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MOOT COURT-II

Scheduled on:

27 Sep 2014

Submission by:

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IN THE HON'BLE BOMBAY HIGH COURT,
MUMBAI

*Written Statement filed
in response to Petition
under Article 226
Of Constitution of
India*

Rekha Parmar.....Petitioner

Vs.

The State of Maharashtra.....Respondent

WRITTEN SUBMISSIONS ON BEHALF OF THE DEFENDANT

*Most Respectfully Submitted to the Hon'ble Chief
Justice of High Court & other Companion Judges of
the Hon'ble Bombay High Court, Mumbai*

*27 Dec
2014*

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1. LIST OF ABBREVIATIONS

AIR	All India Reporter
LR	Law Reporter
Para.	Paragraph
SC	Supreme Court
SCC	Supreme Court Cases
WLL	Weekly Law Reports
HC	High Court
IVF	In vitro fertilization
IUI	Intrauterine insemination
UDHR	Universal Declaration of Human Rights
ECJ	European Court of Justice
UK	The United Kingdom of Great Britain
USA	United States of America
ICMR	Indian Council of Medical Research
ART	Assisted Reproductive Technology
EU	European Union

2. INDEX OF AUTHORITIES

2.1. Cases

1. Judgment in Cases C-167/12 C. D. v S.T. and C-363/12 Z. v A Government Department and the Board of Management of a Community School, Court of Justice of the European Union, PRESS RELEASE No 36/14, Luxembourg, 18 March 2014
2. Baby Manji Yamada v. Union of India (2008) 13 SCC 518
3. K. Kalaiselvi v. Chennai Port Trust (WP No. 8188 of 2012 decided on 04 March, 2013)
4. Laxmi Video Theatres v. State of Haryana (1993) 3 SCC 715
5. Daxaben Patel v. State of Gujarat, Gujarat High Court, Appeal No. 976 of 2012 in Special Civil Application No. 15731 of 2011, decided on 31 January, 2014

2.2. Scholarly Lectures, Papers, Religious Books

1. "Special programme on women and children", Inaugural Lecture by Hon'ble Chief Justice of India, TN State Judicial Academy, Chennai, 23 March, 2013
2. "Surrogacy: ethical and legal issues", Pikee Saxena, Archana Mishra and Sonia Malik, Indian J Community Med., 37(4), 211-213, Oct-Dec 2012
3. "The ART (Regulation) Bill, 2010: A case of misplaced priorities?", Priyattama Bhanj, 17 July, 2014
4. "Global surrogacy: exploitation to empowerment", Vida Panitch, Journal of Global Ethics, 2013 Vol. 9, No. 3, 329-343, 29 March 2013
5. अनुदित कुरआन मजीद, अनुवादक मौलाना मुहम्मद फ़ारूक़ खां, published by Rich Décor, Mumbai

2.3. Internet Sites, Web Articles

1. "Surrogacy Laws India" website, 15 December, 2014
2. "Surrogacy arrangements: is the commissioning mother entitled to maternity leave", Bainse Wilson LLP website, 28 March, 2014
3. "Commissioning mother goes to High Court against rejection of maternity leave", web blog of Indian Surrogacy Law website, 29 October, 2014
4. "No maternity leave for women using surrogates, EU court rules", Chee Hoe Low, Progress Educational Trust website, 25 March, 2014

5. "Surrogacy in the mirror of Hinduism and Islam", by M Naushad Ansari, TwoCity.net website, 11 October, 2011
6. "Religious Views on Surrogacy", Eleanor McKenzie, on the web
7. "Surrogacy fractures bond between parents and Creator", Ann Carey, on the web
8. "The Islamic Ruling on Surrogate Motherhood" answered by Shaykh Mohammed Amin Kholwadia, Ilm Gate website
9. "Adopt a child, get six months paid leave", Hindustan Times, 23 Sep 2011
10. "Common questions answered", on the website of Surrogacy UK

2.4. Statutory References (Including Rules and Foreign Legislations and International law)

1. Madras Port Trust (Leave) Regulations, Rule 3A
2. Maternity Benefits Act, 1961
3. Universal Declaration of Human Rights, Art 25(2)
4. Beijing Declaration and Platform for Action Fourth World Conference on Women by UN General Assembly
5. Maharashtra Government GR of 1995 regarding leave rules
6. Government of India, DOPT, OM No. 13018/4/2004-Estt.(L), 31 March, 2006

