

# INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS



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# **MATERNITY LEAVE IN SURROGACY: LAWS AND JUDICIAL RESPONSES**

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## **ABSTRACT**

Maternity leave is an important concern for the pregnant women and also for those women who delivered a child. Medical Assisted Reproductive Technologies especially Surrogacy have brought changes in the concept of motherhood. Whether a woman who begets a child through Surrogacy procedure is entitled to maternity leave is a remarkable question of Law. This paper converse about the Maternity leaves for commissioning mother and also for surrogate mothers under the curtain of legislations viz. The Maternity Benefit Act 1961, The Maternity Benefit (Amendment) Act 2017 and The Surrogacy (Regulation) Act 2021. This paper also analysed the judgements of the Courts regarding Maternity leave on Surrogacy based motherhood.

## **Introduction**

Motherhood always been praised and protect by every society since ages. Justice DS Naidu stated glory of motherhood with the quote of Robert brown “All love begins and ends with motherhood, by which a woman plays the God. Glorious it is as the gift of nature, being both sacrosanct and sacrificial”.<sup>1</sup> Shorter Oxford English Dictionary (Fifth Edition) Maternity means (1) The quality or condition of being a mother; motherhood and (2) The qualities or conduct characteristic of a mother; motherliness.

A Judgment of Hon’ble High Court of Chhattisgarh at Bilaspur decided Maternity as “the time period during pregnancy and shortly after the child's birth. If maternity means motherhood, it would not be proper to distinguish between a natural and biological mother and a mother who has begotten a child through surrogacy. The object of maternity leave is to protect the dignity of motherhood by providing for full and healthy maintenance of the woman and her child.

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<sup>1</sup> P. Geetha vs. The Kerala Livestock Development Board and another [Kerala HC 2014]  
<http://indiakanoon.org/doc/162798767>

Maternity leave is intended to achieve the object of ensuring social justice to women. Motherhood and childhood both require special attention. Not only are the health issues of the mother and the child considered while providing for maternity leave but the leave is provided for creating a bond of affection between the two.”<sup>2</sup>

Assisted Reproductive Technologies (IVF, sperm Donation, Ovum Donation, Embryo Transfer and Surrogacy) have changed the Jurisprudence of motherhood and kinship. A Child who is born through ART may have three kinds of Mother (i) a genetic mother, who donates or sells her eggs; (ii) a surrogate mother, who bear the child; (iii) a social mother, who is rear the child. Surrogacy is a medical arrangement where a woman (Surrogate Mother) agrees to carry the child in her womb for the term and deliver the child to the other couple or individual (Commissioning Parents).

‘What makes a mother child bearing or rearing’ is a dilemma presented in Surrogacy based debates. According to Oprah Winfrey, "Biology is the least of what makes someone a mother," the idea is that a genetic mother must be given the same respect as a natural, biological mother. From Darwin's "On Origin of Species" to Richard Dawkins' "The Selfish Gene," it has been observed that the Cardinal Principle of Evolution is that every senescent being craves the continuation of its offspring, including humans.<sup>3</sup> In Surrogacy a question arises that who is eligible for Maternity leave a surrogate mother because she carried and deliver a child or intending mother on whose intention the child came into existence and she will not only nurture, feed, love and care, brought up the child but also share her social things like name of the family, properties etc. The answer can be finding out in the legislations and the attitude of the Judiciary.

The question whether a female government worker or an organised sector working woman is eligible for maternity leave even if she has a child through surrogacy or if she is a Surrogate Mother, can be analysed in three laws viz. The Maternity Benefit Act 1961, The Maternity Benefit (Amendment) Act 2017 and The Surrogacy (Regulation) Act 2021.

