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IN INDIA AND PROTECTION OF SURROGATE MOTHER**



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RESEARCH ARTICLE

ROLE OF LAW RELATING TO COMMERCIAL SURROGACY IN INDIA AND PROTECTION OF SURROGATE MOTHER

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ABSTRACT

Reproductive right is a basic human right granted by Article 16.1 of the Universal Declaration of Human Rights 1948, and in India it is granted under Article 21 of the Constitution of India. It was after the development of Assisted Reproductive techniques, the medically unfit couples could also exercise their reproductive right through this wonderful process. In addition, by the use of this process through commercial surrogacy not only the intended couples will be benefited but the poor women can also earn money by becoming surrogate mother for the intended couples or by becoming egg donor.

But the death of egg donor Susma Pandey, and Yuma Sherpa of India has raised a question against the role of law regulating the Commercial Surrogacy in India. The Supreme Court of India, In *Baby Manji Yamada versus Union of India & Anr.* [2008] INSC 1656, make it clear that commercial is legal in India and asked the legislature to draft a bill for regulating this process. But still now we don't have any strict law for regulating this wonderful process as the Assisted Reproductive Technologies Bill, 2010 is still pending and because of which it has been found in several occasion that how the Reproductive clinics use to violate the rights of the poor women as well as the guidelines given by ICMR for the process of Assisted reproductive technique causing death of the two egg donor.

To regulate this wonderful process and to protect the rights and life of the surrogate mother as well of egg donor strict laws must be made and The Assisted Reproductive Technologies Bill, 2010 should be passed immediately.

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INTRODUCTION

For any society, law is an important tool to control and punish the people who break law. Therefore, law is a very important mechanism to run the society in peace full way where every people can enjoy there right. A society without law will become Gunda Raaj means goons place. If this happen, then no body's right will be protected anymore. The reason for choosing these topics for research is that in India, Commercial Surrogacy is legal from 2002 and almost millions of money has been earned by the Reproductive Industries from the foreign couples as well as from the Indian couples still now, through this process. But what make me shocked about this process is that, here in India we don't have any law to regulate this Process yet. Moreover, what we have is a drafted Assisted Reproductive Technology Bill, 2010 that is still pending for its approval before parliament. Not only that, in that Bill nothing has been mentioned about the compulsory Life Insurance policy for the every Surrogate mother as well as for the egg donor in case of any miss happening to them during the process. Even lots of loopholes are there in the present drafted Bill, which I have discussed in this paper. Therefore, this Assisted Reproductive Technology has not only proved to be benefitted for the medically unfit Couples but on the other hand

it has also increased a new form of crime against women in the form of trafficking of human eggs and supply of surrogate mother in the reproductive industries by the traffickers. Therefore, either this process should be stopped immediately making it illegal or the drafted Bill should be passed immediately with necessary changes for the prevention of various crime and exploitation against women.

Definition Of Surrogacy And Its Types

The American Law Reports¹ defined the term "Surrogacy" in the following manner:

"...a contractual undertaking whereby the natural or surrogate mother, for a fee, agrees to conceive a child through artificial insemination with the sperm of the natural father, to bear and deliver the child to the natural father, and to terminate all of her parental rights subsequent to the child's".

According to the Black's Law Dictionary, "surrogacy means the process of carrying and delivering a child for another person"².

¹ American Law Reports, *Validity and Construction of Surrogate Parenting Agreement*, 77 A.L.R. 4 70. (1989)

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Surrogacy is mainly divided into two types

1. **Traditional Surrogacy:** - By this method, sperm of the donor or the sperm of the father is artificially inseminated in the women and the women get pregnant and she carries the fetus till the birth of the child. Here, the woman is the biological mother of the child because it is her egg, which was fertilize with the sperm of the donor or the sperm of the father means the child will be genetically attached to the mother.
2. **Gestational Surrogacy:** - And here in this methods the fertilization is done through In Vitro Fertilization (IVF) first. In these methods, the egg and sperm of the intended parent is collected for artificial fertilization i.e. through IVF. Once the embryo is formed, then it is transfer into the surrogate mother womb with the help of Assisted Reproductive Technique. The surrogates' mother carries the baby until the birth of the child. Here, in this case the surrogate mother is not the biological mother of the child because the egg that is use for the fertilization does not belong to her.

