Surrogacy and the Laws on Maternity Benefits

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Five high courts across India have uniformly held that women employees who have children through surrogacy would be entitled to maternity benefits in accordance with the rules. How they have arrived at this conclusion is quite different in each case, and each judgment presents different approaches to address this legal question. Beyond the legal question, the approaches must also be closely examined for class biases and paternalistic assumptions about motherhood.

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Over the last few years, high courts across India have been addressing an interesting question of law: would a woman employee who has had a child through surrogacy be entitled to maternity leave? Five high courts, namely, the Madras High Court, Kerala High Court, Delhi High Court, Bombay High Court, and Chhattisgarh High Court have decided cases on this issue. All of them have uniformly held that a woman employee is entitled to such maternity leave irrespective of the manner in which her child was born.

How they have framed the question and answered it makes for interesting comparison. The questions raised by all these cases see the high courts grappling with some combination and variation of the following questions: Is surrogacy just a technological development? Is it something that the law did not envisage and therefore is outside the purview of maternity benefits legislation? Does it ask us to recast notions of "motherhood"? And, what is the actual purpose of the maternity benefits legislation?

Here, I attempt to compare and contrast the differing approaches taken by the five high courts on these questions. Even though the later judgments cite the earlier ones, it is not a mechanical application of precedent. Judges reveal their thinking about an issue in a judgment and this informs their approach to other questions as well. How judges think about surrogacy would also be relevant in the context of debates over the Surrogacy (Regulation) Bill, 2016.[1]

The first maternity benefits legislation in India was the Bombay Maternity Benefit Act, 1929 passed in the Bombay Province. Subsequently, 12 other laws were passed at the provincial or at the state level, till they were all consolidated in the Maternity Benefit Act, 1961 (Chhachhi 1998). The 1961 act, which applies to all factories, mines, plantations, circuses and any other establishment with more than 10 workers, guarantees a minimum of six weeks of paid holiday for women employees of such establishments after delivery of the child, miscarriage, or termination of pregnancy. There is, at present, a proposal to increase this time period.[2]

Six weeks is only a minimum and there is nothing preventing an employer from granting more generous maternity benefits to women employees. In the specific cases discussed here, none of the claims were made under the 1961 act, but are related to specific employment rules such as the Maharashtra Civil Services (Leave) Rules, 1981, or the Central Civil Services (Leave) Rules, 1972. These regulations provide much longer time periods of maternity leave than the minimum mandated in the 1961 Act. In that sense, these cases all relate to a very small category of working women: those who are in some form of government or quasi-governmental employment.

Maternity Benefits for Surrogates

The earliest case that seems to have addressed the issue of maternity leave in the case of children born of surrogacy is *K Kalaiselvi v Chennai Port Trust* (2013) decided by the Madras High Court in 2013. Justice K Chandru's judgment in the Kalaiselvi case is brief and to the point. He holds that there is nothing wrong or per se illegal in granting maternity benefits under the Port Trust's leave regulations. The regulations relating to maternity are interpreted to mean and include surrogacy as well, and the court found that there was no reason to deny such leave even if there is no specific mention of surrogacy.

The Kerala High Court's judgment in *P Geetha v the Kerala Livestock Department* (2015) was the next such case, decided in June 2014. The court goes into a long discussion on how to legally understand motherhood considering technological developments such as surrogacy. Unlike adoption, where legal fiction deems a person to be the mother of the

child, or natural births, where motherhood is a matter of fact, surrogacy is both and neither. It is not purely a legal fiction as the child shares the genetic material of the mother, yet the child is not born of the mother. At the end of it though, the high court did not come up with a comprehensive definition of motherhood, however, preferring to cite a few homilies from Oprah Winfrey and snatches of text from Charles Darwin's and Richard Dawkins' books. While citing and following the Kalaiselvi case, the Kerala High Court, however, limits the benefits only to those available under the applicable regulations, and, even then, excludes those leave benefits relating to the health of the mother because a surrogate mother does not actually deliver the child.