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<sup>2</sup> Devshree Bandhey v. Chhattisgarh State Power Holding Company Limited & others, Chhattisgarh High Court decided on 20.02.2017

<sup>3</sup> P. Geetha vs. The Kerala Livestock Development Board and another [Kerala HC 2014]  
<http://indiakanoon.org/doc/162798767>

## 1. The Maternity Benefit Act 1961

The Maternity Benefit Act, 1961<sup>4</sup> is an important piece of legislation in India that promotes gender equality and protects the rights of working mothers. It needs to be strengthened and expanded to remain relevant and effective. The Maternity Benefit Act, 1961 is a comprehensive legislation that provides for various benefits to working women during their maternity leave. It provides for 26 weeks of maternity leave for women working in establishments with 10 or more employees, nursing breaks, additional benefits such as medical bonus, coverage for all establishments with 10 or more employees, penalties for non-compliance by employers, and non-discrimination against women on the grounds of pregnancy or maternity. The Maternity Benefit Act, 1961 provides essential support to women during their maternity leave, but there are certain limitations that need to be addressed. These include limited coverage, no paternity leave, limited benefits, and lack of awareness among women about their rights. The Maternity Benefit Act, 1961 has had a significant impact on the lives of working women and their families in India. It provides for maternity leave and other benefits, promotes gender equality in the workplace, increases workforce participation by women, increases awareness about maternity benefits, and improves working conditions for women.<sup>5</sup> Prior to The Maternity Benefit (Amendment) Act 2017 the period for maternity leave was only 12 weeks.

## 2. The Maternity Benefit (Amendment) Act 2017

With a view to remove the defects of The Maternity Benefit Act 1961 and cope up with the novel situations the Indian Government had passed The Maternity (Amendment) Act 2017<sup>6</sup> in 2017. This Act had increased the duration of maternity leave to twenty six weeks from twelve weeks based on the recommendations of the 44<sup>th</sup>, 45<sup>th</sup> and 46<sup>th</sup> Indian Labour Conferences, Ministry of Women and Child Development and other organisations.<sup>7</sup>

Another most important amendment is that it inserted a subsection 3 in section 5 of the Act 1961. It provides that a commissioning mother is entitled to maternity benefit for a period twelve weeks from the date of child is handed over to her at par with adoptive mother. There is no such provision for Surrogate mother. The maternity Benefit Act is still silent on the maternity leave for Surrogate mother if she is working in that where this Act is applicable.

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<sup>4</sup> The Maternity Benefit Act 1961, No. 53, Acts of Parliament, 1961 (India)

<sup>5</sup> Jhalak Singh, Riya biswas, Legislation Commentary on the Maternity Benefit Act 1961, ILE Judicial and Legal Review, 1(1) 2023

<sup>6</sup> The Maternity Benefit (Amendment) Act 2017, No.6, Acts of Parliament ,2017 (India)

<sup>7</sup> Lok Sabha debates, Discussion on the motion for consideration of The Maternity Benefit (Amendment) Bill on 9 March ,2017 p.2

### 3. The Surrogacy (Regulation) Act 2021

Practice of Surrogacy in India is covered under The Surrogacy (Regulation) Act 2021<sup>8</sup>. Earlier to this Act 2021, Commercial Surrogacy was prevalent in India and India became the Surrogacy Hub in the world. This Act prohibited the Commercial Surrogacy completely, hence only altruistic Surrogacy (Non-Commercial) is can be practiced in India. This Act does not have any provision regarding Maternity Leave for either of two mother viz. Commissioning Mother or Surrogate Mother. Even The Maternity Benefit Act 1961 did not have any benefits for the mothers who beget the child through Surrogacy arrangement as the technology was invented after long years of the Act 1961.