At present, a good number of the couples who are medically ailing and want to have their own baby go for Gestational Surrogacy, for the reason that the baby will not be genetically attach to the surrogate mother. Moreover, Countries like India; Ukarine allows Gestational Surrogacy on Commercial basis and are legal there. Some countries like Netherlands, France, and Canada, Australia they do not allow Commercial Surrogacy and its illegal there.

Now to complete this process there is a requirement of Surrogate mother, egg donor or Sperm Donor (depends on the cases). For this, there must be an agreement between Intended parents and the Surrogate Mother. This agreement is known as Commercial Agreement, which is a legal process. Commercial Surrogacy is a written agreement between the Genetic parents and the Surrogates mother that the surrogate mother will give birth to the child of the genetic parents and in return, she will get money from Couple, and all the medical expenses will be borne by the genetic couples or by the clinics. Moreover, after giving birth to the Child, the Surrogates mother will have no right over the child born. Now point to be noted here that there is no law to regulate this process.

Law Relating To Commercial Surrogacy In India

In India, the first child born through gestation was at Dr. Nayna Patel's Akanshka Fertility Clinic in Gujarat during 2004. After this only India, become the favorite destination for Commercial Surrogacy for the foreigners. It is legal here, I don't know it can be legal here when we do not have any law to regulate it and what we had here is a proposed bill which is still pending for its approval. Because of which many legal issues like trafficking of Women for eggs and Surrogate mother, payment for surrogate mother etc was highlighted in past as well in present Scenario in entire world as well as in India also.

It was in the case of Baby Manji Yamada versus Union of India & Anr. [2008] INSC 1656³, for the first time Honorable Supreme Court in its judgment asked the government to pass a Law for governing and regulating the procedure of Surrogacy as well as said that Commercial Surrogacy is legal in India. According to that, Legislature has prepared a bill called Assisted Reproductive Technologies (ART) REGULATION Draft Bill 2010, which is still pending for its approval. And God knows when this Draft will be passed.

The Law Commission of India⁴, submitted its Report No-228, whereby it says that the price fixed for the Commercial Surrogacy Agreement in India, between the Intended parents and the surrogate mothers, is near about \$25,000-\$30,000 that is around 1/3 from the other countries⁵. Simply because of the low cost, Modern medical facility, easy availability of surrogate mother and with no strict laws to regulate the commercial surrogacy, India becomes the favorite destination for the foreign couples for Commercial Surrogacy. That is the price fixed between Intended Parents with the Reproductive clinics, but the amount, which is given to the surrogate mother for renting her womb, is very less in compare to the service, which she rendered. As in proposed bill nothing is mentioned about the fees to be given to the surrogate mother by the reproductive clinics. Thus, here the economic right of the surrogate mother is hampering. Actually, by these the income of the ART Clinics is increasing.

In an article written by Deborah Conlon, it was found that near about 3000 fertility clinics were there in 2002 in India, and by Commercial Surrogacy this industries has earned more than \$400 million per year⁶.

Human Trafficking And Economic Exploitation Of Women For Commercial Surrogacy

The National Rapporteur on Trafficking in Human Beings of Dutch⁷ while doing its research on *Human Trafficking For The Purpose Of The Removal Of Organs And Forced Commercial Surrogacy*, raised their concern for the Surrogate mother who comes for the Commercial Surrogacy. That whether such women were coming voluntarily or forcefully to become a Surrogates mother for commercial surrogacy? Poverty is one of the reasons for the commission of the crime as well as the poor people get easily victim of the trafficking. Moreover, while answering the same Jyotsna Gupta, a senior lecturer in gender studies and diversity at the University of Utrecht, argues, "Indian surrogate mothers are usually under enormous pressure from their husband and family"⁸. Therefore, from this report we can find that Indian women belonging from poor

³ Kari Points, *Commercial Surrogacy And Fertility Tourism In India The Case Of Baby Manji*, INSTITUTION IN CRISIS, <https://web.duke.edu/kenanethics/CaseStudies/BabyManji.pdf>

