Advanced Contract, Tending and Public Procurement
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Formation of Contract: Legality of Object & Public Policy – Part 03

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The discussion and understanding section 23 of the Indian Contract Act is being continued here which broadly emphasizes on the fact that certain agreements are considered void and are not going to be enforceable simply because they are not in public interest or what is referred to as opposed to public policy. The previous session dealt with the Competition Act 2002 and the background of how the Indian Contract Act is complemented with several other special legislations to understand the direction of public policy in this country.

As was stated in the previous lecture, public policy is not defined in the Indian Contract Act. It is left to judicial discretion to actually define public policy. It is judiciary that aligns the direction of public policy from time to time. It is not the sole proprietary jurisdiction of the judiciary as the legislature also has to play a very important role in laying term in the direction of public policy, especially in contracts and agreements. This is where you will notice that the legislature from time to time has provided several legislations that can give us an idea of what agreements would not be enforceable.

The government is rather a huge contributor to the economy in India, because the government is not only doing governance by providing amenities to the citizens, but also a lot of businesses. We have a lot of public sector banks and public sector companies. One of the mechanisms through which government agencies engage in contract is the rule of tendering.

They have to follow by tender and they have to go by competitive quotations in government contracts. What tender does is to actually lay down a transparent process of contracting. So, tendering is the rule. There can be exceptions, which will be discussed a little while later. When bids are called through tenders, contractors submit their bids and the government will evaluate those bids. The government will actually give the contract to the most favorable bid. There is the concept of L1 and H1, where L1 means lowest bidder number 1 and that he has quoted the lowest price. When the government is buying, they go by the lowest price mechanism, and if the government is selling, they follow H1, the highest price mechanism.

In such a scenario, what may happen is that contractors may actually enter into some kind of a collusive secret understanding or an arrangement or an agreement. Bidders and contractors can actually rig a tender whereby attempts are made to defeat the purpose of tendering. The purpose of tendering is to actually ensure competition. Better competition means better price, and better products, which makes competition a healthy aspect for the market conditions, consumer interest and government interest.

Can bidders rig the tender so as to defeat competition? can they disclose their price information or financial information? Can they divide the markets among themselves? Can bidders create entry barriers for new contractors to come in? These are some of the strategic behavior among contractors, which the law clearly prohibits. So, any kind of agreement that tries to defeat the purpose of tender amounts to bid rigging which is prohibited under the competition law. This is important because whenever the government goes by any kind of a tender or even in a private contract, the manufacturers, the producers, the distributors, cannot enter into any kind of secret understanding so as to defeat the purpose of competition or tendering.

When Section 23 of the Indian Contract Act is read to understand the public policies involved, the Competition Law is a great effort which clearly says these are agreements opposed to public policy. Under the Competition Act, the Competition Commission of India has been established which is both the regulator and adjudicator in the field of competition. So, the Competition Commission of India can be complained to for any kind of anti-competitive agreement activity that has come to the knowledge of any individual or any businessman. The Competition Commission of India will investigate that complaint, they will find out whether there is any truth in the complaint.

And once they have finished their investigation, they will inquire. After inquiry, there are various kinds of penalties that can be imposed on parties who actually engage in anti-competitive behavior or have entered into anti-competitive agreements. The Competition Commission of India is duty-bound to impose penalty and hold these agreements as void.

Please refer to Section 3(2), which says that anything that is in contravention of Section 3(1) shall be void which means agreements will have no enforceability. Hence, once it has been decided by the competition law, a regular court cannot provide any kind of remedy to hold the agreement to be enforceable at law. This is a significant aspect of public policy in India.

Business leaders, managers and entrepreneurs must know what agreements are permissible and what agreements are not permissible. For example, when you look at the competition law, there could be an exclusive supply agreement. Now, exclusive supply agreement very clearly says that someone who is to supply goods would supply it to one individual/entity and to nobody else. Not all of these kinds of agreements are going to be illegal or going to be void. There can be an exclusive supply agreement. The purpose, intention and motive of this agreement will be the first criteria to intervene under the conditions. The second intervention would be what is the impact of this agreement on the competitive market. This will be the test.

