

VOICE OF FREEDOM AND RIGHTS



VOLME 1 AND ISSUE 1 OF 2023

INSTITUTE OF LEGAL EDUCATION



Voice of Freedom and Rights
(Free Publication and Open Access Journal)

Journal's Home Page – <https://vfr.iledu.in/>

Journal's Editorial Page – <https://vfr.iledu.in/editorial-board/>

Volume 1 and Issue 1 (Access Full Issue on – <https://vfr.iledu.in/category/volume-1-and-issue-1-of-2023/>)

Publisher

Prasanna S,

Chairman of Institute of Legal Education (Established by I.L.E. Educational Trust)

No. 08, Arul Nagar, Seera Thoppu,

Maudhanda Kurichi, Srirangam,

Tiruchirappalli – 620102

Phone : +91 94896 71437 - info@iledu.in / Chairman@iledu.in



© Institute of Legal Education

Copyright Disclaimer: All rights are reserve with Institute of Legal Education. No part of the material published on this website (Articles or Research Papers including those published in this journal) may be reproduced, distributed, or transmitted in any form or by any means, including photocopying, recording, or other electronic or mechanical methods, without the prior written permission of the publisher. For more details refer <https://vfr.iledu.in/terms-and-condition/>



ANALYTICAL STUDY OF THE MATERNITY BENEFIT ACT, 1961

Author - CHARMI TEJAS SHAH & VAIBHAVI DATTATRAY SAWANT, Students at KES' Shri Jayantilal H. Patel Law College

Best Citation - CHARMI TEJAS SHAH & VAIBHAVI DATTATRAY SAWANT, ANALYTICAL STUDY OF THE MATERNITY BENEFIT ACT, 1961, *Voice of Freedom and Rights*, 1 (1) of 2023, Pg. 62-66, ISBN - 978-81-961120-1-1.

Abstract

Social legislations proliferate the process of elevating the status of individuals in a society. India being a developing country needs to assess its growth by securing the rights of its citizens, especially the ones who are susceptible to vulnerability. The Maternity Benefit Act, 1961 is one such beneficial piece of legislation that gives cognizance to the role of women in both social and familial institutions. The Act intends that by giving birth to a child, a woman need not compromise on her financial independence. A protection by way of providing for fully paid leaves for a substantial period in different cases of maternity, adoption, and surrogacy is given under this Act. Although the structure of the Act is out-and-out consisting of various provisions of penalties, appointment of inspectors and their powers, powers of Central Government, along with provisions for Maternity Benefit, the Act is not free from deficiencies. This paper interprets, analyzes, and compares the Act in India as well as provide for suggestions for its upward mobility.

Keywords: maternity benefit, pregnancy, employment, establishment, child.

I. Introduction

Although women are gifted with the power of creating a life, their economic dependence leads to inferior status in the society. The Maternity Benefit Act, 1961 is first beneficial piece of legislation which necessitates to protect the dignity of "Motherhood" by introducing various

provisions which help them to keep a balance between their job and childbearing responsibilities.

The need for the Act arose with the increasing transformation in the society wherein women became a significant part of the labour force. The Maternity Benefit Act, 1961 and its recent amendment of 2017 is based on the constitutional principle of providing humane working conditions to women. This paper tries to give an insight into the beneficial aspects as well as certain deficiencies of the Act.

I. Historical Background

Internationally certain conventions¹⁰⁶ have recognized the need for incorporating gender-equal provisions to safeguard a woman's reproductive and economic rights. The International Labour Organization (ILO) has adopted three conventions¹⁰⁷ emphasizing on comprehensive standards of protection during maternity and enhancing social protection to pregnant women.

¹⁰⁶ Convention on Elimination of All Forms of Discrimination against Women (CEDAW), 1979, the International Covenant on Civil and Political Rights (ICCPR), 1966, the International Covenant of Economic, Social and Cultural Rights (ICESCR), 1966 and the Convention on Rights of the Child (CRC), 1989

¹⁰⁷ C003 – Maternity Protection Convention, 1919 (No. 3). International Labour Organization.
https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0:NO::P12100_INSTRUMENT_ID:312148

¹⁰⁷ C103 – Maternity Protection Convention, 1952 (No. 103). International Labour Organization.
https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0:NO::P12100_INSTRUMENT_ID:312248