⁴ *Supra*.note 2

⁵ *Ibid*. at11

⁶ Deborah Conlon, "No Pain, No Gain": *Outsourcing Surrogacy In India*, Development Perspectives, May29,2014, <http://www.developmentperspectives.ie/no-pain-no-gain-outsourcing-surrogacy-in-india/>, Last visited, July23,2014

⁷ National Rapporteur on Trafficking in Human Beings, *Human trafficking for the purpose of the removal of organs and forced commercial surrogacy*, THE HAGUE: BNRM,2012,at.18

<http://www.dutchrapporteur.nl/reports/organ-removal-forced-commercial-surrogacy/>

⁸ *Ibid.*, at 19

² Law Commission of India in Report No-228, *Need For Legislation To Regulate Assisted Reproductive Technology Clinics As Well As Rights And Obligations Of Parties To A Surrogacy*, August 5, 2009 <http://lawcommissionofindia.nic.in/reports/report228.pdf>

section are in great danger. They can easily become the victim of trafficking because of their illiteracy and off course for their poverty also. And as there is no law to regulate this process so the wrongdoer can easily get the benefit of it to protect themselves.

In less developed countries, where nearly all of the inhabitants belong to poor society, rights of women's from that society were infringed and violated by the intermediary and the clinics for the money which was agreed to be paid to the Surrogate mother for the purpose of Commercial Surrogacy. As most of the money which she is about to receive from this surrogacy agreement were taken by the Reproductive clinics and the agent and they hardly get Rs.2.5 lakhs of Surrogacy Agreement.

Dr. Roel Schats⁹, chief medical officer of the IVF centre of the VU Medical Centre, argued against Commercial Surrogacy, "It is a form of modern slavery to use an Indian woman as a breeding machine without the benefit of any form of care". And we all know that slave system is the violation of Human rights.

The National Rapporteur on Trafficking in Human Beings of Dutch Commercial Surrogacy in their report discussed that if a woman is Forced, Coerced and Exploited to become a Surrogate mother in that case it will be considered as a crime and it will fall under trafficking¹⁰.

Now a days, there is a huge demand of Surrogate mother and egg donors in the Medical Clinics or in the Reproductive Industries, for the Gestational Surrogacy. As the demand of surrogates mother and egg donor is too high in the current scenario, so to meet the demand, supply of the surrogate mother and the egg donor is also required in the same ratio. Thus to meet this demand there is great risk of trafficking of women and minor girls in the global flesh market of Reproductive trade so as to meet the demand of Surrogates mother and egg donor. And this Reproductive trade trafficking is also worked in the same way like Organ trade trafficking.

In a Article published by Prof. Rita Biswas¹¹ in **Human Trafficking – A Burning Problem In India**, mentioned that near about 80% of the human trafficking used to be done for sexual exploitation and the remaining portion for forced slavery and India is considered to be the highest crime rate ratio in trafficking in Asia. Here most of the girls were trafficked from Nepal, Bangladesh to run the prostitution. In addition, women from India were trafficked to Middle East for the same purpose.

As it's already mentioned in the report of National Rapporteur on Trafficking in Human Beings of Dutch Commercial Surrogacy that if a woman is Forced, Coerced and Exploited to become a Surrogate mother in that case it will be considered as a crime and it will fall under trafficking. Also according to

Jyotsna Gupta¹², women from poor society are usually under enormous pressure from their husband and family to become surrogate mother. Therefore, from both these statement we find that how much the life of women in India is in danger. And how easily they can become the victim of trafficking.

According to the definition of the United Nations, "trafficking is any activity leading to recruitment, transportation, harboring or receipt of persons, by means of threat or use of force or a position of vulnerability"¹³. And women who become the victim of human trafficking suffered both mental and physical torture.

Therefore, from above discussion and going through the report of National Rapporteur on Trafficking in Human Beings of Dutch Commercial Surrogacy and also from the definition of United Nations, we can say that if a woman is forced to become Surrogate mother or to donate her eggs in that case it will be a crime and will fall under human trafficking.

We can consider the reports submitted by National Reporter for the amendment of our existing trafficking laws as well as for making new laws, so that the traffickers should get correct punishment for their wrongdoer. As for now whether its Indian Penal Code or Immoral Trafficking Prevention Act, it's high time to include this new form of trafficking in its.