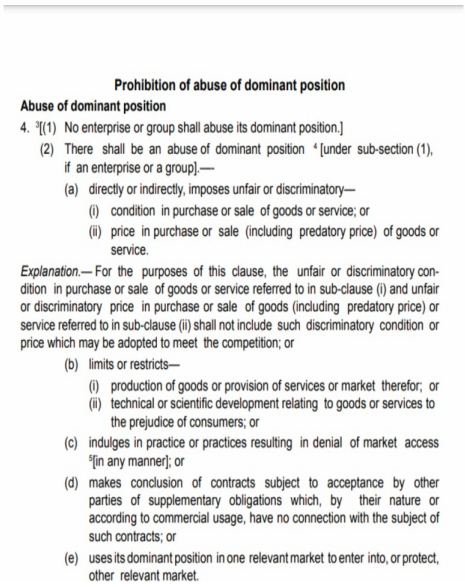
Therefore, under the competition law, every agreement will be tested in terms of what kind of effect it has on markets and competition. It is not that every agreement is going to be declared to be void. The rule is what we call as the rule of reason. You will have to reason out the impact of this agreement. And in case the agreement has an adverse impact of competition only then the agreement shall be held to be void.

Against the rule of reason, you have another very interesting rule called the Rule of per se illegal under the competition law. Now, the per se illegal rule applies to agreements such as cartels. Interestingly, the term cartel has been existing in business and in markets for a long period of time. The oldest cartel is among the oil producing nations called OPEC. These are sovereign nations and are not business entrepreneurs. So, sovereign nations can have cartels, but that is not the purpose of any competition law. Competition Law deals with entities inside a country, they are not about what sovereign nations can do. So, OPEC is just an example of cartel. It is not something that a competition law can actually deal with.

A cartel is about those kinds of engagements of manufacturers, producers, or association of Manufacturers, who come together. The purpose of cartel or cartelization, as we call it, is to

see that the producers of one commodity or one services, pool in together, they come together. Coming together is not a problem. But once you come together, and you try to rig the market, how do you rig the market? Maybe you rig the price. Now, how do you rig the price? Maybe you create an artificial shortfall, you create artificial demand by reducing the supply, so that you can maintain some kind of stability of price. Cartel is illegal in India, like in most other jurisdictions. Cartel comes under the per se illegal rule and any kind of an agreement that creates or attempts to create a cartel will be considered as illegal under the competition law. So, agreements that create cartel have been declared to be illegal.

All void agreements are not necessarily illegal. But illegal agreements are definitely void. So, cartel is illegal and void. Once it is illegal, there is no question of it being enforceable at law. Competition law helps us understand an idea of what an illegal agreement can be. There have been significant interventions by the Competition Commission of India. One of the most famous case of cartelization was a case of cement industries or cement producers or manufacturers of India. The Builders Association, which is also an entity of service providers, found that the cement manufacturers had entered into a cartel through their cement manufacturing association. The Competition Commission of India did find evidence of cartelization and imposed a penalty on the cement manufacturers. To a larger extent, the cement manufacturers cartelization case was an eye opener, saying that although you can be a member of producers or manufacturers association and can do good work, they cannot form a cartel, rig the price, create artificial demand and supply gaps, create conditions that will adversely affect consumer interest, and most importantly, defeat the purpose of competition in the market.



Prohibition of abuse of dominant position

Abuse of dominant position

4. [3][(1) No enterprise or group shall abuse its dominant position.]

(2) There shall be an abuse of dominant position [4][under sub-section (1), if an enterprise or a group].—

(a) directly or indirectly, imposes unfair or discriminatory—

(i) condition in purchase or sale of goods or service; or

(ii) price in purchase or sale (including predatory price) of goods or service.

Explanation.— For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or service referred to in sub-clause (i) and unfair or discriminatory price in purchase or sale of goods (including predatory price) or service referred to in sub-clause (ii) shall not include such discriminatory condition or price which may be adopted to meet the competition; or

(b) limits or restricts—

(i) production of goods or provision of services or market therefor; or

(ii) technical or scientific development relating to goods or services to the prejudice of consumers; or

(c) indulges in practice or practices resulting in denial of market access [5][in any manner]; or

(d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or

(e) uses its dominant position in one relevant market to enter into, or protect, other relevant market.

One of the provisions of the competition law for our reference at this point of time is Section 4. Section 4 of the competition law very clearly talks about abuse of dominant position. It says, if anybody tries to abuse their respective dominant position, then to that extent, that is a prohibited restricted activity. And please note, abuse of dominant position can happen also through a contract or through an agreement. Being a dominant position is not a problem for the competition law. For public policy, you can be a dominant player and you can have dominant positions in the market such as that occupied by market leaders. We have Indigo airline as the market leader in aviation space and Airtel in the telecom space. They may be in a dominant position. Now, dominant position is not necessarily 50 percent or more market share, it can be 30 percent, it can be 20 percent as well. It is not necessarily dominance vis-a-vis the Indian market, it can be dominant visa vie Karnataka or Bangalore or any other jurisdiction. So, the market has to be defined to determine who the dominant player is, as it can vary from market to market. The point is being a dominant player or being in a dominant position can happen based on mergers with competitors. This is called the combinations of competitors. So, under the competition law, you have a combination regulation as well that deals with this practice.