¹⁰⁷ C183 – Maternity Protection Convention, 2000 (No. 183). International Labour Organization.
https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0:NO::P12100_ILO_CODE:C183#:~:text=MATERNITY%20LEAVE&text=Article%204.1.2

In India, the foundation of maternity benefit legislation was laid by the passing of the Bombay Maternity Benefit Act, 1929¹⁰⁸. After independence, the Constitution of India through its Directive Principles of State Policy and specifically under Article 42 spoke about the State's obligation in securing just and humane conditions of work and maternity relief¹⁰⁹. With this guiding principle, several legislations¹¹⁰ were enacted. However, due to disparities in already existing legislations, a need for uniform Central legislation was felt. As a result, the Maternity Benefit Act, 1961 was enacted following a major amendment in the year 2017 to address the concerns of maternity health in changing times.

II. Objective and scope

The objective is categorically stated in the preamble of the Act, as follows,

*An Act to regulate the employment of women in certain establishments for certain periods before and after child-birth and to provide for maternity benefit and certain other benefits.*¹¹¹

On elucidating the objective so provided, there are two specific areas which this Act focuses on.

Firstly, the core fundamentalism of the Act is to regulate the employment and safeguard the interest of pregnant women in such establishments as applicable under section 2 of the Act. To support this view, it is rightly pointed out by the Supreme Court¹¹²:

"Performance of the biological role of childbearing necessarily involves withdrawal of a woman from the workforce for some period....In order to enable the women worker to subsist during this period and to preserve her health, the law makes provision for maternity benefit so that the woman can play both her productive and reproductive roles efficiently."

¹⁰⁸ *Babasabeh on Maternity Benefit Bill in 1928*. Savari – adivasi bahunjan and dalit women conversing. (Apr. 13, 2017). <https://www.dalitweb.org/?p=3430>

¹⁰⁹ India Const. art. 42.

¹¹⁰ The Employees' State Insurance Act, 1948, § 50, No. 34, Acts of Parliament, 1948 (India). The Plantations Labour Act, 1951, § 32, No. 69, Acts of Parliament, 1951 (India).

¹¹¹ Maternity Benefit Act, 1961, Preamble, No. 53, Acts of Parliament, 1961 (India).

¹¹² *B. Shah v. Presiding Officer, Labour Court Coimbatore & Ors.*, (1977) 4 SCC 384; 1977 SCC (L&S) 560

Secondly, the Act bears in mind various situations that may arise and makes provisions to avail maternity leave and other certain maternity benefits within the stipulated time-period. The legislature with this object, intends to help women cope with the intense process of labour and nurturing the child alongside.

III. Analysis of Provisions of the Act

A. Applicability

The Maternity Benefit Act, 1961 being a Central legislation applies to the establishments covered under section 2 of the Act. These include:

- (i) A factory, mine, or plantation (both owned by Government and private sector),
- (ii) All establishments which employ persons for exhibition of equestrian, acrobatic and other performances (circus)¹¹³,
- (iii) Every shop or establishment wherein 10 or more persons are employed in the preceding 12 months,
- (iv) Other establishments or class of establishments of industrial, commercial, agricultural or other nature which the State Governments may notify in Official Gazette,
- (v) Beedi and Cigar workers¹¹⁴,
Excluding establishments covered under the Employees' State Insurance Act, 1948.¹¹⁵

Based on the nature of work, the following category of female employees have been made eligible under the Act:

- a. Permanent employees
- b. Casual or muster roll employees¹¹⁶

¹¹³ Defined under Rule 2(aa) of the Maternity Benefit (Mines and Circus) Rules, 1963 passed by the Central Government in lieu of power conferred under section 28 of the said Act

¹¹⁴ The Beedi and Cigar Workers (Conditions of Employment) Act, 1966, § 37(3), No. 32, Acts of Parliament, 1966 (India).

¹¹⁵ The Employees' State Insurance Act, 1948, § 50, No. 34, Acts of Parliament, 1948 (India).

¹¹⁶ *Municipal Corporation of Delhi v. Female Workers (Muster Roll) and Ors.*, MANU/SC/0164/2000

- c. Contract workers¹¹⁷
d. Temporary or ad hoc employees¹¹⁸
- B. Mandatory compliances by the employer

1. Restrictions in employment

Section 4 of the Act mandates the employer to not knowingly employ a woman during six months immediately after the day of her delivery, miscarriage or medical termination of pregnancy. Likewise, any pregnant woman choosing to work in her pre-natal stage cannot be asked by the employer to do any work which is detrimental to her or the child's health.