3. SYNOPSIS OF FACTS

1. Ms Rekha Parmar ("Petitioner"), a resident of Pune, is a woman of about 38 years of age.
2. Petitioner was married when she was 18.
3. Petitioner says that she could not beget a child even after 20 years of marriage.
4. In spite of the fact at (3) above, there is nothing on record to show that Petitioner is conclusively incapable of conceiving.
5. There is nothing on record to show that Petitioner's husband has/d any reproductive health issues.
6. Petitioner joined Maharashtra Government service at the age of 23.
7. For the past 15 years Petitioner has been in continuous Maharashtra Government service and has been serving at Public Works Department of Government of Maharashtra at Pune.
8. The Petitioner, being in continuous employment, is financially sound.
9. There is nothing on record to show whether the couple exercised the options of in vitro fertilization (IVF) and intrauterine insemination (IUI) (common methods to improve the probability of conception) between themselves.
10. There is nothing on record to show whether the couple considered adoption of an orphaned child.
11. Petitioner and her husband obtained a child through lawful commercial surrogacy.
12. Petitioner has not shared with her employers a copy of commercial surrogacy contract she has entered into or the transactions made on this behalf.
13. The child was delivered on 27 November, 2014.
14. Surrogate mother is the biological mother. Petitioner did not provide the ovum.
15. The sperm used in surrogacy was from Petitioner's husband.
16. According to the Leave Rules of State of Maharashtra, Petitioner was not and is not entitled to Maternity Leave toward acquiring a child by surrogacy.
17. Petitioner applied to the Department for a six months maternity leave which was rejected.
18. Petitioner has filed a writ petition in the High Court of Mumbai against this decision.

4. STATEMENT OF ISSUES

The defendants respectfully ask the Hon'ble High Court for resolution of the following issues:

ISSUE-I

Do the existing Leave Rules have legal interpretation that is favorable to the Petitioner in the light of the new scientific advances in the field of surrogacy?

ISSUE-II

Is the grant of maternity leave to Petitioner necessary to protect fundamental rights of the Petitioner guaranteed by Constitution?

ISSUE-III

Will non-grant of maternity leave to Petitioner be against the public policy and long cherished values to India?

ISSUE-IV

Is the grant of maternity leave to Petitioner essential to protect human rights under the international human rights instruments to which India is a signatory?

5. SUMMARY OF ARGUMENTS

1. Do the existing Leave Rules have legal interpretation which is favorable to the Petitioner in the light of the new scientific advances in the field of surrogacy?

Extrapolation of older laws to include subsequent scientific discoveries would depend upon the facts, circumstances, and the possible implications of such an extrapolation. These aspects in the present case do not permit interpretation of the existing laws to consider surrogacy at par with adoption and include it in the existing laws for the interpretation of maternity benefits accordingly. Surrogacy is fundamentally different from adoption in that adoption is usually of an orphan child, involves no commercial consideration, and brings immense societal benefits. On the contrary, commercial surrogacy is a private contract between private citizens for monetary consideration.

2. Is the grant of maternity leave to Petitioner necessary to protect fundamental rights of the Petitioner guaranteed by Constitution?

Surrogacy laws in India are still in infancy and as a result, a vast majority of scholars believe that the fundamental rights of the poor surrogate mothers rather than those of the rich, modern commissioning mother are under threat. It is reported that in the commercial surrogacy contract such as entered into by Petitioner at high cost, the surrogate mother is exploited and the profit is earned by middlemen and commercial agencies. The commercial surrogacy contract in India is necessarily between economic opposites (economic equals would enter into an altruist surrogacy arrangement). The view that commissioning mother's fundamental rights remain protected without granting her maternity leave is well supported by decisions of ECJ in a UK referral. There is no gender based discrimination either. Therefore, Government of Maharashtra granting maternity leave to Petitioner would encourage surrogacy leading to more complaints of exploitation of women who out of sheer poverty enter into commercial surrogacy contract. On the other hand not granting maternity leave to Petitioner who along with her husband are an economically strong party will not deprive them of any fundamental rights guaranteed by Constitution.