To amalgamate or merge two companies, which may have an adverse effect on competition law, the combination regulation says that you have to take the prior permission of the Competition Commission of India. So, the Competition Commission of India can certify and that merger of two companies is fine if they may not have adverse impact on the market and competition. Hence, this is a kind of pre-emptory intervention of the Competition Commission of India for mergers and amalgamations.

Dominant position is fine, abusing the dominant position is not fine. So, abuse of dominant position is regulated and restricted activity under the competition law. And you could probably abuse dominant position by many such factors. For example, one of the factors is, looking at predatory pricing of goods and commodities. The other factor would be imposing unreasonable conditions on purchase of goods and services. Imposing conditions is usually through contracts, limiting or restricting the supply of goods and services, indulging in practices that deny market access.

There are various aspects about how a dominant position can be abused. Section 4 very clearly speaks about all those kinds of activities that are important for the intervention of public policy. Now, the most famous and under abuse of dominant position is the case of the real estate sector. The real estate sector led by companies like DLF, were actually pulled up by the Competition Commission of India. Now the real estate sector is a booming sector because there is a great demand for housing in cities. New companies are coming into the sector and there is a lot of demand and supply gap. Once the sector is new and has a lot of demand, naturally there are companies that get into dominant positions. DLF happened to be a dominant player in the Delhi NCR region. They entered into a lot of controversies because of the kind of relationship they had with the politicians and state governments as well. Once there is a nexus between the politicians and the contractors and the real estate builders, of course, the market conditions are going to be exploited. DLF had unreasonable terms and conditions, including a term and condition where they said we will not give a refund, if there is cancellation of booking in their contracts, especially when they were actually making buildings and selling it to allottees or consumers. The Courts found DLF's extraordinary contractual terms and conditions to be shocking and unconscionable. It is definitely not in favor of public policy where the real estate companies engage in what is called as reservation of rights clause.

In reservation of rights clause, most of these real estate companies would have the rights to make the agreement and the content. The entire contract would have already been drafted by the real estate company and the consumer would have to simply sign. They may negotiate the price. But the substantive clauses in the contract would be already something that is drafted by DLF. Then a consumer has no choice, he simply has to agree to it.

Would real estate company want to practice fairness? How many marketplaces actually practice fairness through their contracts and agreements? Very few. This kind of attitudinal

shift is something that the competition law and contract law attempts to make. This is also what a legal system must have. You do not always need law to actually tell you what to do and what not to do. cContracts must attend fairness. If they do not, regulator is needed in each of these sectors to actually ensure that a fairness of contract, fairness of market and fairness of bargain is maintained. DLF was not only the one notorious. The courts have looked at making a demolition order for Supertech. We have seen groups like Amrapali, and others, which have actually tried to rig the real estate market, get into abusive behaviors by trying to use the dominant apposition to the adverse interest of consumers, nation and public policy as well.

In the DLF case, what is interesting is how did the Courts intervene in a very unique fashion? What they did was that they listed out the objectionable clauses in the agreement. They said these are the objectionable clauses and they also suggested how, in the future, these clauses must look like. This is to be really appreciated as the duty of the court is to say that the agreement is entirely what need not be, but the doctrine of severability can be applied to pick up those objectionable clauses in the contract, for moderation or refinement.