2. Prohibition from dismissal

Section 12 of the Act forbids the employer from dismissing, discharging, varying the terms of service or otherwise leading to loss of employment by any pregnant woman, except in cases of gross misconduct.

C. Entitlement of Maternity Benefit

Section 5 provides that a woman who has worked in an establishment for at least 80 days (including lay-off and holidays) in the preceding 12 months is entitled to maternity benefit under the Act by way of giving notice in writing in prescribed form. The employer is liable to pay a pregnant woman the average daily wage of preceding three months before her leave of absence. However, under section 6, no service of notice of claim will not disentitle the woman from availing the Maternity Benefit or any other amount.

D. Allowance of Maternity Benefit

The Act has taken diverse view in providing paid maternity leave and has prescribed durations for the same which is categorized in different cases as follows:

- **26 weeks** of which not more than 8 weeks precede the date of her expected delivery. Except in case of 2 or more surviving children, only **12 weeks** shall be availed: [Sec.5(3)]
- **12 weeks**, wherein a child is adopted below the age of 3 months: [Sec.5(4)]
- **12 weeks**, for a commissioning mother¹¹⁹ (another woman is called the host/surrogate): [Sec.5(4)]
- **6 weeks**, for a woman who has gone through miscarriage or medical termination of pregnancy, provided no woman shall be disentitled with maternity benefit if the eligibility criterion is not met as per section 5(2)¹²⁰: [Sec.9]
- **2 weeks**, for a woman who has gone through tubectomy: [Sec.9-A]
- **Additional 1 month** for women who suffer illnesses arising out of pregnancy, miscarriage, premature birth, delivery, medical termination of pregnancy, or tubectomy: [Sec.10]

On collective analysis of abovementioned sections, it is pertinent to note that the Act lays onus on the woman to produce such proofs as required.

The Act being plenary in nature allows the nominee, if any, or legal representative of a pregnant woman, in case of her death¹²¹ to avail of the maternity benefit.

Further, the Act not being restrictive in nature provides utmost facilities to a woman when she returns to duty after her delivery by allowing minimal rest breaks and nursing breaks under Section 11 of the Act. Insertion of Section 11-A vide the amendment of 2017¹²² providing mandatory crèche facility in establishments having 50 or more employees is a revolutionary step by the

¹¹⁷ Rachna Chaurasiya v. State of Uttar Pradesh and Ors., MANU/UP/3187/2017

¹¹⁸ Mrs. Savita Ahuja v. State of Haryana and Ors., 1998 (1) SLR 735

¹¹⁹ As defined under clause (ba) of Section 3 of Maternity Benefit Act, 1961, "commissioning mother" means a biological mother who uses her egg to create an embryo implanted in any other woman.

¹²⁰ Management of Kallayar Estate, Jay Shree Tea and Industries Ltd. v. Chief Inspector of Plantations, 1998 Lab IC 3394 (Mad)

¹²¹ The Maternity Benefit, Act, 1961, § 7, No. 53, Acts of Parliament, 1961 (India).

¹²² The Maternity Benefit (Amendment) Act, 2017, The Gazette of India, pt. II sec. 1 (March 28, 2017). <https://egazette.nic.in/writereddata/2017/175036.pdf>

legislature. Additionally, the Ministry of Women and Child Development has issued guidelines¹²³ to fill the lacunas with respect to creche facilities.

E. Other Provisions

The legislature with an intent to bring to light offences committed under the Act and to ensure its smooth functioning has made provisions for appointment of inspectors and conferred various powers as specified under sections 14 to 17.

If any employer fails to provide maternity benefit or fails to comply with the Act, is liable to pay fine which may extend to Rupees 5000/- and imprisonment which may extend upto one year as mentioned under Sections 21 and 22.

The Act confers power on the Central Government under sections 25 to 28 to give directions to the State Government, to exempt establishments, and to make rules for any modifications in the Act as and when required.

IV. Critical Analysis

The Maternity Benefit Act, 1961 though considered to be a social legislation striving to protect the employment of women during their pregnancy, is not void of certain shortcomings, as follows:

1. Complete economic burden on the employers - The Act through its various provisions has made the employers responsible for upholding the legislative intention. This may create possibilities of decrease in hiring of female employees by companies or institutions. Besides, the employers may require to employ workers on interim basis to meet demands of workload while granting maternity leaves, which casts additional financial stress on them.

