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MATERNITY BENEFIT IN INDIA: THE ROAD TAKEN SINCE 1929

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ABSTRACT

Providing Maternity Benefits for working women is the result of societal recognition of women's participation in the labour market. Legislations to extend such benefits are being considered as very important welfare measure for women. In India, there has been remarkable developments in the field since 1929, after some prior hesitations. With the 2016 amendments recently approved by the Rajya sabha, to the Maternity Benefit Act 1961, the country has joined a very short list of elite countries that have provided for higher maternity leave periods/benefits than the ILO standard in this regard.

Judiciary in India has played a very helpful role through positive and beneficial interpretations of the central Maternity Benefit Act 1961.Through several pro-women pronouncements, higher courts in India have greatly clarified and amplified the scope and provisions of the Act. The Indian jurisprudence evolved over the years on maternity benefits for women has been consistent to promote women welfare upholding the spirit of the constitution emanating from its Part III Fundamental Rights and Part IV Directive Principles of State Policy.

In the recent context of Government of India deciding to enhance the maternal benefit leave for 24 weeks and Tamil Nadu Government extending the maternity leave period for 9 months for women in State Government employment, this contribution revisits the legislative and jurisprudential developments thus far with the view to provide fresh enlightenment.

Key Words: *Maternity Benefit, Indian jurisprudence, pro-women pronouncements*

THE PRELUDE

Legislation providing maternity benefits to working women is reckoned as very important, positive measure in the realm of welfare and benefit of women. Such an action is also considered as indicative of the Government's recognition of women's participation in the labour market and growing awareness of the need to create a conducive working environment for women through protective and supportive initiatives.

The developments in this field in India during British regime was not so encouraging. In fact, in 1929 India expressed unwillingness to adopt the I.L.O Convention on maternity benefits to women workers. It is interesting to note the reasons adduced by the (then) Government of India for such a reluctance:

(a) the impossibility of enforcing the compulsory periods of absence from work in case of the pregnant women workers

(b) the shortage of medical women who would be necessary for issuing medical certificates,

(c) the impossibility of compulsory contribution schemes to provide benefits and

(d) the absence of need for provision regarding nursing periods and for the protection of women from loss of employment during pregnancy.[1]

PRE-INDEPENDENCE INITIATIVES

Though reluctance prevailed at the Central Government level, the Bombay Government brought into existence the first Maternity Benefit Act in 1929. Under the Act, every woman worker who has worked for a period of nine months in a factory was made eligible for maternity benefits on the production of a medical certificate. The benefits included leave of absence of the woman worker for four weeks; monetary benefit at the rate of 'eight annas per day'[2]. During the same year, The Royal Commission on Labour (1929) came with the recommendation that other provinces also enact maternity benefit legislations similar to the Bombay Act, and to make the benefit 'non-contributory' type. A number of provinces passed their own maternity benefit legislations accordingly.[3] Perhaps taking the cue from provincial legislations on maternity benefits, the Central Government enacted the Mines Maternity Benefit Act, 1941. Similarly, the Plantation Maternity Benefit Act 1951 was passed to offer maternity benefits to women working in plantations. But both the Acts, having coverage of workers only in mines and plantations respectively, had a very limited application.

POST-INDEPENDENCE SCENARIO AND CONSTITUTIONAL PROVISIONS

After Independence and adoption of the Constitution of India, the Constitution serves as the fountain for women's welfare and positive benign discrimination for effecting protection of women. Provisions for right to equality in law[4]; right to social equality[5]; right to social equality in employment[6]; protective discriminations[7] ; right against exploitations of women [8]; adequate means

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[1] Labour Legislation in India, International Labour Organization (ILO) 1952, p.98.

[2] i.e., Rs.0.5/ now.

[3] Central Provinces and Berar in 1930.,Madras and Ajmer in 1934, Delhi in 1937, U.P. in 1938, Bengal and Sind in 1939, Hyderabad in 1942, Punjab in 1943, Assam in 1944 and Bihar in 1945. [In Bihar the Maternity Benefit Act, was re-enacted in 1947 with certain changes.]

[4] Article 14 of the Constitution of India

[5] Article 15.

[6] Article 16.

of livelihood[9] ; equal pay for equal work [10]; non abuse of the health and strength of workers both men and women[11] ; just and humane conditions of work and maternity relief [12]; improvements in employment opportunities and conditions of the working women[13] etc. serve as guiding principles and directions for all post-constitution legislations relating to women's welfare in India.