3. Will non-grant of maternity leave to Petitioner be against the public policy and long cherished values to India?

Petitioner, who has approached the Hon'ble Court as a private citizen, is seeking maternity leave in the capacity of her role as a public servant governed by the rules of Government of Maharashtra. These rules must essentially resonate with the larger ambit of public policies. Petitioner claims that surrogate is equivalent of an adopted child and hence she is entitled to the same benefit. However, as has been argued under Issue-I, there is a fundamental difference between surrogate and adopted children. Adoption being a social cause with no commercial consideration, the public policy demands that the state must promote this method of attaining motherhood. There is no such justification in the case of commercial surrogacy where the parties to the contract are private citizens, there is no discontinuity of mother's affection to the newborn child and all expenses are part of the contract. Public policy in India is also influenced by religious beliefs and long cherished values that do not support commercial surrogacy. This argument is well supported by laws of the industrialized nations including UK where commercial surrogacy arrangement is not allowed; only altruist surrogacy based on mutual love and friendship is allowed.

4. Is the grant of maternity leave to Petitioner essential to protect human rights under the international human rights instruments to which India is a signatory?

This issue has primarily arisen from the K. Kalaiselvi v. Chennai Port Trust case where the question of human rights of the commissioning mother and of the surrogate child had come up. The argument that maternity leave for commercially commissioning mother is necessary under Clause 25(2) of UDHR suffers from non-contextual reference to the content. The phrase "whether born in or out of wedlock" in the UDHR as sought to be applied to surrogate child in reality upholds the rights of children like those born to rape victims, prostitutes, or unwedded couples. Similarly, the arguments about violation of human rights of the mother, in reality, apply to the surrogate mother, not the commissioning mother.

6. ARGUMENTS ADVANCED

May it please the Court;

My name is Rajendra Kumar Kale, counsel for the defendant, namely Government of Maharashtra.

Pray permit me to begin with a verse from Holy Quran¹ of Islam, the second largest religion in India:

“... Their mothers are only those who conceived them and gave birth to them.” – 58(2)

Your Honour, surrogacy is not new to Indian culture. Its reference can be found in the ancient scriptures of Hindus, like that of the birth of twins Dhrishtadyumna and Draupadi. It is well known that Jesus was also born to (surrogate) Mother Mary. But the word *mother*, your Honour, has intense emotions, pioussness, and serenity attached to it in the civilized world. Renting a womb, the most intimate part of a woman's body only to separate the newborn from the carrying mother for money, aka *surrogacy tourism*, is an innovation of recent materialism. The socio-psychological-biological problems associated with the poor surrogate mother who has to resist emotional bond with the baby in her womb for nine months – because for her own sustenance she has contracted its transfer it to the customer – not only undermines the very institution of marriage but also converts child into a commodity.

Such as the matter stands, Your Honour, I am duty bound to address dispassionately the issues arising in this case keeping aside for the time being my personal sentiments over the word *mother*.

Your Honour, it may be pointed out that commercial surrogacy was legalized in India in the year 2002, particularly from the viewpoint of meeting the international demand for low-cost hiring of surrogate mothers in India. The present laws in India, as also in several industrialized countries do not recognize any right of the commissioning mother to maternity leave. Given that Indian woman's contribution to surrogacy is

¹ “उनकी माएं तो वही हैं जिन्होंने उनको जन्म दिया है.”, अनुदित कुरआन मजीद, अनुवादक मौलाना मुहम्मद फारूक खां, published by Rich Décor, Mumbai.

more as surrogate mother (the poor womb-lender) than as commissioning mother (the rich customer), it is not surprising that the present case does not have many parallels in the history of Indian judiciary. Indeed, the most relevant cases to the present petition are but two: Baby Manji Yamada v. Union of India (2008) 13 SCC 518 and K. Kalaiselvi v. Chennai Port Trust (WP No. 8188 of 2012 decided on 04 March, 2013), which, with peripheral literature are listed in the section, "Index of Authorities."

Your Honour, Hon'ble Madras High Court had, in K. Kalaiselvi v. Chennai Port Trust case (supra), allowed maternity leave to the commissioning mother. It is worth a mention here that the said case appears to be rather one sided. It appears from the text of the short judgment that the defendant, Chennai Port Trust, hardly offered any arguments against the petitioner, perhaps being too considerate for their employee. As a result, there was little contribution from the defendant toward any in-depth exploration of the subject matter. Although the judgment of the Hon'ble Madras HC is not binding on this Hon'ble court, it will be my duty to make up for the deficit of arguments on the part of Chennai Port Trust in the said case.

