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Maternity benefit legislation in India: A study of Miscarriage Leave

Sagar Jain^a

^aPanjab University, Chandigarh, India

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In India, the Maternity Benefit Act 2017 is the principal legislation providing for paid maternity and miscarriage leaves for a maximum period of twenty-six and six weeks respectively. India, being the very first country to have such a law is much ahead of various developed nations such as the USA in this regard. However, various provisions of the Act concerning miscarriage, creche facilities, 'work from home' etc are in desperate need of clarification. For example, it is unclear whether a miscarriage is covered under Section 5 which states the pre-conditions to receiving maternity benefits, or whether it covers the unorganized sector and daily wage workers? Needless to say, various judgements by the honorable Supreme court have certainly helped to clarify some of the major issues. With its various pitfalls, the Act does require further changes especially towards expanding its coverage and sharing the financial burden of providing benefits between the employer and the state.

Keywords: *maternity leave, miscarriage, maternity benefit act.*

INTRODUCTION

Originally, the Maternity Benefit bill was introduced in India by Dr.B. R. Ambedkar in the Bombay Legislative council meeting held on 28th July 1928. The same was officially enacted on 12th December 1961 as Act no.53 of 1961. Four years ago in 2017, the act was amended by the

Maternity Benefit (Amendment) Act, 2017¹. However, the provisions concerning miscarriage cases remain unchanged.

ANALYSIS OF MATERNITY BENEFIT ACT, 1961

Section 2² describes various types of establishments covered under the act and also mentions certain exceptions, such as, it does not apply to the establishments on which the provisions of the Employees' State Insurance Act are applicable. Section 3(e)³ illustrates that an 'establishment' may include factories, mines, and plantations among others. The specific definitions can be found under the Factories Act 1948⁴, Mines Act 1952⁵, and Plantations Labour Act 1951⁶. Further, the act is also applicable to any other establishment where ten or more persons are employed on a day during the preceding 12 months of the act being implemented. In addition, the State government with due approval of the Central Government may declare the applicability of all or any provision of the act to any other establishment.

Section 3 (j) defines miscarriage as the removal of the contents of a pregnant uterus at any period prior to or during the 26th week of pregnancy. It, however, excludes miscarriage, caused by an act that is liable to punishment under the Indian Penal Code (1860)⁷. Further, the 2017 amendment added the definition of a "commissioning mother" under clause (b)(a). Due to this newly added provision, now twelve weeks of maternity leave is granted to 'commissioning' mothers who use the help of a surrogate to have a child as well as to working women who adopt a baby below the age of three months. Prior to this, the principal act did not provide any maternity leave for commissioning or adopting mothers.

Section 4(1) forbids the employer to make a female employee work during a period of 6 weeks immediately succeeding her miscarriage or delivery day, provided that the employer is made aware of the case. Subsection 2 in the same tone, prohibits a woman to work under any

¹ Maternity Benefit (Amendment) Act, 2017

² Maternity Benefit Act, 1961, s 2

³ Maternity Benefit Act, 1961, s 3(e)

⁴ Factories Act, 1948

⁵ Mines Act, 1952

⁶ Plantations Labour Act, 1951

⁷ Indian Penal Code, 1860

establishment for the same duration. Subsequent clauses prohibit the employer to make the pregnant woman do any work that may affect her and the fetus's health or interfere with the normal delivery or may cause a miscarriage. The 'prohibition period' is one month preceding 6 weeks of her expected delivery.

Section 5 provides that a woman employed is entitled to receive maternity benefit, at the rate of her average daily wage, from the employer for the period of her absence. This period includes the delivery day, the day before the delivery, and 6 weeks after the delivery, in case of a miscarriage. Clause (2) provides that in order to claim maternity benefit, the woman should have been employed with the employer for at least 160 days in the 12 months immediately preceding the date of her expected delivery. Further, clause (3) in accordance with the 2017 amendment, states that the maximum period of maternity benefit can be 26 weeks instead of the earlier stipulated 12 weeks, for women with up to two kids. For women with more kids, the limit is 12 weeks. Further, the 2017 amendment stipulates, that a woman employee, depending upon the nature of her job and mutual agreement with the employer, may be allowed to 'work from home after 26 weeks of paid maternity leave.