It is to be noted that Article 42, under Part IV- Directive principle of State Policy, specifically states that "The State shall make provision for securing just and humane conditions of work and for maternity relief." It is in fulfilment of this directive principle and due to the strong emphasis on women welfare approach laid by the Second Five Year Plan (1956-61), the enactment of the central legislation on maternity benefit –The Maternity Benefit Act, 1961 happened.

THE MATERNITY BENEFIT ACT 1961

The Maternity Benefit Act 1961 [MB Act, for short] was mainly passed with a view to reduce disparities under the existing Maternity Benefit Acts and to bring uniformity with regard to rates, qualifying conditions and duration of maternity benefits. The 1961 Act was formulated keeping in view all the pre-constitution legislations and the revised ILO Maternity Protection Convention, 1952. The Act repealed the Mines Maternity Benefit Act, 1941, the Bombay Maternity Benefit Act, 1929, the provisions of maternity protection under the Plantations Labour Act, 1951 and all other provincial enactments covering the same field. However, the Act has no application to factory or establishment to which the provision of Employee's State Insurance Act 1948 applies, save as otherwise provided in Sections 5A and 5B of the Act.

The Act extends to the whole of India and seeks to regulate the employment of women in establishments specified therein, for prescribed periods before and after childbirth and to provide maternity and other benefits to women workers. It applies to every establishment being a factory, a mine or plantation including any such establishment belonging to Government and to every establishment wherein persons are employed for the exhibition of equestrian, acrobatic and other performances; to every shop or establishment within the meaning of any law for the time being in force in relation to shop and establishments in a state, in which ten or more persons are employed, or were employed, on any day of the preceding twelve months. The State Government is empowered to extend all or any of the provisions of the Act to any other establishment or class of establishments, industrial, commercial, agricultural or otherwise with the approval of the Central Government by giving not less than two months' notice.

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[7] Article 15 (3)
[8] Article 23.
[9] Article 39 (a).
[10] Article 39 (d).
[11] Article 39 (e)
[12] Article 42.
[13] Article 46.

AMENDMENTS TO THE ACT AND EXPANSION OF SCOPE AND APPLICATION

The M.B.Act has undergone several amendments over the years. The Amendment carried out in 1972 provides that in the event of the application of the Employee's State Insurance Act, 1948 (ESI Act) to any factory or establishment, maternity benefit under the M.B Act would continue to be available to women workers, until they become qualified to claim similar benefit under ESI Act. Circus industry was included within the ambit of the Act by an amendment in 1973.Further extension of coverage of women employed in factories or establishments covered by the ESI Act, 1948 and in receipt of wages exceeding entitlement specified in that Act was done by the 1976 amendment. The recommendations of the working group of Economic Administration Reforms Commission was incorporated through amendments made in1988. The Act was extended to shops or establishments employing 10 or more persons. The rate of maternity benefits was enhanced and some other changes were introduced. Further expansion of the coverage of the Act and recognition of 'medical termination of pregnancy' and providing incentives for family planning was carried out by the. Maternity Benefit (Amendment) Act, 1995. It also provides that there shall be a six weeks leave with wages in case of medical termination of pregnancy, two weeks leave with wages to women employees who undergo 'tubectomy' and one month leave with wages in cases of illness arising out these two. In 2008, the existing ceiling on maternity benefit was increased from Rs. 250 to Rs. 1000. The Central Government has been given power to increase the medical bonus from time to time subject to a maximum of Rs. 20, 000/-To cap it all, in August 2016, a bill has been passed in the Rajya Sabha to provide for 26 weeks of leave entitlement for women workers in the country. By this legislation, India joins a small but highly elite group of 'nations that meet or exceed the ILO Recommendation No.191' wherein 18 weeks of maternity leave has been proposed.[14]

EXPANSION EFFECTED IN 2016 BILL

The 2016 Bill is a remarkable legislative measure to promote and protect the welfare of women workers in the country. The main advance is to provide for a noteworthy increase in the period of maternity leave- from the existing12 weeks- to 26 weeks. By this stroke, India exceeds the ILO recommendations on maternity benefit. Further, under the 1961Act, it was prescribed that maternity benefit should not be availed before six weeks from the date of expected delivery. But, the present Bill changes this to eight weeks. As an incentive for promoting family planning, in the 2016