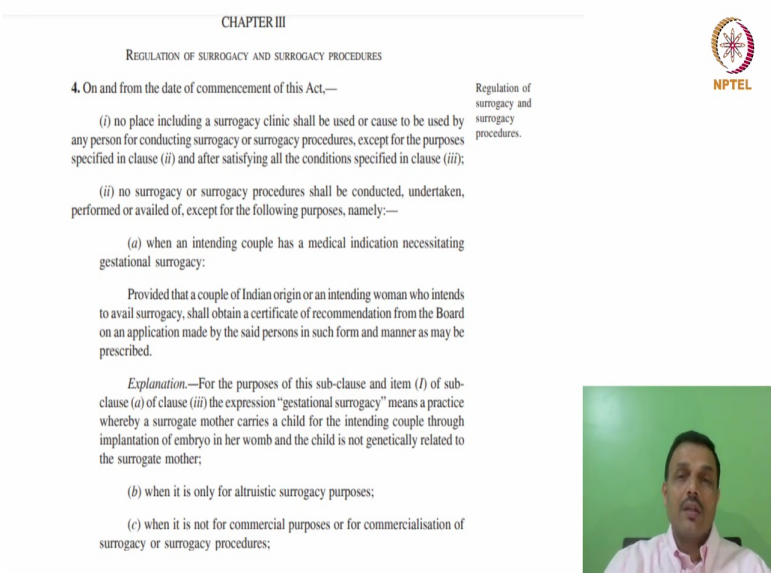
One of the remedial law that applies to Indian contract act is the Specific Relief Act of 1963. Suppose there is a breach of contract, the remedy is that of damages. The second remedy is known as the specific performance of a contract. The Specific Relief Act also has something called rectification of an instrument. The courts can rectify an instrument if they feel that it is rectifiable. And once it is rectified, the obligations between the parties can continue. So, it is not that the instrument must be canceled or thrown into the dustbin or declared void. It is not that damages is the only end result, the parties can continue with their obligations as well. The allottee can continue living in DLF or the DLF can actually improve their attitude and services towards the allottee. Both can coexist and the contract can still be enforceable at law provided the court feels that the objectionable clauses can be rectified in such a manner that both the parties can continue to have a subsisting contract and commercial relationship going forward. So, these are also the remedies that are possible.

For example, in government contracts, once we go to arbitration, it is as if A has won and B has lost. I do not see why in contracts only that kind of a conclusion should be there. I think it is possible that arbitrators can rectify the instrument and make the contract a workable contract. And that is something that probably the DLF case clearly highlights. So, I have just

given you two or three examples, about how competition law becomes a very, very important legislation in understanding the parameters of public policy in contracts.

Though the competition law application is far wider and broader, we have the Competition Commission of India, being the market watchdog for ensuring fair competition in different sectors. But again, you will notice that the Competition Commission of India is the general competition regulator. Whereas, we have specific competition regulators in each of the sectors like IRDA in the insurance sector, TRAI in the telecom sector and the Reserve Bank of India, in the banking sector.

This is the kind of landscape that we have. Anti-competition is definitely against public policy. Hence today, if you go to the courts, it would not only apply the provisions of competition law, it may want to also refer to sections 23 in saying broadly this is what public policy actually means.



CHAPTER III

REGULATION OF SURROGACY AND SURROGACY PROCEDURES

Regulation of surrogacy and surrogacy procedures.

4. On and from the date of commencement of this Act,—

(*i*) no place including a surrogacy clinic shall be used or cause to be used by any person for conducting surrogacy or surrogacy procedures, except for the purposes specified in clause (*ii*) and after satisfying all the conditions specified in clause (*iii*);

(*ii*) no surrogacy or surrogacy procedures shall be conducted, undertaken, performed or availed of, except for the following purposes, namely:—

(*a*) when an intending couple has a medical indication necessitating gestational surrogacy:

Provided that a couple of Indian origin or an intending woman who intends to avail surrogacy, shall obtain a certificate of recommendation from the Board on an application made by the said persons in such form and manner as may be prescribed.

Explanation.—For the purposes of this sub-clause and item (*I*) of sub-clause (*a*) of clause (*iii*) the expression "gestational surrogacy" means a practice whereby a surrogate mother carries a child for the intending couple through implantation of embryo in her womb and the child is not genetically related to the surrogate mother;

(*b*) when it is only for altruistic surrogacy purposes;

(*c*) when it is not for commercial purposes or for commercialisation of surrogacy or surrogacy procedures;

Another interesting example that one can look into is a practice, technology, science and innovation in the medical sector, called surrogacy. There have been a lot of inventions in trying to help couples get a child.

The Western world has regulations on surrogacy. India has been struggling for more than a decade right now. Initially, the ART Bill or the Assisted Reproductive Technologies Bill, were proposed but could not be enacted. In 2021, the Parliament of India passed the Surrogacy Act.

