶ The Act also provides that a surrogate child is deemed to be a biological child and has the same rights and privileges as a natural child.

Marriage Laws: As the surrogate child is deemed as a biological child for the purpose of marriage, he/ she has the same limitation upon marriage as a natural child and only lineage has to be traced to determine the Sapinda relationship is three generations ascending through the intended mother and five generations ascending through the intended father. Similarly, for all Prohibited relationships only relation through the intended mother and the intended father needs to be considered.

Inheritance Laws: The Surrogacy Act has greatly impacted on inheritance aspect of Hindu personal laws and simplified the process of tracing kinships for inheritance.

Devolution of property upon the surrogate child: A surrogate child after enactment of the Surrogacy Act has an interest in the coparcenary property of the intended father as a coparcener and he or she has the same rights as a biological child. The surrogate child can claim a share in the coparcenary property as well as ask for partition and sever from the status of a Hindu joint family. The surrogate child is eligible to succeed from the intended father as per Sec 8 of HSA. The surrogate child is also eligible to succeed the property of the intended mother under Sec. 15 of HSA.

²⁵ Surrogacy (Regulation) Act 2021, s 38

²⁶ Surrogacy (Regulation) Act 2021, s 4

Devolution of property from the surrogate child: For devolution of property from the surrogate child the HSA has differentiated between male surrogate child and female surrogate child.

Devolution of property from the male surrogate child: For a male surrogate child mother is a Class-I heir and after the Surrogacy Act, the intended mother is the only 'mother' eligible to succeed from him. Further, if there is no Class-I heir for the purpose of Class-II heirs' entries I, II, IV, VI, VII, VIII and IX the intended father, brother and sisters from the intended father, and various relations specified through the intended father and the intended mother are eligible to succeed from the surrogate child.

Devolution of Property from the female surrogate child: For the female surrogate child to devolve the property on her parents, it is necessary to trace the source of the property as per Sec. 15 of HSA. If the property is inherited from her father or her mother their heirs are eligible to succeed from her and after enactment of the Surrogacy Act 'mother' is the intended mother and the 'father' is the intended father.

CONCLUSION

In India people from different religions are governed by different personal laws. The Hindu personal laws are codified to a large extent and in all aspects including marriage, adoption, divorce and inheritance. Prior to the enactment of the Surrogacy Act satisfying conditions for marriage under Sec. 5 of HMA, the child's Sapinda relationship and prohibited relationship need to be traced from different sets of parents depending upon the method of surrogacy. In some form of surrogacy, the child was eligible to marry a person within the Sapinda relationship through the intended mother and intended father. This complexity and abnormality are done away with by deeming the surrogate child as same as a biological child and the only set of persons through whom Sapinda and Prohibited relationship need to be traced is the intended mother and intended father.

In the realm of Hindu inheritance law, the Surrogacy Act has removed a lot of confusion and complexities and streamlined the line of succession to the surrogate child and from the surrogate child. Prior to the Surrogacy Act, the surrogate child was eligible to succeed from the biological

mother and biological father and he/she was ineligible to succeed from the intended mother or the intended father. In a situation where the surrogate mother was married to another person attracting the Evidence Act surrogate child could have been assumed as a legitimate child of the surrogate mother and her husband, making such a surrogate child eligible to take an interest in the coparcenary property of the surrogate mother's husband. After the Surrogacy Act came into effect this defect is completely removed and the surrogate child is eligible to succeed from the intended mother and the intended father only as if he was a naturally born biological child of the couple.

The same effect has taken place when the question regarding succeeding from the surrogate child arises. Wherever necessary the intended mother, the intended father, other relations through the intended mother and intended father and heirs of the intended mother and the intended father are eligible to succeed to the property of the surrogate child and the Surrogacy Act has removed any grounds available for claim by any other role of parent to succeed the property of the surrogate child. The various provisions of the Surrogacy Act are questionable such as criminalising commercial surrogacy, recognising only altruistic forms of surrogacy, and recognising only a few methods of gestational surrogacy where the intended mother has no genetic relation with the embryo, but at the same time the Surrogacy Act by deeming the surrogate child as a biological child of the intended couple removed complexities and confusions that were brought in dealing with Hindu personal law by permutations and combinations of the role of persons involved in the surrogacy.