Ranjana Kumari¹⁴, Director of Center for Social Research said that, in most of the cases relating to Commercial Surrogacy, it was found that, the surrogate mothers were exploited. The broker and the medical clinics exploited them for so many reasons.

According to Akanksha Patel¹⁵, "Legislation should be there so that this wonderful procedure can be supervised and it is being done by the right people for the right people".

Due to lack of law relating to Commercial Surrogacy in India, in case of death of surrogate mother or miscarriage due to any complication, the hospital authorities were never held liable. In India, no one is liable for the misery of the Surrogate Mother. Even the surrogate mothers were not provided with any Life Insurance policy by the hospital authority and neither by the intended parents for any miss happening. Even if some hospital provides it then the amount is very less in compare to the life of surrogate mother.

Till now there is one reported death of surrogate mother named Premila Vaghela¹⁶, age 30 died when she was 8 month pregnant. She died due to sudden health complications. Premila death is the only reported death till now, but don't know how

¹² *Supra note 7* at 19

¹³ *Supra note 11*

¹⁴ Nita Bhalla, Manshi Thapliya, *India seeks to regulate its booming 'rent-a-womb' industry*, (Mon Sep 30, 2013, 1:01pm) REUTERS, <http://www.reuters.com/article/2013/09/30/us-india-surrogates-ibidUSBRE98T07F20130930>

¹⁵ *Ibid.*

¹⁶ TNN, *Surrogate mother dies of complications*, THE TIMES OF INDIA, "(May 17, 2012, 03:06 AM IST) <http://timesofindia.indiatimes.com/city/ahmedabad/Surrogate-mother-dies-of-complications/articleshow/13181592.cms>

⁹ *Ibid.* at 20

¹⁰ *Supra note 7*

¹¹ Rita Biswas, *Human Trafficking - A Burning Problem In India*, 2(4) ONLINE JOURNAL EPISTEME, (March, 2014), <http://www.bharatcollege.in/PDFs/human-trafficking---1394774411.pdf>

many Premila had died till now which is not reported in media because of the money and power of the Reproductive Clinics. According to Dr. Sudhir Ajja¹⁷ of Surrogacy India, a Mumbai based fertility bank said that “ There is a need to regulate the sector”.

The UNODC Model Law against Trafficking in Persons, which was developed by the United Nations Office on Drugs and Crime (UNODC),¹⁸ has suggested for including “the use of women as surrogate mother¹⁹” under exploitation. Moreover, we know that exploitation of human beings come under violation of Human Rights.

In cases of Commercial Surrogacy it is found that, in case of any complications during delivery, the Doctors always tried to save the life of the unborn baby first and then the life of the mother. As, the price fixed was for the unborn baby and not for the mother. For Commercial Surrogacy, lives of the Unborn Child were given more importance in compare to life of Surrogate mother. Ethically it should be the mother life, whose life is more important than the unborn child. Even though, if she is a surrogate mother then also her life should be saved first not the unborn child.

As In India, still we do not have any law relating to Commercial Surrogacy, here the fate of the surrogate mother as well as the egg donor are in great stake that we can find out from the following cases:-

- In India, there was a case, where a girl from the orphanage of Haryana, sold out for two times within 3 yrs²⁰ to bear a child of a childless couple.

Even in the article published by Debesh Banerjee,²¹ he mentioned that, while making the famous documentary movie, filmmaker Ishani K Dutta, first did research for her documentary film “Womb on rent”. The movie was based on Surrogacy. While doing her research she found that, even though it is in the ICMR guidelines that, a girl below 18 years could not donate her eggs. However, in reality it is opposite. Because while doing research for her film, she found that girls below 18 years were also donating eggs. She expressed her fear that by this way, girls after attaining her puberty will become a machine for printing money for others. She also found that, the conditions of surrogate mothers in India are not good and they were exploited by the moneymaking fertility Clinics.

- In India, a 26 years woman named Yuma Sherpa²² from Delhi, died after the egg removal procedures on

January 29, 2014 and a 17 years Girl named Sushma Pandey²³ from Mumbai, died after two days of egg removal procedures on August 2010. The story behind there death is not only pathetic but it is also found that there was a great violation of ICMR guidelines for Assisted Reproductive Technology.