During discussion on the motion for consideration of The Maternity Benefit Act 1961 in Lok Sabha Dr. Kakoli Ghosh Dastidar, a Member of Parliament had drawn the attention of Lok Sabha toward Maternity leave in Surrogacy cases. In her words “the surrogate mother should be given some kind of benefit when it is not done commercially but it is done only through goodwill because she is the one who is holding the baby for so many months”.<sup>9</sup>

#### **Judicial Responses Towards Maternity Leave In Surrogacy**

The need for maternity leave for Commissioning mother was felt when Surrogacy became popular among childless couples in India. In absence of the proper law many intended mothers were not entitled to get maternity leave compare to other normal mothers. In those conditions they moved to Courts for seeking relief in favour of them. Judiciary had played a crucial role to get them relief. There are few leading cases for maternity leave in Surrogacy arrangement:-

#### **Case I. K. Kalaisevi vs. Chennai Port Trust [Madras High Court 2013]**

The petitioner is an Assistant Superintended in the Traffic department of the Chennai port Trust and is married. She had an arrangement with Prashanth Multi-speciality Hospital, Chennai to have a baby through surrogate procedure. She applied for maternity leave, but was informed that she was not entitled for post delivery. She requested for sanction of maternity leave, but the Chairman of the port Trust granted her two months period leave as a special case. However, the leave was cancelled. Mr. Srinath Sridevan, counsel for the petitioner, referred to the Supreme Court of California, the Universal Declaration of Human Rights, the Beijing

<sup>8</sup> The Surrogacy (Regulation) Act 2021, No.47 Acts of Parliament, 2021 (India)

<sup>9</sup> Lok Sabha debates, Discussion on the motion for consideration of The Maternity Benefit (Amendment) Bill on 9 March ,2017 p.24

Declaration and Platform for Action Fourth World Conference on Women, and the Convention on the Rights of the Child. He also referred to the Convention on the Rights of the Child, which states that every child has the inherent right to life and must be ensured to the maximum extent possible. In light of this he claimed that the petitioner is entitled to develop bondage with a minor girl child through a surrogate arrangement, and is entitled to have the leave granted in her favour and her daughter's name included in the FMI Card.

The court ruled that the petitioner is entitled to leave in terms of Rule 3-A of the Leave Regulations due to the need for proper bonding between the child and parents, even in the case of Surrogacy arrangements.

### **Case II P.Geetha vs. The Kerala Livestock Development [Kerala HC 2014]**

The petitioner and her husband had a surrogate procedure to have a baby, but the first respondent Board informed them that they could only take maternity leave under normal circumstances. The learned counsel for the petitioner has argued that maternity through surrogacy or the biological process is the same thing, and that the commissioning parents have the same rights and responsibilities as natural parents. She asserts that motherhood does not end with the birth of a child; rather, it continues more vigorously through the equally challenging process of child rearing. Justice DS Naidu opined that “The issues of surrogacy and the dichotomous motherhood have their birth pangs as nascent aspects of law; they seek to be reared in the cradle of common law, i.e., case law, in the absence of the comfort of the statute law”.<sup>10</sup>

This Court declares that a woman should not be subjected to discrimination in her entitlement to maternity benefits solely because she has a surrogate child. In addition, it is made abundantly clear that, keeping in mind the dichotomy of motherhood and maternity, the petitioner is entitled to all post-delivery benefits that an employee might receive, excluding leave related to the mother's health after the delivery. To put it another way, the petitioner should be eligible for any child-specific statutory benefits that may be available.<sup>11</sup>

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<sup>10</sup> P. Geetha vs. The Kerala Livestock Development Board and another [Kerala HC 2014]  
<http://indiakanon.org/doc/162798767>

<sup>11</sup> P. Geetha vs. The Kerala Livestock Development Board and another [Kerala HC 2014]  
<http://indiakanon.org/doc/162798767>

**Case III Rama Pandey vs. Union of India [New Delhi HC 2015]**

The petitioner's desire for a child was fulfilled with twins on 09.02.2013, through a surrogacy arrangement with Mrs. Aarti (Surrogate Mother). The petitioner was unhappy when her application for maternity and Child Care Leave (CCL) was rejected by respondent no.3, based on inputs received from respondent no.2 via two communications dated 04.09.2013 and 19.09.2013. The petitioner was informed that there was no provision for grant of maternity leave in cases where the surrogacy route is adopted, but the CCL could be sanctioned under Rule 43-A, which was applicable to female government servants.