Section 9 entitles a woman, on the production of prescribed proofs, leave with wages at the rate of maternity benefit (rate of the average daily wage) for a period of six weeks immediately following the day of her miscarriage. Section 10 provides further, that on account of illness arising out of miscarriage, additionally paid leave for a maximum period of one month may be granted. This entitlement is over and above what is allowed under Section 9. Moreover, the amendment act added 'Creche' facilities to Section 11 of the principal act. That is, every establishment with a minimum of 50 workers is legally required to have a creche facility. The lady employee is entitled to 4 visits per day to the creche, which includes her stipulated rest interval of the day. Further, subsection (2) imposes a duty on the establishment to inform all the newly hired women employees (after enactment of the amended act) regarding all the benefits covered by the act. Besides the Maternity Benefit (Amendment) Act 2017, some other legislations also provide for the provision of miscarriage leave. They are as follows.

*Central Civil Services (Leave) Rules, 1972*⁸: The leave rules grant a maximum of 45-day maternity leave to a female government servant in her entire employment period. The policy does not vary on account of the number of surviving children; in past or during the delivery.

Employees' State Insurance Act, 1948: Chapter 5, Section 46⁹, subsection (1)(b) of the act requires the employer to provide periodical payments to an 'insured' woman in the event of a miscarriage. The 'confinement' is payable for 6 weeks from the date following the miscarriage. The term confinement has been defined in the act and means the labor after twenty-six weeks of pregnancy which results in the issue of a dead child.

*All India Services (Leave) Rules, 1955*¹⁰: The policy grants a maximum 6-week maternity leave in cases of a miscarriage

LIMITATIONS AND PITFALLS

Does not apply to the unorganised sector: On a careful interpretation of section 2 of the Maternity Benefit Act and section 2 (m)¹¹ of the Unorganised Workers Social Security Act 2008, we can infer that the unorganised sector and daily wage workers are not covered and thus are not entitled to receive maternity benefits.

No Paternity leave: Husbands too are traumatised after a case of miscarriage, after all, child care is the joint task of both the parents and a paid leave allows the husband to support his wife in her recovery period. It must be noted that the Paternity Benefit Bill, 2017¹² has already been proposed by an MP from Maharashtra in the parliament. To illustrate, the Republic of the Philippines provides paternity leave of 7 days in the event of a miscarriage of the male employee's legitimate spouse.

⁸ Central Civil Services (Leave) Rules, 1972

⁹ Employees' State Insurance Act, 1948, s 46

¹⁰ All India Services (Leave) Rules, 1955

¹¹ All India Services (Leave) Rules, 1955, s 2(m)

¹² Paternity Benefit Bill, 2017

The entire financial burden is borne by the employer: In stark contrast to India, in other countries providing for paid miscarriage leave, the financial burden is spread across the employer, the government, insurance provider, and other available social security programs. For instance, France has a social insurance scheme in this regard. Lack of clarity whether the conditions and requirements mentioned in Section 5(2) are applicable in cases of miscarriage. It would be unwarranted if a female employee is denied paid miscarriage leaves on the ground that she worked with the employer for say, 145 days instead of 160. It defeats the very principle and rationale of the act. Further, the Act does not clarify the number of times a woman can avail the benefit of the miscarriage leave policy. It is also uncertain whether the miscarriage paid leave can be altered depending on the number of children surviving. For example, one normal delivery and one miscarriage at the same time.

Need for Uniformity in-laws: The acts like Employees State Insurance Act, All India Services (Leave) Rules, Factories Act, Central Civil Services (Leave) Rules, and the Unorganised Workers Social Security Act differ in their ambit and provide different benefits. It is important to bring homogeneity in providing miscarriage leave benefits. Further, we can also concur that an 'establishment' not covered under Section 2 clause (2) or which is excluded as a result of a notification under Section 26¹³ of the Maternity Benefit Act, is not obligated to have a crèche as required by the 2017 amendment. In addition, the work from home provision added under section 5 is mere suggestive in nature and does not significantly improve the well-being of the mother post-delivery.

JUDICIAL PRECEDENTS

*Punjab National Bank by Chairman v Astamija Dash*¹⁴, (SC): It was held that if a woman probationer was not in a position to take the test required for a permanent position on account of her miscarriage, then it would be highly unreasonable and unfair to terminate her services. She should be given additional chances.

¹³ Maternity Benefit Act, 1961, s 26

¹⁴ *Punjab National Bank by Chairman v Astamija Dash* 2008

That a woman who had undergone miscarriage is entitled to different treatment under Article 14¹⁵ (to her benefit) and the state in the exercise of its power of discretion should be commensurate with the doctrine of reasonableness.