The Delhi High Court's judgment in *Rama Pandey v Union of India* (2015), delivered in July 2015, categorically rejects the argument that maternity benefits were meant *only* to protect the health and safety of the woman and the child. Justice Shakdher, who decided this case, rests his reasoning on the interpretation of the word "maternity" to include not just biologically giving birth to a child, but also adoption and surrogacy. He does this by not only examining the applicable rules, but also other laws and the Supreme Court's judgment in *Baby Manji Yamada v Union of India* (2008) to understand what surrogacy means in law and, therefore, what implications it has on the term "maternity" for the purposes of receiving maternity benefits. Both the Kalaiselvi and Geetha cases are cited, but more to buttress the reasoning than to follow it on the whole.

The Bombay High Court's judgment in *Dr Hema Vijay Menon v State of Maharashtra* (2015), also delivered in July 2015, goes further in trying to understand what motherhood means, legally. Authored by Justice Vasanthi Naik, it provides a strong and cogent justification for an expanded conception of motherhood in the context of maternity benefits. Naik does not reach for authorities and sources to buttress her assertions on the nature of motherhood. She relies on logic (and perhaps life experience) to point out that maternity leave is not just about the physical aspects of pregnancy, but the emotional and psychological ones too, especially the bond between the mother and the child.

The latest judgment on this issue is the Chhattisgarh High Court's in *Sadhna Agrawal v State of Chhattisgarh* (2017). It grounds its interpretation not only textually, but on the Constitution too. It reads in the right to motherhood under the right to life protected under Article 21. What is problematic though is some vague generalisations about motherhood being the most natural thing for women. Although these relate to observations of the Supreme Court (*Municipal Corporation of Delhi v Female Workers [Muster Rolls]* 2000), the approach seems to suggest that the maternity benefits law is a paternalistic benevolence to women and not something necessary to enable them to be part of the workforce without seriously compromising the child's and their own physical, emotional and psychological needs.

Broad Commonalities in Approach

It is important to note here that there is a certain class similarity to all the litigants. They are all white-collar employees: teachers, college lecturers, or managerial level employees. As such, we do not know how the courts would have addressed the issue if say a working-class woman who gave birth to a surrogate child sought maternity leave and approached the court. Or, if she had worked as a commercial surrogate, would the court respect her choice as well? We do not know for sure, but perhaps the approach might have been very different. Certainly, those cases that rest on something more than pure interpretation of the concerned regulations, such as notions of motherhood, might as well have taken a different approach entirely.

The reasons for trying to understand the underlying thinking in these judgments come into sharp focus because of the proposed Surrogacy (Regulation) Bill. With commercial surrogacy proposed to be banned,[3] how will courts approach the question of the validity of such a ban? Will the courts see it from the point of view of the women who provide surrogacy services or those who obtain such services?

What these judgments make clear is that the court sees women who get a child through surrogacy as no different from women who give birth to a child. But, will the court see women who give birth to a child for commercial reasons as being the same as those who give birth to a child to build a family?

The answer to this somewhat rhetorical question may come only much later, and it would be hazardous to take a guess at this stage. It might, however, be safe to say that merely because courts have constructed maternity to include surrogacy, it does not necessarily mean that even physically giving birth to a child, for commercial reasons, will be treated in the same way.

NOTES

1 The bill text is available at http://www.prsindia.org/uploads/media/Surrogacy/Surrogacy%20%28Regulation%29%20Bill,%202016.pdf (viewed on 13 January 2017).

2 See Maternity Benefits (Amendment) Bill, 2016 available at http://www.prsindia.org/uploads/media/Maternity%20Benefit/Maternity%20Benefit%20Bill,%202016.pdf (viewed on 13 January 2017).

3 Clause 3(ii) of the Surrogacy (Regulation) Bill.

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