6.1. Interpretation of Leave Rules in the light of the new scientific advances

Your Honour, the first issue before the Hon'ble Court is, "Do the existing Leave Rules have legal interpretation that is favorable to the Petitioner in the light of the new scientific advances in the field of surrogacy?"

Your Honour, the above issue arises from the argument in K. Kalaiselvi v. Chennai Port Trust (supra) that at the time of enacting Maternity Benefit Act, 1961, "such a practice was not there". The learned counsel added: "What was recognized by the law, at some point of time need not be the same in the light of the changed situation". The learned counsel had cited examples of two SC cases: Laxmi Video Theatres v. State of Haryana (1993) 3 SCC 715, where Cinematograph Act of 1952 was interpreted to include 'video cassette recorder' invented later and The Senior Electric Inspector v. Laxmi Narayana Chopra and Ors, AIR (1962) 3 SC 159, where 'telegraph line' found in the Indian Electricity Act, 1910 was ruled to include connectivity of wireless telegraphy in the Post and Telegraph Wireless Section.

On these grounds it was argued that "if law can provide child care leave in case of adoptive parents as in the case of Rule 3-A of the Madras Port Trust (Leave) Regulations, 1987, then why they should not apply to parents like the petitioner who

obtained child through surrogate agreement", that is an arrangement that did not exist in eighties. Your Honour, these arguments do not apply to the present case.

Firstly, the privileges including special leave for adoption cannot be claimed for surrogacy contract. In Maharashtra, adoption has been encouraged as a social cause on the basis of recommendations of the Sixth Pay Commission. In the words of Chairman of, Civil Law Committee of BMC, "There are hundreds of orphans, who live a difficult life because of the absence of parents. The proposal will be a ray of hope for them."² The same views are resounded by Pikee Saxena et al. who have drawn a dismal picture of surrogacy in India in their scholarly paper published in Indian Journal of Community Medicine, 2012: "It seems ironical that people are engaging in the practice of surrogacy when nearly 12 million Indian children are orphans." In a country facing population explosion, birth control is an additional social benefit of promoting adoption. On the contrary, commercial surrogacy in the present case was a private contract and it had nothing social about it. Therefore to compare surrogacy with adoption as a justification for maternity leave for Petitioner would be like comparing apples and oranges. They are different altogether.

Secondly, just because medical research has added one more method of conceiving, the existing laws cannot be automatically stretched to include this new method. Such an inclusion would depend on the facts and circumstances of the scientific progress. The Arms Act, 1959 will not automatically cover a pistol capable of firing nuclear bullets if such a horrible gun becomes reality in the future. Thus the argument that the existing law should necessarily be interpreted to include the new surrogacy method, while the ethical and moral questions associated with commercial surrogacy are still not settled, holds no water.

Indeed before Petitioner (a government servant well versed in the service rules) decided to rent a womb at a high cost, she clearly had two clear options to become a mother:

- (i) Adoption, that comes with several privileges including child care leave,
- (ii) Surrogacy, that comes without the provision for any maternity leave.

Petitioner clearly made a conscious choice against adoption and associated privileges, and she was well aware that she has no legal right to claim the same.

² See "Adopt a child, get six months paid leave", Hindustan Times, 23 Sep 2011

An adopted child is often an orphan before adoption, living on charity without mother's care and therefore the sooner the adoptive mother takes charge of it, the better; hence the privileges. On the other hand, the surrogate child remains in the custody of her biological mother at the cost of the commissioning mother till such time as the transfer takes place. Since the transfer is from mother to mother and the surrogate mother is paid for (in the Petitioner's case), there is no question of child being deprived of child-care. The commissioning mother can well form the necessary bond in after-office hours, on weekends, on holidays, or even by availing leave as due, leave as not due and leave without pay.

Your Honour, the moot point here is that the leave sought by Petitioner is equivalent of only about a couple of Lakh Rupees or so which is well affordable jointly by Petitioner and her husband who have paid several times more for the surrogacy after voluntarily choosing it over the option of adoption which is free and being socially beneficial comes with several benefits. Thus Petitioner has no justification to claim the benefits of adoption in the present case.