[14]Globally, 51 per cent of countries provide a Maternity leave period of at least 14 weeks, the standard established by ILO Maternity Protection Convention, 2000 (No. 183). 20 percent of countries meet or exceed the standard of 18 weeks of leave suggested in Recommendation No. 191. [For more details see: Shashi Bala ,Implementation of Maternity Benefit Act, V.V. Giri National Labour Institute,2012]
Very recently, the T.N. Chief Minister has announced in the Legislative Assembly that from now on 'Women Govt Employees in the state shall have the benefit of 9 months of maternity leave.'

amendment, it has been stipulated that in case of a woman with two or more children, the maternity benefit will continue to be only at the original of 12 weeks and the same cannot be availed before six weeks from the date of the expected delivery. This provision is likely to affect women who already have two or more children. The latest amendment provides for maternity leave for adoptive and commissioning mothers. The Bill has introduced a provision to grant 12 weeks of maternity leave to:

(i) a woman who legally adopts a child below three months of age; and
(ii) a commissioning mother.

A commissioning mother is being defined as a biological mother who uses her egg to create an embryo implanted in another woman. The 12-week period of maternity benefit will be calculated from the date the child is handed over to the adoptive or commissioning mother.

Recognizing the need to make women informed of the enabling provisions of the M.B. Act and its amendments, the Bill has a provision which requires every establishment to intimate the women at the time of their appointments of the maternity benefits available to them/her. Such communication must be in writing and electronically. Another facility of 'working from home' is also being extended to women. According to the provision in the amendment, an employer may permit a woman to work from home and such facility would become applicable if the nature of work assigned to the woman permits her to work from home. Women can avail of this option, after the period of maternity leave, for a duration that is mutually decided by the employer and the woman. Moreover, there is a requirement that every establishment with 50 or more employees shall provide crèche facilities within a prescribed distance. Women workers shall be allowed four visits to the crèche in a day and the interval for rest shall also be included in it.

JURISPRUDENTIAL STRIDES IN MATERNITY BENEFIT

Judiciary in India has greatly helped positive and beneficial interpretations of the M.B. Act. Through several pro-women pronouncements, higher courts in India have in fact clarified and amplified the scope and provisions of the Act with the consistent view to promote women welfare. The jurisprudence evolved by the Supreme Court of India on maternity benefits for women deserve appreciation for upholding the spirit of the constitution emanating from its Part III Fundamental Rights and Part IV Directive Principles of State Policy .

In one of the early decisions pronounced in November 1965, a four-judge bench of the Apex court (***Bombay Labour Union vs. International Franchises Pvt. Ltd.)*** [15]had occasion to adjudicate on a rule in the packing and labelling department of the respondent concern that prescribed ' if a

[15] ***1966 AIR 942, 1966 SCR (2) 477***

woman employee got married, her service would stand automatically terminated.' The court observed that there was no great evidence showing that married women were more likely to absent themselves from work than unmarried women or widows. If the requirement is based on the presence of children which could possibly be the reason for greater absenteeism among married women, then widows with children shall also be on the same plain. "The only difference in the matter of absenteeism that we can see between married women on the one hand and unmarried women and widows on the other is in the matter of maternity leave which is an extra facility available to married women. To this extent only, married women are more likely to be absent than unmarried women and widows."[16] The court rejected the contentions of the employer and held that their 'reasons do not justify such a drastic rule.' Allowing the appeal by the Labour Union the court directed that 'the rule in question in the form in which it exists at present be abrogated. The abrogation shall take effect from the date of this judgment.'

In ***B. Shah vs. Presiding Officer, Labour Court, Coimbatore and others*** [17]thebench consisting of Justices Jaswant Singh and V.R. Krishna Iyer considered the question whether Sundays being wage-less holiday should be excluded in calculating the maternity benefit for the period covered by Section 5 of the M.B.Act. The Court, applying the beneficial rule of construction in favor of the woman worker, emphatically held that Sundays must also be included. It observed further that the maternity benefit conferred by the Act, in the light of the Article 42 of the Constitution, was intended to enable the working woman 'not only to subsist but also to make up her dissipated energy, nurse her child, preserve her efficiency as a worker and maintain the level of her previous efficiency and output'.

The court recognized the 'biological role' of women in child bearing and found it totally necessary to support her to preserve her health and well-being, through liberal benefits, so as to enable the woman play her productive and reproductive roles efficiently. The Court held that maternity benefit is one that every working woman shall be entitled to, and her employer shall be liable for, the payment of maternity benefit, which is the amount payable to her at the rate of the average daily wage for the period of her actual absence.

In this case it was further held that 100% wages were to be provided for all days of leave as well as Sundays and rest days.