In the concept of a surrogacy there is an agreement for surrogacy. The basic relationship that governs this kind of process is a commercial contract, though commercial surrogacy is not

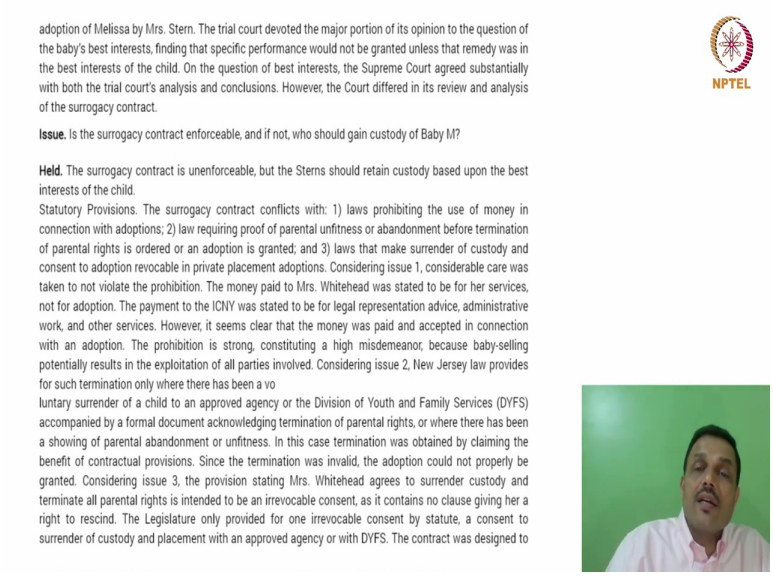
allowed. In surrogacy, even though there is nothing much commercial about it, is the document some kind of an enforceable contract? One will have to appreciate the enforceability of surrogacy agreement because the subject matter of surrogacy is a baby which is a child to be born and handed over to the couples.

In surrogacy intending parents who are not unable to have a child, go to a clinic or medical hospital and they express their desire to have a child. It is this hospital or the clinic that actually identifies a surrogate mother or a lady who will actually agree to be a surrogate. Interestingly, this is called of a renting of a womb. In India, you will notice that a lot of foreign couples come for fertility tourism, as it is easier and cheaper. Most probably, those who agree to be a surrogate mother, may be those from the economically weaker section of the society. They expect some compensation or payment for agreeing to bear fetus in the womb for 9 months and handing over to the intending parents.

There have been challenges to this kind of arrangement, agreement or contract for surrogacy in India. One of the most famous challenges that one would want to look at is called the baby M case, or Manji's case. A couple from Japan come to India for surrogacy, constitute the agreement, make the payment and the fetus starts developing in the womb of the mother. The child is born in India, but the couple went back to Japan because they could not stay back for a longer duration of time. There is nothing called a surrogacy visa at that point of time. Later on, they decided to go separate ways. So, nobody came to take the child.

In the Japanese couple's case, what happened was a newspaper report which highlighted how India is becoming baby market. It means that babies are being born and there are no parents to actually take care of baby. If you are born in India, to a Japanese parent, do you get Indian citizenship, just because you are born in India? You will notice that the Citizenship Act has also been amended. It says that just because you are born in India cannot be a citizen. One of your parents also has to be an Indian. In that baby Manjis's case, which is called the Japanese couples case, the grandmother actually came and took the child from India.

In the German twins case, twins were born to German couple. At that point of time, Germany did not permit surrogacy and they did not legalize it. But he came to India, he decided to have a child. When he got twins, instead of writing his wife's name, in the birth certificate that went to the Anand municipality, he writes the surrogate mother's name, so that he can get the birth certificate, passports and visas ready, to take the children back to Germany. The case was decided by the Gujarat High Court.


adoption of Melissa by Mrs. Stern. The trial court devoted the major portion of its opinion to the question of the baby's best interests, finding that specific performance would not be granted unless that remedy was in the best interests of the child. On the question of best interests, the Supreme Court agreed substantially with both the trial court's analysis and conclusions. However, the Court differed in its review and analysis of the surrogacy contract.

Issue. Is the surrogacy contract enforceable, and if not, who should gain custody of Baby M?

Held. The surrogacy contract is unenforceable, but the Sterns should retain custody based upon the best interests of the child.