The argument in *K. Kalaiselvi v. Chennai Port Trust* (supra) that surrogacy was a new scientific invention akin to inventions of video cassette wireless technology is absurd. It is more so, because in the same breath the learned counsel had sought to compare a commercial surrogation child with an adopted child.

Your Honour, as I have pointed out in my opening statement under the current section, the concept of surrogate mother was never an alien concept in India although it was not known in the society by that particular English word. Leaving aside the examples from the mythological past there were (are) numerous examples where closely related fertile couples (e.g., cousins) gave (give) to an infertile couple their newborn baby especially planned, conceived and delivered out of sheer affection. Although such a transfer is given no separate nomenclature other than adoption, the practice itself is equivalent to Petitioner's "surrogacy arrangement," *minus* the commercial angle and what the common Indians (both Hindus and Muslims) would call the moral turpitude of impregnating a needy, poor, stranger woman with the sperm of a man not her husband. The lawmakers of the past were surely aware of this practice and therefore it is not true that surrogacy was a concept which was discovered by scientists only in the 21st century.

Your Honour, exactly like the Indian traditional culture, the current UK laws also do not allow surrogacy as a commercial contract such as executed by Petitioner. In the UK, “the law states clearly that no surrogate may receive any form of payment during or after a surrogacy agreement³.... They get involved in surrogacy because they want to help a couple have their own child. But it is important to realize that in the eyes of the law, the baby is not yours until the Parental Order has been issued after the baby is born: that means the surrogate could keep the baby if she chose to. *That’s why it is so important that surrogacy is based on friendship.*”⁴ (Emphasis is supplied by student.) Your Honour, this is so humane and so close to Indian philosophy! It is only in the poor countries like India that surrogacy has assumed commercial angle. Petitioner has availed commercial surrogacy. Thus to grant her maternity leave can only lead to legitimization of the exploitation that accompanies commercial surrogacy.

6.2. Regarding protection of fundamental rights of the Petitioner

May it please Court,

Your Honour, the second issue before the Hon’ble Court is, “Is the grant of maternity leave to Petitioner necessary to protect fundamental rights of the Petitioner guaranteed by Constitution?”

The right to equality is not violated in this case because no other party has been given the privilege denied to Petitioner. In the case of referrals made by a UK and an Ireland employment tribunal concerning claims brought by two women, the ECJ has ruled that women using surrogacy to become mothers are not entitled to maternity or adoption leave under EU law. This judgment also confirms the absence of any discrimination on this account: “... an employer’s refusal to grant such leave to a commissioning mother does not constitute discrimination at work on the grounds of sex and disabilities.” The question of disability also does not arise because even pregnancy of a child-carrying mother is not a disability: It is settled by law that pregnancy is not a disability and it does not hinder “full and effective participation in professional life.” The child’s own right to equality is also not affected by denial of maternity leave since at no point of time the option of friendly arrangement with the surrogate mother (as discussed in the

³ Except for bearing the cost of the procedure, pre/post-natal care as per the social etiquette

⁴ See, “Common questions answered”, on the website of Surrogacy UK

preceding section) is taken away where the commissioning mother is not willing to avail of her leave due or leave not due.

Your Honour, the right against exploitation would indeed be violated in the case of surrogacy arrangements; but to the disadvantage of the surrogate mother (not commissioning mother) as well as the members of her family. This turns the tables on the Petitioner's arguments as I shall presently elaborate.

In a scholarly article, Pikee Saxena et al. mentioned before have drawn a dismal picture of surrogacy in India. Indeed I am tempted to quote extensively from their paper published in Indian Journal of Community Medicine, 37(4), 2012:

"At a glance, surrogacy seems like an attractive alternative as a poor surrogate mother gets very much needed money, an infertile couple gets their long desired biologically related baby and the country earns foreign currency, but the real picture reveals the bitter truth. ... There is no transparency ... Although in 2005, ICMR issued guidelines for accreditation, supervision, and regulation of ART clinics in India, these guidelines are repeatedly violated. ... There are incidences where the child given to couple after surrogacy is not genetically related to them and in turn, is disowned by the intended parent and has to spend his life in an orphanage. If we look upon the problem of surrogate mothers, things are even worse and unethical. The poor, illiterate women of rural background are often persuaded in such deals by their spouse or middlemen for earning easy money. These women have no right on decision regarding their own body and life. In India, there is no provision of psychological screening or legal counseling, which is mandatory in USA. After recruitment by commercial agencies, these women are shifted into hostels for the whole duration of pregnancy on the pretext of taking antenatal care. The real motive is to guard them and to avoid any social stigma of being outcast by their community. These women spend the whole tenure of pregnancy worrying about their household and children. They are allowed to go out only for antenatal visits and are allowed to meet their family only on Sundays. The worst part is that in case of unfavorable outcome of pregnancy, they are unlikely to be paid, and there is no provision of insurance or post pregnancy medical and psychiatric support for them. Rich career women who do not want to take the trouble of carrying their own pregnancy are