Justice Shakhder on the issue of maternity leave for commissioning mother had opined that this is something to keep in mind: The pre- and post-natal stages of pregnancy are distinct from one another. The biological union of an ovum and spermatozoon results in pregnancy. A foetus or embryo is produced in the female womb as a result of this union. The average pregnancy lasts 266 days, from conception to birth. The female body undergoes physiological changes during pregnancy, including morning sickness, abdominal enlargement, and more. During the course of the pregnancy, the woman carrying the child experiences limitations in her mobility. In the event of complications, the pregnant woman's ability to move may be restricted even before the pregnancy reaches full term. Employees who are pregnant are entitled to 180 days of maternity leave for these reasons. To him, the commissioning mother, also ought to be entitled to maternity leave because it is clearly foreseeable that a commissioning mother needs to bond with the child and at times take over the role of a breast-feeding mother, immediately after the delivery of the child.<sup>12</sup>

**Case IV Dr. Mrs. Hema Vijay Menon vs. State of Maharashtra through its Secretary of Higher and Technical Education and others [Bombay HC 2015]<sup>13</sup>**

The petitioner was a highly qualified lecturer of Law and served as guest faculty at several institutions. The petitioner's 15-year-old son passed away on July 28, 2010. The petitioner and her husband decided to have a child after suffering severe mental trauma from the death of their only son. The petitioner went through five cycles of IVF procedures but she was unable to bear the child. She decided to have a child through surrogacy, and an embryo was successfully transplanted in the womb of a surrogate mother. The surrogate mother delivered a baby boy

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<sup>12</sup> P. Geetha vs. The Kerala Livestock Development Board and another [Kerala HC 2014] <http://indiakanon.org/doc/162798767>

<sup>13</sup> Dr. Mrs. Hema Vijay Menon vs. State of Maharashtra through its Secretary of Higher and Technical Education and others [Bombay HC 2015] <http://indiakanon.org/doc/106417919>

and the petitioner and her husband spent a huge amount about INR 45, 00,000/- for the procedure.

The petitioner applied for maternity and child care leave to the Principal of the Dr. Ambedkar College, based on the provisions of Maharashtra Civil Services (Leave) Rules, 1981 and the Government Resolution dated 28.07.1995. However, the Joint Director of Higher Education informed the Principal of the College asserted that there was no provision for granting maternity leave to a mother who begets a child through surrogacy; so they did not have authority to grant maternity leave.

Shri Dhore (Petitioner's counsel) argued that an employee mother is entitled to maternity leave under the Maharashtra Civil Services (Leave) Rules and Government Resolution. He argued that the purpose of providing maternity leave is related to the health concerns of the mother and the upbringing of the child, and that the Joint Commission's action is arbitrary and discriminatory. Ms. Udeshi (Respondent's Counsel) argued that the said Government Resolution provided for maternity leave to an adoptive mother, but not to a mother who had secured the child through surrogacy.

The Court ruled that a mother who begets a child through surrogacy has the same rights and obligations as a natural mother. A commissioning mother like the petitioner would have the same rights and obligations as a natural mother, and cannot be denied paid maternity leave. A newly born child needs the care and attention of its mother during the first year of its life, and the bond of affection must be developed. The Court also quote the popular saying that being a mother is one the most rewarding jobs on earth and also one of the most challenging. The Court also accepted the point of petitioner's counsel that there is nothing in Rule 74 of the Maharashtra civil Services (Leave) Rules 1961 which would disentitle a woman motherhood through Surrogacy procedure to maternity leave.<sup>14</sup>

### **Case V Smt. Sadhna Agrawal vs. State of Chhattisgarh [Chhattisgarh HC 2017]**

The petitioner was a Lecturer working in a Government Girls Higher Secondary School of Chhattisgarh. After 26 years of marriage, she decided to have a child through surrogacy as she was not medically able to conceive and deliver a baby. In June 2015, an embryo was