Because of the absence of law and guidelines regarding how many eggs that can be removed from the body at a time and the dosage of injection **Gonadotropin** or any other **Synthetic Hormone** which is used for producing multiple of eggs, has increased a great concern for the doctors, lawyers and Human rights activist in respect of the health and life of the women.²⁴ Egg donating process consists of several process of Hormone Treatment and this entire hormone treatment is very much harmful to the health of the Women e.g. *colon cancer*²⁵ and sometime causing death in severe cases. In addition, it has been found that the hospital authorities never disclose this harmful side effect to the egg donor at time of their counseling. They only use to disclose about the money which the donor can earn after this process. It is also found that in India, nothing has been mentioned about the dosage of such synthetic hormone as well as nothing has been mentioned about the number of eggs, which can be removed from the body at a time. Mostly the Reproductive Clinics, they used to give Advertisement in the Newspaper and in their website, which attracts the young girl for donating their eggs and in return they can earn a handsome amount that also in a short span of time without disclosing the ultimate naked truth of the process i.e. the side effect for long term.

Another important point to discuss here is that The *Reproductive Organ* especially *Egg or Ova* should be considered under *Guiding Principles on Human Organ Transplantation of WHO* and in *The Transplantation of Human Organs Act, 1994*, of India to protect the women from becoming the victim of Reproductive Organ Trafficking especially by considering the serious issue relating to health of the women after the egg removal process and how this process is used by the traffickers for money making.

In an article published by Kathleen Sloan²⁶, he said that, In Surrogacy process, surrogates mother acts like a Commercial Industry and the product of this Industry, is the baby born through this process. Women from the poor section were exploits, and there health is on risk throughout this process. The European Parliament in the year 2011 declared that the process of surrogacy violates the human rights of the women.

¹⁷ Nita Bhalla and Mansi Thapliyal, *Foreigners Are Flocking To India To Rent Wombs And Grow Surrogate Babies*, Business Insider (Sep. 30, 2013, 6:05 AM) <http://www.businessinsider.com/india-surrogate-mother-industry-2013-9?IR=T>

¹⁸ United Nations Office on Drugs and Crime, *Model Law Against Trafficking in Persons*, at.1

http://www.unodc.org/documents/human-trafficking/UNODC_Model_Law_on_Trafficking_in_Persons.pdf

¹⁹ *Ibid.* Sec.2(f) at 28

²⁰ Vrinda Marwah, *Commercial Surrogacy In India*, GENEWATCH, <http://www.councilforresponsiblegenetics.org/GeneWatch/GeneWatchPage.aspx?pageld=350>

²¹ Debesh Banerjee, *A Surrogate Story*, THE INDIAN EXPRESS, Mar.21,2014 <http://www.geneticsandsociety.org/article.php?Ibid=7631>,

²² Shefalee Vasudev, *A young woman's death after egg donation in a Delhi clinic raises questions about lack of awareness for such procedures*, LIVE.MINT, Feb 06 2014 11:40 PM IST

<http://www.livemint.com/Opinion/jaLf5RYkFQKSPHGZhr42M/Minority-report--Death-in-the-birth-industry.html>

²³ Grhari, *Bombay High Court questions role of Hospital in death of egg donor*, July 28, 2012 <http://blog.indiansurrogacylaw.com/bombay-high-court-questions-role-hospital-egg-donors-death/>

²⁴ Womens eNews, *Donor Deaths In India Highlight Surrogacy Perils*, THOMSON REUTERS FOUNDATION, (Jun.16 2014, 09:16 GMT), <http://www.trust.org/item/20140617101347-iu0x4/>

²⁵ Judy Norsigian, *EGGS FOR SALE*, GENEWATCH, <http://www.councilforresponsiblegenetics.org/GeneWatch/GeneWatchPage.aspx?pageld=213>

²⁶ Kathleen Sloan, *Inconvenient Truths about Commercial Surrogacy*, TWIN CITIES, Apr.1,2014, <http://www.geneticsandsociety.org/article.php?Ibid=7663>

Recently, the Thailand Military Government²⁷, after the case of BABY GAMMY, has given approval for a drafted bill by which Commercial Surrogacy in Thailand will amount to be a criminal offence and thereby making it forbidden. Only because of the serious issue related to this process the Government of Thailand has taken this decision.