resorting to hiring surrogate mothers. There are a number of moral and ethical issues regarding surrogacy, which has become more of a commercial racket, and there is an urgent need for framing and implementation of laws for the parents and the surrogate mother. Due to lack of proper legislation, surrogate mother is exploited and the profit is earned by middlemen and commercial agencies."

It is clear, your Honour, that the argument of violation of fundamental right against exploitation applies to the surrogate mother and her own children and the household rather than to the career woman who chooses to prefer surrogacy over adoption in India. This speaks volumes against the legality of Petitioner's claim for maternity leave as a commissioning mother. It is amply clear that as of date, the protection to the surrogate mothers is practically non-existent in India. Therefore, favoring maternity leave to the commissioning mother is akin to turning a Nelson's eye toward the shocking reality that it would indirectly support the exploitation as shown above.

6.3. The issue of public policy and long cherished values of India

May it please the Court

Your Honour, the third issue before the Hon'ble Court is, "Will non-grant of maternity leave to Petitioner be against the public policy and long cherished values to India?"

Your Honour, In the market of commercial surrogacy, the parties are private citizens who enter into a private contract whereas one party in the present case is Public Works Department of Government of Maharashtra. Defendant, although she has approached the Hon'ble High Court in the capacity of a private citizen, is seeking maternity leave in the capacity of a public servant. Since Government is answerable to public at large, the policy of a public department cannot be framed on the basis of how private commercial contracts are made in the free economy market. Indeed your Honour, the Petitioner's case must be scrutinized for public policy that must be reflected in the conduct of the public servants and the policies of the public departments where they serve. Your Honour, the matter before the Hon'ble Court is not covered by any legislation and it is a subject of heated public debate. With the rise of Westerners using Indian surrogate mothers for economic considerations, the element of politics is also added to the issue.

Public life in India, your Honour, derives its life blood from traditions, religious beliefs and cultural heritage. The world has also valued Indian way life with UNO declaring 21

June as the International Day for Yoga. Since the law is for the people and it is not that the people are for the law, it would be prudent to examine the issue before the Hon'ble Court in the light of these long cherished values shared by roughly a sixth of world's population.

Your Honour, since India is a colorful collage of various religious beliefs I pray Hon'ble Court to consider the following religious views on the complex and contentious moral and ethical issues associated with surrogacy borrowed from the article on the web, "Religious Views on Surrogacy," by Eleanor McKenzie:

"The Catholic Catechism states that a child is a gift not a right and that surrogacy is gravely immoral because a third party comes between the 'one flesh' principle that unites husband and wife. In 1987, the Donum Vitae congregation issued a statement on surrogacy, echoing the views of the Catechism and adding that it violates the dignity of the child. A further statement in 2008 through the Dignitas Personae congregation reinforced the teaching that conception should only be a product of conjugal love. Orthodox and Conservative rabbis take the view that using another person as an incubator is degrading and devalues motherhood. There is also concern that it accentuates economic differences, claiming that there is an inherent imbalance of power between wealthy parents and poor surrogates. Muslim scholars ... claim it is akin to adultery, because it involves a woman, who is not the husband's legal wife, carrying an egg fertilized by him. It also means that the child has no legal lineage, making him or her illegitimate. Islamic arguments against it also point to the problems that arise if the surrogate refuses to give up the baby. However, other Muslim thinkers claim that surrogacy is permissible, because humans have a responsibility to preserve the human species and that it is in the public interest to allow surrogacy for infertile couples. Buddhism totally accepts surrogacy. This may be because Buddhism, unlike Christianity, Judaism, and Islam, doesn't make procreation a moral duty. Couples are not under pressure to marry or have children, and there are no Buddhist teachings suggesting that infertility treatments or surrogacy are immoral. Hinduism allows infertility treatments in specific circumstances. Children are very important to Hindu families, and medical help is allowed if a couple can't conceive. Hindus permit artificial insemination using the husband's

sperm, but not that of an unknown donor, because the child would not know its lineage.”