*Management of Kallayer Estate, Jay Shree Tea & Ind. Ltd. v Chief Insp. of Plantations*¹⁶, (Madras HC): Madras High court held that there is no need for the woman worker to put in 160 days of service prior to the date of miscarriage for availing the paid leave. That, it is true that in order to claim the maternity benefit under Section 5¹⁷, the woman concerned has to satisfy the conditions mentioned under the above section. The court held that section 9 and section 5¹⁸ are independent and not interdependent and they should not be combined, as in case of a miscarriage there cannot be an expected date of delivery

*Parkasho Devi v Uttar Haryana Bijli Vitran Nigam Limited*¹⁹, (P&H HC): It was held that the Maternity Benefit Act, 1961 is not applicable the Nigam employees. Further, Punjab Civil Services Rules do not provide for maternity leave to a female government servant having more than two living children. Since the petitioner has three children, she is not entitled to the maternity leave benefit claimed by her.

Note: In contrast, the Maternity Benefit Act, 1961 does not contain any such limit for availing the benefits in miscarriage cases.

*Municipal Corporation of Delhi v Female Workers (Muster Roll)*²⁰, (SC): The court held that daily wage women workers working on the muster roll are entitled to receive maternity leave, benefits. That, they cannot be denied the maternity leave, pay, and allowances only because the women were working on a daily wage basis on muster roll and not in regular employment. That, the activity of the Delhi Municipal Corporation of construction work falls well within the ambit of the Maternity Benefit Act.

¹⁵ Constitution of India, 1950, art 14

¹⁶ *Management of Kallayer Estate, Jay Shree Tea & Ind. Ltd. v Chief Insp. of Plantations* 1998 FLR 639

¹⁷ Maternity Benefit Act, 1961, s 5

¹⁸ Maternity Benefit Act, 1961, s 5, 9

¹⁹ *Parkasho Devi v Uttar Haryana Bijli Vitran Nigam Limited* 2008 PLR 248

²⁰ *Municipal Corporation of Delhi v. Female Workers (Master Roll)* 2000

MISCARRIAGE LEGISLATION IN FOREIGN NATIONS

New Zealand is the most recent country to pass legislation providing for 3-day paid leave for miscarriage cases and is over and above the normal sick leave. The United Kingdom provides for 14 days of bereavement leave following the death of a child under the age of eighteen. The legislation also includes a case of miscarriage. Australia provides for 12 months of 'unpaid' parental leave for both parents. In the Philippines, the law provides for 60-day leave for the mother and 7 days leave for the father. The law applies to each and every case of miscarriage, regardless of frequency, and there is no limit on the number of times it can avail. In countries such as Nicaragua and Panama (both in Central America) maternity leave benefits vary and are given in accordance with the mother's needs in each case. In contrast, in El Salvador (also in Central America) there is a total ban on abortion (miscarriage is also called spontaneous abortion). Thus, on account of a miscarriage, women can be legally put behind bars in the country. The United States of America does not have any such law on miscarriage leave. Only a few countries, most of which are in southern Africa such as Eswatini and Lesotho don't have any law concerning maternity benefits.

SUGGESTIONS AND WAY FORWARD

Passing legislation provides no assurance to ameliorate the situation of parents experiencing a miscarriage. The provisions of the Maternity Benefit Act must be made gender-neutral, that is, it should cover the mother and father and also same-sex couples. The act must also cover daily wage workers who have been employed in the past for a certain period, irrespective of the employment period, whether it was continuous or not. Further, it must depend on the total number of working days. They cannot be denied the benefits on account of their services not being 'regularised.' The government can introduce tax-based solutions in order to reduce the financial burden on employers, at least in the formal sector. This is certainly the most effective and easily implementable solution in this regard. To illustrate, in Singapore the woman is provided a 12-week maternity leave. The cost is divided between the employer and the government, that is, the employer provides benefits for the initial period of eight weeks and the government for the next eight weeks. This will prevent any gender-based discrimination

on account of having to pay the female worker ‘free money. The policy must cover time off for people, including women and their husbands to recover from a miscarriage “irrespective of whether deemed medically necessary.” The scope of paid leave needs to be expanded and should include miscarriage due to an unsuccessful assisted reproductive technology procedure (ART), a failed adoption arrangement, and failed surrogacy.