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<sup>14</sup> Dr. Mrs. Hema Vijay Menon vs. State of Maharashtra through its Secretary of Higher and Technical Education and others. [ Bombay HC 2015] <http://indiankanoon.org/doc/106417919>

successfully transplanted in the womb of a surrogate mother. On 15-3-2016, the surrogate mother delivered twin babies and they placed in the hands of the petitioner and her husband at the Indore Hospital on the same day. Rule 38 of the Rules of 2010 provides for maternity leave to female Government servants with less than two surviving children up to 135 days from the date of its commencement. The petitioner filed this writ petition claiming that she is entitled for maternity leave as provided in Rule 38 of the Rules of 2010. Principal of the rejected the application because there was no provision to grant maternity in Surrogacy arrangements on Rule 2010.<sup>15</sup>

The court found it suitable to see specific established arrangements in such manner. Part-III of the Constitution accommodates key privileges. Article 14 gives that the State will not deny to any individual uniformity under the steady gaze of the law or the equivalent security of the regulations inside the domain of India. Article 15 gives that the State will not oppress any resident on grounds just of religion, race, rank, sex, and place of birth or any of them.<sup>16</sup>

Further Court gave reference of a judgement of the Supreme Court in the matter of Hindustan Antibiotics Ltd. V. The Workmen<sup>17</sup> held that the labour to whichever sector it may belong in a particular region and in a particular industry will be treated on equal basis.

The Court adopted the idea of social justice from the case J.K Cotton Spinning. & Weaving Mills Co. Ltd. vs. Labour Appellate Tribunal of India<sup>18</sup> that Social justice is an integral part of industrial law, aiming to remove socio-economic disparities and inequalities. It does not adopt a doctrinaire approach, but instead adopts a realistic and pragmatic approach. Inequalities must be eliminated and everyone given what is legally theirs in order to establish a just social order. Women, who make up almost half of our society, need to be respected and treated with respect wherever they work to support themselves. They must be provided with all the amenities to which they are entitled, regardless of the nature of their responsibilities, profession, or workplace.

The Court also reaffirm that human rights are supreme in the The Universal Declaration of Human Rights 1948. Further Court discuss Article 11 of the “Convention on the Elimination

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<sup>15</sup> Sadhna Agrawal vs. State of Chhattisgarh [Chhattisgarh HC 2017 p.2] <http://indiakanoon.org/doc/1293677316>

<sup>16</sup> ibid

<sup>17</sup> Hindustan Antibiotics Ltd. Vs. The Workmen [AIR 1967SC 948]

<sup>18</sup>J.K Cotton Spinning. & Weaving Mills Co. Ltd. vs. Labour Appellate Tribunal of India [AIR 1964 SC 737]

of all Forms of Discrimination against Women” which proposed that States/parties must take measures to eliminate discrimination against women in the field of employment, such as prohibiting dismissal on the grounds of pregnancy, introducing maternity leave with pay, encouraging the provision of supporting social services, and providing special protection to women during pregnancy. Protective legislation must be reviewed periodically in light of scientific and technological knowledge.<sup>19</sup>

The court also discussed the principles of statutory principle as per G.P. Singh Interpretation of Principles of Statutory Interpretation (12<sup>th</sup> Edition 2010) in Chapter-4 by Justice G.P. Singh under the heading “Later Social, Political and Economic Developments and Scientific Inventions” states that the Rule of Dynamic Construction is a principle that states that a statute must be interpreted in the light of the legal system as it exists today. It states that courts must apply a statute to the world as it exists today and in the light of the legal system as it exists today. It also states that a statute may be interpreted to include circumstances or situations which were unknown or did not exist at the time of enactment. The doctrine has its limitations, such as not allowing for the language of an old statute to be construed to embrace something conceptually different.