In **Ram Bahadur Thakur (P) Ltd. v Chief Inspector of Plantations**, a female worker employed at the Pambanar Tea Estate was denied maternity benefits on the grounds that she had actually worked for 157 days instead of the 160 days required to qualify for them. The Supreme

[16]Justice A.N.Wanchoo in *Bombay Labour Union vs. International Franchises Pvt. Ltd.* 1966 AIR 942, 1966 SCR (2) 477

[17]***1978 AIR 12 ;(1977) 4 SCC 384***-Date of Judgment 12/10/1977

Court underlined that the M.B. Act would have to be interpreted in such a way as to advance the purpose of the Act and therefore to uphold the woman worker's claim. The Court held that for the purposes of computing maternity benefits, all days including Sundays and unpaid holidays must be taken into consideration and also drew attention to one of its earlier decision[18]wherein the Court held that for purposes of computing maternity benefit all the days including Sundays and rest days which maybe wage- less holidays have to be taken into consideration.

In ***Rattan Lal and Ors. Vs. State of Haryana and Ors.***[19]the*e*Supreme Court dealt with the grievance of the Haryana teachers who were appointed on ad hoc basis by the government. The complaint was non-payment of salary during the summer vacations and denial of several privileges such as casual leave, medical leave, maternity leave etc. All such benefits were available to all other regular government servants. Denial of such facilities to ad hoc teachers was held as unreasonable and unjustifiable. The Supreme Court ordered that all service privileges including maternity benefit, medical leave etc. available to regular teachers shall be extended to adhoc teachers also. This ruling, perhaps, could be taken as the precursor of the landmark decision (2000) relating to Delhi Municipal Female workers

In extending the scope of maternity benefits even to casual workers (on muster roll) the decision on ***Municipal Corporation of Delhi vs. Respondent Female Workers (Muster Roll) &Anr.***[20]is a landmark verdict. The Municipal Corporation of Delhi (MCD) has been granting maternity leave to its regular female workers but the benefit was not available to the employees under daily wages, that is, those on the muster rolls. The women workers pleaded that the practice was unfair as there was no difference in the work allotted to female workers whether on regular or on daily wage.

The Supreme Court referred to Clause (3) of Article 15 of the Constitution of India that sanctions making of special provisions for women and children and then to the provisions, in Part IV of the Constitution of India containing Directive Principles of State Policy, including Article 42 and observed that the validity of an executive or administrative action in denying maternity benefit to casual workers has to be examined on the anvil of Article 42 which, even when not enforceable is nevertheless available for determining the legal efficacy of the action complained of. The Court stated, significantly, as follows:

> As we shall presently see, there is no justification for denying the benefit of this Act to casual workers or workers employed on daily wage basis.

[18] See ***1978 AIR 12 ;(1977) 4 SCC 384***-Date of Judgment 12/10/1977 and also (***1982(2) LLJ 20)***

[19]***1985(3) SLR 548=1985(2) SLJ 437 (SC).***

[20]***AIR 2000 SC 1274, 2000 SCC (L&S) 331***

> 27. The provisions of the Act ….. would indicate that they are wholly in consonance with the Directive Principles of State Policy, as set out in Article 39 and in other Articles, specially Article 42. A woman employee, at the time of advanced pregnancy cannot be compelled to undertake hard labour as it would be detrimental to her health and also to the health of the foetus. It is for this reason that it is provided in the Act that she would be entitled to maternity leave for certain periods prior to and after delivery. We have scanned the different provisions of the Act, but we do not find anything contained in the Act which entitles only regular women employees to the benefit of maternity leave and not to those who are engaged on casual basis or on muster roll on daily wage basis.

In the case of ***AIR India vs. Nergesh Meerza and Ors.***theissue raised was against differential retirement ages between Air Hostess and Flight Pursers. Further, provisions on retiring Age had implications on benefits under the M.B.Act 1961.

In Air India the retirement age of an Air Hostess is 35 years, or on marriage, if it took place within four years of service, or on first pregnancy whichever occurred earlier. The Court observed that the question of marriage within four years on entry into service did not suffer from any constitutional infirmity as such rules play a role in the promotion and boosting up of the country's family planning programme.

The second part in the provisions states that the services of Air Hostess is liable for termination on first pregnancy. The Court observed this as a most unreasonable and arbitrary provision. Noting that the Regulation do not prohibit marriage after four years but when an Air Hostess after having fulfilled the first condition becomes pregnant, there is simply no reason to consider the pregnancy affecting her continuance in service. The court was not willing to take the contentions of the Corporations regarding pregnancy leading to a number of complications, medical disabilities etc. Once married woman is allowed to continue in service then under the provisions of the Maternity Benefit Act, 1961 and the Maharashtra Maternity Rules, 1965 (these apply to both the Corporations as their Head Offices are at Bombay), she is entitled to certain benefits including maternity leave.