Your Honour, the ethical question of India emerging as a surrogacy market has alarmed not just the common public in India, but also the philosophy scholars across the world. In the words of Vida Panitch who published in Journal of Global Ethics, the practice exploits Indian surrogates on the basis of an inter-contractual failure of both justice and consent. Author holds that the exploitation lens eclipses the particularities of the surrogate’s lived experience. This clearly shows that public department lending official support to surrogacy and brining it at par with adoption would be totally against the public policy.

Your Honour, from the above discussion it appears that by and large the Indian psych will not accept the concept of commercial surrogacy arrangement without raising eyebrows. While it has been lent legal cover under the free market economy policy, in the larger public interest and public policy, it would not be justifiable to grant maternity leave to Defendant who is a public servant serving under public organization.

6.4 The issue of human rights under international instruments

Your Honour, the last issue before the Hon’ble Court is, “Is the grant of maternity leave to Petitioner essential to protect human rights under the international human rights instruments to which India is a signatory?”

Your Honour, in *K. Kalaiselvi v. Chennai Port Trust* (supra) the attention of the Hon’ble HC was drawn to the UDHR with particular reference to Article 25(2) which reads as follows:

“Motherhood and childhood are entitled to special care and assistance. All children *whether born in or out of wedlock*, shall enjoy the same protection.” (Emphasis supplied by the student).

The Beijing Declaration and Platform for Action Fourth World Conference on Women, dated 15 September, 1995 was also referred and the following resolutions were quoted:

“17. The explicit recognition and reaffirmation of the right of all women to control all aspects of their health, in particular their own fertility, is basic to their empowerment;

“33. Ensure respect for international law, including humanitarian law, in order to protect women and girls in particular”.

Article 6 of the Convention on the Rights of the Child by United Nations General Assembly by a resolution on 20 November, 1989 was also referred:

“State Parties recognize that every child has the inherent right to life. State Parties shall ensure to the maximum extent possible the survival and development of the child.”

In the light of the above, it was suggested to the Hon’ble Court that commissioning mother was undoubtedly the mother of a minor girl child, she was entitled to develop a bond with the child obtained through surrogate agreement, and that in the interest of the child the commissioning mother is entitled to the leave on account of child obtained by surrogacy.

Your Honour, while there is no denying the fact that all mothers and children, especially girl children, are entitled to special protection, the text from the international law has clearly been quoted out of the context. Firstly, the phrase “born in or out of wedlock” in the UDHR Article 25(2) seeks to remove the stigma society attaches to the children of unwedded mothers, such as those of prostitutes and rape victims who are often called by unspeakable names. The key purpose of this UDHR text is to uphold the rights of children who are born out of illegitimate relationships. Even in Indian laws, the children born out of wedlock enjoy special protection. Many children in orphanage are born out of questionable relationships and the very fact that adoption by public servants is encouraged by Government of Maharashtra by way of granting several benefits to adoptive mothers indicates that human rights of the children born out of wedlock are placed at a high pedestal in Indian society. However as explained above, the UDHR clause cannot be automatically extrapolated to argue that maternity leave to commissioning mother will be necessary to protect the child born out of surrogacy.

As regards woman’s right to control the aspect of her fertility, this right is also not in any way jeopardized by denying the maternity leave to Petitioner. Right to commercial surrogacy has been protected by law in India in accordance with free market economy policy. This clearly gives any woman the right to be a surrogate or a commissioning mother by contract. The maternity itself being a part of this contract, there is nothing preventing the working commissioning woman to avail various leaves other than

maternity leave. The question of granting maternity leave is associated with the larger issue of public policy which, in this case, governs the leave policy of a department of Government of Maharashtra. Therefore, your Honour, there is no violation of the human rights as laid down under the UDHR.