2. Neglect of female workers in unorganized sectors - Approximately 4.4% of women in India work in formal sector and thus the Act is non-applicable to 95.6% of women¹²⁴. Though the Ministry of Labour and Employment has clarified¹²⁵ that the Act applies to establishments of unorganized nature, it excludes those establishments which employ less than 10 employees.

3. Artificial distinction between biological and adoptive / surrogate mothers - Though the 2017 Amendment of the Act was lauded by various sections for including the provision of maternity leave for adoptive and commissioning mothers¹²⁶, it failed to explain the distinction made in the leave period prescribed. It has been held by Bombay High Court¹²⁷ that to distinguish between a surrogate and natural mother would result in insulting the intention of a woman to bring up a child begotten through surrogacy. A Public Interest Litigation has also been filed in the Apex Court challenging the constitutional validity of Section 5(4) discriminating against adoptive mothers.¹²⁸

V. Suggestions

1. Many countries such as Norway, Sweden, Russia, China¹²⁹ have made it the State's responsibility to provide for maternity

¹²³ National Minimum Guidelines for setting up and running creches under Maternity Benefit Act, 2017. Ministry of Women and Child Development (2018). <https://wcd.nic.in/act/national-minimum-guidelines-setting-and-running-creches-under-maternity-benefit-act-2017>

¹²⁴ Centre for Social Research, *Analysis on Effectiveness of the Implementation of the Maternity Benefit Act, 1961*, National Commission of Women (May 2014). <https://ncwapps.nic.in/pdfReports/NCWMaternityBenefitStudy.pdf>

¹²⁵ Ministry of Labour and Employment, the Maternity Benefit (Amendment) Act, 2017 - clarifications (Apr. 12, 2017). <https://labour.gov.in/sites/default/files/The%20Maternity%20Benefit%20%28Amendment%29%20Act%2C2017%20-Clarifications.pdf>

¹²⁶ The Maternity Benefit Act, 1961, § 5(4), No. 53, Acts of Parliament, 1961 (India).

¹²⁷ Dr. Mrs. Hema Vijay Menon v. State of Maharashtra and Ors., MANU/MH/1769/2015

¹²⁸ Hamsaanandini Nanduri v. Union of India, W. P. Civil No. 960/2021

¹²⁹ Digvijay, *Comparative Analysis of Maternity Benefit Act in India with legislations of other countries*, 6 (4) Journal of Positive School Psychology, 883, (2022). <https://research.jgu.edu.in/comparative-analysis-of-maternity-benefit-act-in-india-with-legislations-of-other-countries/>

leave, conforming with ILO convention¹³⁰. India should make efforts to conform to such practice by providing monetary incentives to employers so that the object of the Act is truly fulfilled.

2. Discriminatory provisions¹³¹ relating to varied leave period be reconsidered and modified to bring in equality among all pregnant women and to ensure that the up-bringing of the child is unaffected.
3. The Act needs to converge various National Schemes¹³² and include women in the unorganized sector not having designated employer in order to bring uniformity.
4. The concerned Ministry may launch a portal to monitor the progress of the Act and to provide redressal mechanism.

VI. Conclusion

After understanding the trajectory of the Maternity Benefit Act, 1961, we can infer that the Act has placed India in a better position than several countries by keeping harmony with the contemporary needs of society. Nonetheless, it has to be ensured that the Act does not remain a piece of legislation which sets aspirational values but fails to be effective in its implementation. Therefore, certain improvements as discussed above, need to be made to maximize the well-being of women working in all sectors.

¹³⁰C183 – Maternity Protection Convention, 2000 (No. 183). International Labour Organization. https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C183#:~:text=MATERNITY%20LEAVE&text=Article%204,1,2

¹³¹ The Maternity Benefit Act, 1961, § 5(3) and 5(4), No. 53, Acts of Parliament, 1961 (India).

¹³² Janani Suraksha Yojana, Vande Mataram Scheme, Pradhan Mantri Matru Vandana Yojana, Pradhan Mantri Surakshit Matritva Abhiyan are some of the Maternity Benefit schemes – Raman Sharma, *The new Horizons of Maternity Benefits in India: It's impact on the Employability of women workers*, 8 (6) IJCRT, 239-240 (2020). <https://ijcrt.org/papers/IJCRT2006039.pdf>