Exhibiting clear pro-women stance, the court suggested that if the Corporations feel that pregnancy from the very beginning may come in the way of the discharge of the duties by some of the Air Hostess, they could be given maternity leave for a period of 14 to 16 months and the Management can make arrangements on a temporary or ad hoc basis by employing additional Air Hostess. The court also rejected the argument of the Corporation that a woman after bearing children becomes weak in physique or in her constitution. The existing provision, according to the court, amounts to compelling the poor Air Hostess not to have any children and thus an unacceptable interference with the ordinary course of human nature.

Holding strongly that "It seems to us that the termination of the services of an Air Hostess under such circumstances is not only a callous and cruel act but an open insult to Indian womanhood.", the provision was declared "not only manifestly unreasonable and arbitrary but contains the quality of unfairness and exhibits naked despotism and is, therefore, clearly violative of Article 14 of the Constitution." The court struck down the last portion of Regulation 46(i) (c) and held that the provision 'or on first pregnancy whichever occurs earlier' is unconstitutional, void and is violative of Article 14 of the Constitution and will, therefore, stand deleted."

As per the provisions of the Maternity Benefit Act 1961 a woman is prohibited from working in an establishment during the period of six weeks from immediately following the day of her delivery, miscarriage or medical termination of pregnancy.[21] Rules made under an Act (subordinate legislation) must be made only in conformity with the parent Act. In the case of ***Punjab National Bank by Chairman and Anr. vs. Astamija Dash and Astamija Dash vs. Punjab National Bank and Anr*** [22]the court had to deal with the Regulations framed by the board of directors of the Punjab National Bank which failed to provide for grant of Maternity Leave and other benefits to which any woman employee would be entitled to under the M.B. Act 1961. The court held that a woman who had undergone miscarriage was entitled to a different treatment in view of the nature of the doctrine of equality as a positive concept as enshrined in Art.14 of the Constitution.

The Executive Committee of the Bank had fixed the number of chances to be given to an employee in the confirmation test. The writ petitioner could not prepare well at the second test as she suffered miscarriage. If the bank's rule is enforced against the writ petitioner, it would be to her disadvantage, mainly due to her physical position. Ratio Decidendi: When conflict occurs between an executive order and a statutory Regulation, the latter will prevail - Whereas persons absolutely similarly situated, should be treated equally, equal treatment to the persons dis-similarly situated would also attract the wrath of Article 14. So, court held that the petitioner was entitled to another opportunity to appear at the examination.

In a landmark case recently (***Kakali Ghosh v. Chief Secretary, Andaman & Nicobar Administration and Others*****)** the main question was whether a female employee of the Central Government could ask for 730 days of uninterrupted child care Leave under the Central Civil Services (Leave) Rules, 1972. Justices S.J. Mukhopadhaya and V. Gopala Gowda of the Supreme Court held that a female employee of the Central Government is entitled to two years of uninterrupted leave for childcare, which may also include illnesses and schoolwork. While thus disposing the case, the court observed that the judgment of the Calcutta High Court, Circuit Bench at Port Blair was ignorant of the rules framed by the Central Government.

[21]Section 9 states that 'In case of miscarriage or medical termination of pregnancy, a woman shall be entitled to leave with wages at the rate of maternity benefit, for a period of six weeks immediately following the day of her miscarriage, or, as the case may be, her medical termination of pregnancy.'

[22]***AIR 2008 SC 3182***

CONCLUSION

Observing the developments in the field of Maternity Benefit since 1929, in India, there is no hesitation to conclude that the entire trinity of the state - the legislature, executive, and the judiciary- have been constantly promoting the cause of the women, women workers in India. The legislature has, through several amendments to the Maternity Benefit Act 1961, widened the ambit and applicability of the Act in faithful adherence to the lofty principles embedded in the Constitution. The Judiciary, on its part, through numerous pro-active pronouncements has infused more life into the legislative frame and has further extended the entitlements and benefits to the women workers including casual workers. The Executive is urged to strive for early removal of the existing anomalies among the rules made in states and establish a seamless system throughout the nation for extending all the benefits and entitlements provided and intended not only by the Maternity Benefit Act but also those envisaged by the constitution, to all working women in the country.

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