Coming to the right of the child, your Honour, it has been made amply clear how the present case of surrogate differs from the case of an adopted child. To recall my earlier arguments, here the child is safely transferred from one mother (the surrogate mother) to the other mother (the commission mother) under the commercial contract that necessarily includes medical care and hence the child's rights are seamlessly protected in the transition. In the case of an adopted child, the transfer of the orphan takes place from its cold parentless environment to the warm care of adoptive parents with the significant element of social benefits and hence it is essential that this couple be given state assistance according to the public policy. In the case of a surrogate child, the state machinery assumes supervisory powers over the private parties' contract to protect the child's rights, whereas in case of the adoptive child, state itself becomes a party siding with the adoptive mother who has taken over from the state the responsibility of the welfare of the orphaned child. In the light of this distinction, your Honour, it can be seen that there is no violation of any international instrument of human rights to which India is or is not a signatory.

6.5 Concluding Remarks

Your Honour, there is nothing on record to show that despite Petitioner not having conceived in 20 years of marriage her infertility was conclusively established. Petitioner chose surrogacy over adoption knowing that it was not covered by maternity rule. It may be argued that she was hopeful that the ART (Regulation) Bill, 2010 will soon be passed and streamline the process of commercial surrogacy in India and therefore the Hon'ble Court should sympathetically consider the Petitioner's case. However, clearly, the Hon'ble Court cannot be prayed to take a proactive step in this regard. The bill itself has been a topic of controversy. Experts, (e.g., in JILS Blog, 22 Dec 2014) wonder if the bill, originally framed by ICMR, is "a case of misplaced priorities." It is still undergoing debate amongst various ministries. In the meantime, the poorly managed surrogacy clinics are mushrooming and it would not be proper for defendant to encourage this activity by bringing it at par with socially beneficial process of adoption for a public servant who clearly has the option of adoption which comes with several benefits.

8. PRAYER

Wherefore in the light of the issues raised, the arguments advanced, reasons given therein, and authorities cited, this Hon'ble Court may be pleased:

TO HOLD

That surrogacy being a gray area in India, the existing Leave Rules of Government of Maharashtra shall not be interpreted to extend the benefits including paid maternity leave available to an adoptive mother, to the commissioning mother in the employment of Government of Maharashtra who has become a mother by surrogacy arrangements.

TO HOLD

That the petitioner, as the beneficiary of the law permitting commercial surrogacy arrangement in India having chosen the same over adoption in her capacity of a public servant shall be responsible for post-pregnancy medical and psychiatric support to the surrogate mother.

TO DIRECT

That Petitioner shall submit to Government of Maharashtra (a) a copy of the commercial surrogacy contract entered into for public record, (b) a certificate to the effect that she has met all the obligations toward the surrogate mother and her family in accordance with the commercial surrogacy contract, and (c) and undertaking that she shall meet all expenses toward post-pregnancy medical and psychiatric support to the surrogate mother.

TO ORDER

Dismissal of the Petition.

ANNEXURE

1. The Moot Court case problem allotted:

Rekha Parmar is a resident of the city of Pune located in the state of Maharashtra of the Union of India. She has been working in the Personnel Department of the Maharashtra Public Works Department under the State Government for the past 15 years.

Rekha Parmar could not beget a child even after 20 years of marriage and so she and her husband decided to have a child through surrogacy. The surrogate mother delivered a child on 27 November, 2014. Rekha Parmar applied to the Department for a six months maternity leave which was rejected by the Department stating that she was required to submit a medical certificate to the effect that she has given birth to a child so as to avail the maternity leave.

Since she is not the biological mother of the child she could not produce the medical certificate. She approached the Commissioner of the Public Works Department stating the fact of becoming a parent through surrogacy. The application was rejected again. Subsequently Rekha Parmar wrote to the Government of Maharashtra which replied that the decision of the Commissioner of the Department shall be final.

Rekha Parmar has filed a writ petition in the High Court of Mumbai against this decision which is due to be heard on 15 January, 2015 before a two-judge bench.

Questions: (1) State the issues, and (2) State the arguments.

2. Data not available, and thus, the assumptions made

It is assumed that the petitioner married when 18 and joined the Service at 23 years of age. Husband is assumed fertile. It is assumed that during the intervening 20 years the couple neither tried the options of IVF or IUI, nor of adoption. It assumed that the surrogacy was commercial not altruistic. It is implied that the surrogacy was traditional but whether the sperm came from commissioning father or from unknown donor, is not known. Hence, suitable assumptions are made.