Statutory Provisions. The surrogacy contract conflicts with: 1) laws prohibiting the use of money in connection with adoptions; 2) law requiring proof of parental unfitness or abandonment before termination of parental rights is ordered or an adoption is granted; and 3) laws that make surrender of custody and consent to adoption revocable in private placement adoptions. Considering issue 1, considerable care was taken to not violate the prohibition. The money paid to Mrs. Whitehead was stated to be for her services, not for adoption. The payment to the ICNY was stated to be for legal representation advice, administrative work, and other services. However, it seems clear that the money was paid and accepted in connection with an adoption. The prohibition is strong, constituting a high misdemeanor, because baby-selling potentially results in the exploitation of all parties involved. Considering issue 2, New Jersey law provides for such termination only where there has been a vo

luntary surrender of a child to an approved agency or the Division of Youth and Family Services (DYFS) accompanied by a formal document acknowledging termination of parental rights, or where there has been a showing of parental abandonment or unfitness. In this case termination was obtained by claiming the benefit of contractual provisions. Since the termination was invalid, the adoption could not properly be granted. Considering issue 3, the provision stating Mrs. Whitehead agrees to surrender custody and terminate all parental rights is intended to be an irrevocable consent, as it contains no clause giving her a right to rescind. The Legislature only provided for one irrevocable consent by statute, a consent to surrender of custody and placement with an approved agency or with DYFS. The contract was designed to

The most important one for our reference is a case from the United States. This is a very interesting case about the challenges to the surrogacy agreement itself. Can an agreement of surrogacy be enforceable at law, was the question that was posed in the American case called the baby M case. We had a baby M case in India and we had a baby M case in the United States called Stern versus Whitehead. This was in the early 1990s and 1980s when there are two forms of surrogacy. One is called traditional surrogacy. One is called the modern form of surrogacy. In this case, there was an agreement that was entered into between Sterns, a couple and Whitehead, a surrogate mother. They entered into an agreement thinking that they have hired the services of Mrs. Whitehead.

When you hire the services of a person, it could be to help you domestically, it could be to drive you somewhere etc. So, these are all service contracts. Womb happens to be a human organ. Can you trade in human organ? can there be a commercial contract in human organ? No, because that is also public policy. You can gift human organ, you can donate human organs and that is why we say blood and kidney cannot be part of commercial contract and commercial trade.

Surrogacy Act of 2021 also says commercialization is not acceptable. So, contract cannot be applied in that sense. However, in this terms also in Whitehead case no such law in the United States existed precisely. It is temporary renting meaning, temporary 9 months, and after that you are to hand over the baby. But in the Sterm versus Whitehead case, what happened was, once the baby was born, the surrogate mother started feeding the baby and she got attached to the baby. And hence she ran away with the baby, she refused to hand over the

baby to the Sterns. And that is when the Sterns went to the court and they wanted the enforceability of the agreement because under that agreement, Mrs. Whitehead promised to handover the baby to the Sterns. So, the Sterns sought enforceability of the agreement. They sought specific performance, as damages was not going to be an equal remedy at all.

The Sterns wanted the only remedy of getting the child from Mrs. Whitehead. Mrs. Whitehead actually ran away with the child. To a larger extent the court in this case did found Mrs. Whitehead in violation of her obligation. But at the same time, the court said that it is difficult to call this kind of contract as an enforceable contract. Because there is emotion attached. The surrogate mother is attached to the child both genetically as well as emotionally, and we cannot give Sterns the entire rights of enforcing the contract. This was traditional surrogacy in which the Sterns and Mrs. Whitehead both had some genetic connection to the child. And hence, there had to be balancing of interests and balancing of rights. And you will notice that Mrs. Whitehead in this case was given visitation rights. She could visit the baby because she had rights over the baby. It was not like the modern surrogacy where surrogate mothers just provide the womb.

Taking all those due note and consideration of the courts in the United States had to evaluate whether the agreement is enforceable at law. The major portion in this case did not look at it from a contract or a commercial service. What we have to look at it right now is the best interest of the child. In the baby Manji case as well in India, the Supreme Court also looked at the best interest of the child. They ascertained that while handing over a child to a grandmother, the physical, emotional and psychological strength of the grandmother to take care of the child was to be evaluated. It was probably in the best interest of the child because the child could not remain in India or in an orphanage or anyone else taking care of the child may not be a feasible option. So, grandmother could exercise that best interest of child she was able to convince the court and the court handed over the baby to the grandmother in the Indian case.

So, surrogacy also posed challenges of public policy in general. And right now you will notice that while we rule out commercial aspects of surrogacy it is an interesting dimension about how surrogacy started from a contract. It started from consent. And right now, we refuse to hold it as a commercial contract. Because we think this is not something that the law and public policy would accept it as. So, commercializing of surrogacy is prohibited once there is no commercializing of surrogacy, a contract of surrogacy is not a contract, it is now

going to be governed under the law of 2021 in India, and that will be the basis of determinations of rights between the parties in the contract as well.