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RECENT DEVELOPMENT IN THE SURROGACY RULES IN INDIA

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Surrogacy, globally, has been a boon for couples facing infertility and equally been in controversy due to medical, legal and ethical concerns. While, simply put, surrogacy, is the process of a surrogate mother carrying a child for someone else may be a couple (parents) or single woman. In all its practicality, the process can be as complex as involving 3 classes of people i.e., (i) surrogate mother; (ii) commissioning or intending parent(s); and (iii) genetic or donor mother / father. The complexity arises inter alia in obtaining each of their consents, maintaining confidentiality or anonymity and determining domicile in case of difference in nationality.

As of date, the principle Indian surrogacy laws comprise of Surrogacy (Regulation) Act, 2021 ("Act") and the Surrogacy (Regulation) Rules, 2022 ("Rules"). The laws came into place after India became infamous for surrogacy farming, exploitation of the surrogate mother and comparatively cheaper cost of procedure as there was no specific bar on commercial surrogacy and there were close to no laws other than the guidelines prescribed by the Indian Council of Medical Research. The Act itself saw the dawn of the day after repetitive efforts of bill being tabled at the Parliament in the past between 2016 and 2019.

The Act has prohibited and penalized commercial surrogacy, and also brought about an array of regulations in terms of qualifications for the intending couple, intending woman and surrogate mother, document requirements for commencement of process, etc. The Rules, on the other hand, sets out formats for certificate to be obtained by medical personnel, affidavit to be sworn by the intending couple / woman, consent format, etc. The Act and the Rules collectively have changed the face of surrogacy in India, into a regulated and an arguably more streamlined process, albeit mooted to be restrictive.

Since the inception of the Indian surrogacy law, there have been two amendments to the Rules.

The first amendment to the Rules was vide notification dated 10 October 2022 ("2022 Amendment"). Rule 5(2) requires the intending couple to purchase insurance coverage for 36 (thirty-six) months and that such insurance coverage should be guaranteed by signing an affidavit. Earlier, the provision stated that this affidavit needs to be sworn by signing an affidavit before the Metropolitan Magistrate or Judicial Magistrate of the First-Class. The 2022 Amendment allowed it to be sworn before either of the additional two classes of authorities, i.e., Executive Magistrate or Notary Public. Thus, the 2022 Amendment allowed flexibility to the intending couple and made way for a quicker process of surrogacy application.

The second amendment to the Rules has come in recently vide notification dated 14 March 2023 ("2023 Amendment"). This Amendment is a major change in the substantive law as it disallows for intending couple to commission surrogacy with donor gametes. The 2023 Amendment substitutes Para 1(d) of Form 2 (Consent of the Surrogate Mother and Agreement for Surrogacy) under Rule 7 of the Rules.

On a liberal reading of the earlier provision, it could have been implied that the surrogacy by donor gametes was permitted, because it stated that the method of treatment "may include: ... (d) the fertilization of donor oocyte by the sperm of the husband." However, through the 2023 Amendment, this provision has been substituted with a restrictive clause which states the following:

"(d)(I) Couple undergoing Surrogacy must have both gamete from the intending couple & donor gametes is not allowed;

(II) Single woman (widow/divorcee) undergoing Surrogacy must use self eggs and donor sperms to avail surrogacy procedure."

(emphasis supplied)

Thus, it completely disallows the use of donor gametes, i.e., eggs or sperms for intending couple and donor eggs for intending single woman (widow / divorcee). A prior restriction was that the surrogate mother was not allowed to provide her own gametes, as provided under Section 4(iii)(b)(III) of the Act.

As a result, the 2023 Amendment restricts the pool of eligible persons to commission surrogacy. In addition to restrictions regarding age, marital status, medical requirements, the intending persons must provide their own gametes in order to opt for surrogacy in India. Also, in the case of widow, it will have to be tested whether the word "donor sperm" would include the sperm of the deceased husband (if available).

Though the Amendment clarifies the position, which was ambiguous earlier, it may cause difficulty to intending parent(s) opting for surrogacy who have a medical problem with their own gametes and require a donor gamete to conceive a child.

- Nandini Khaitan (Partner), Saranya Mishra (Associate) & Kartik Gupta (Associate)

For any queries please contact: editors@khaitanco.com

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