Now the Government of India should take necessary to regulate this process.

Sugession

- There is a need of a Strong Uniform International Law to control the trafficking related to Commercial Surrogacy. As for now, we do not have any law dealing with trafficking relating to commercial surrogacy. The pending Assisted Reproductive Technology (ART) Bill, 2010 need to be pass immediately.
- A single woman should not be allowed to become surrogate mother as well as egg donor under Assisted Reproductive Technology (ART) Bill, 2010.
- In absence of law relating to dosage of synthetic Hormone for Egg removal process, we have seen that how doctor were misusing it for their benefit and innocent women's were becoming victim of it. Therefore, to deal with these situations there must be some homogeneous regulation and rule across the World regarding the dosage of synthetic hormone.
- Then, according to section 26(8) of ART Bill, 2010, a woman can donate her eggs for not more than six times in her entire life and the interval between each donation should be three months. However, nothing is mention about the number of eggs that can be removed at a time. Even there is no mechanism to check that how many times the same woman has donated her eggs and in what interval. This is another point of concern for the safety of the women health. Even for the Assisted Reproductive Technology, only those couple should be allowed for Commercial Surrogacy who is medically unfit and not those who already had a child of their own.
- General Awareness should be spread with the help of the media and NGO, regarding the risk of the process of human eggs donation as well as the risk of the life of the Surrogates mothers and its future side effects. NGO's can play a vital role for spreading messages among the places where trafficking of girls and women are very high. So that, the women can be saved from the brokers or intermediary, who worked for the Hospital authority.
- Concerning the serious impact of egg donation in women health as well as its trafficking for the purpose of Commercial Surrogacy, it is high time for the Indian Government as well as in the International level, to consider the Human egg under *Guiding Principles on Human Organ Transplantation of WHO* and in *The Transplantation of Human Organs Act, 1994*. As, the egg removal process is not only safe for the life of the women due to its serious health issue but also it causes

death of the women in certain cases and also other legal issues relating to it. In addition, for **Assisted Reproductive Technology** only the family members should be allowed to become surrogate mother as well as for the egg donor. By doing this we can control the trafficking as well as exploitation of women up to certain extend.

- Again, every Reproductive clinics must have counseling department to check that whether the surrogate mother and the egg donor were coming voluntary or by forcefully. This can be an effective method check the mental condition of the surrogate mother. In addition, this counseling team should give counseling to the surrogate mother as well as to the egg donor about the entire process of the Surrogacy as well as about the health issue relating to it in an unbiased way. So, that the Surrogate mother as well as the egg donor should know the process very well before taking any final decision.
- The hospitals authority should not entertain any kind of Broker or intermediary for the process of surrogacy. Because in most of the trafficking cases it is found that women were trafficked from remote areas of Villages with, the help of such intermediary in the name of jobs in metropolitan cities etc. Not only that some portion of the amount which is fixed for the Commercial Surrogacy Agreement goes to this intermediary as there commission for arranging egg donor or surrogate mother whatever the case may be.

CONCLUSION

According to Dr. Kamini Rao²⁸, "Surrogacy is a blessing if used in the right manner but it has been misused on many occasions. If we can bring a law to regulate surrogacy, misuse can be stopped. Infertility affects 10% of the population in our country and yet we don't have a law to regulate surrogacy." Thus, we have found that in the absence of Law, the Reproductive Clinics were flourishing day by day with the increase in number of trafficking of women and minor girl in Indian market as well as in the International market and to deal with the present scenario, uniform International Law is to be passed with immediate effect.

Adoption is much better then surrogacy.....try to bring happyness in someone face through adoption

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<http://lawcommissionofindia.nic.in/reports/report228.pdf>

²⁷ Reuters in Bangkok, *Thailand To Band Commercial Surrogacy In Wake Of Gammy Scandal*, THEGUARDIAN (Aug.13, 2014, 20.01 BST), <http://www.theguardian.com/lifeandstyle/2014/aug/13/thailand-ban-surrogacy-gammy>

²⁸ Hetal Vyas *Rent a womb for Rs 3,000/month*, The Times of India, (Dec. 10, 2011, 03.16 AM IST)

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