Sinha J. had observed in a case where old law was not enough to handle the problems occurred due to advent of new technologies. In his words “Global changes and outlook in trade and commerce could be a relevant factor.- What was not considered a necessity a century back may be held to be so now”.<sup>20</sup>

Subbarao, J. explained that in modern progressive society, it is unreasonable to confine the intention of a Legislature to the meaning attributable to the word used at the time of the law. An interpretation should be given to the words used to take in new facts and situation, if they are capable of comprehending them.<sup>21</sup>

The Court also looked the matter with the spectacles of constitution and said that the Right to life under Article 21 of the Constitution of India includes the right to motherhood and also the right of every child to full development. If the Government can provide maternity leave to an

<sup>19</sup> Sadhna Agrawal vs. State of Chhattisgarh [Chhattisgarh HC 2017 p.5] <http://indiakanoon.org/doc/1293677316>

<sup>20</sup> Liverpool and London SP&I Association vs. M.V.Sea Success & Associate Ltd. [9SCC 2004 512 Para 65]

<sup>21</sup> Senior electric Inspector v. Laxmi Narayan Chopra [AIR 1962 Sc 159]

adoptive mother, it would be wholly improper to refuse to provide maternity leave to a mother who begets a child through the surrogacy procedure and as such, there cannot be any distinction between an adoptive mother who adopts a child and a mother who begets a child through surrogacy procedure after implanting an embryo.<sup>22</sup>

After an extensive exploration of laws rules and legal principals court allowed the writ petition and decided that the petitions is entitled to maternity leave under rule 38 of Chhattisgarh Civil Services.<sup>23</sup>

#### **Case VI Sunita vs. Union of India M/O Law and Justice [CAT Delhi 2018]<sup>24</sup>**

Sunita, a government servant, was denied 180 days maternity leave due to FRSR Leave Rule 43, which states that maternity leave is not provisioned under rules on getting a surrogacy baby. Being aggrieved by the said order the applicant filed an O.A in Central Administrative Tribunal Delhi. The Court found that though Rule 43 does not provide maternity leave for Surrogate Mothers and Commissioning Mothers yet An O.M dated 01.04.2016 issued by the Department of Personnel, Public Grievances & Pensions, Department of Personnel & Training (DoPT) stipulated that 180 days maternity leave may be granted to the Surrogate as well as Commissioning mothers in case either or both them are government Servants. The Court held that applicant is entitled for grant of maternity leave for 180 days.<sup>25</sup>

#### **Case VII Sushma Devi vs. State of Himachal Pradesh [HP HC 2020]<sup>26</sup>**

The petitioner was employed at the Government Senior Secondary School in District Kullu, as a contract language teacher. Through surrogacy treatment at Fortis La Femme Hospital, New Delhi, the petitioner was blessed with a child on October 10, 2020. The petitioner had submitted an application for maternity leave to the Principal of Government Senior Secondary School, District Kullu. Principal forwarded the application to the Deputy Director of Higher Education in Kullu, to determine whether the petitioner is eligible for surrogacy-based maternity leave. The respondents denied the petitioner's request for maternity leave due to a lack of clarity regarding the admissibility of maternity leave to a female Government employee on surrogacy.

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<sup>22</sup>Sadhna Agrawal vs. State of Chhattisgarh [Chhattisgarh HC 2017 p.12] <http://indiakanoon.org/doc/1293677316>

<sup>23</sup> ibid

<sup>24</sup> Sunita vs. Union of India M/O Law and Justice [CAT Delhi 2018] <http://indiakanoon.org/doc/87974764>

<sup>25</sup> Sunita vs. Union of India M/O Law and Justice [CAT Delhi 2018] <http://indiakanoon.org/doc/87974764>

<sup>26</sup> Sushma Devi vs. State of Himachal Pradesh [HP HC 2020]

Then the petitioner filed a writ petition in the High Court seeking a relief as a direction to the respondents to sanction or grant the maternity leave to her. The Court after discussion on various cases observed that the claim of maternity leave is founded on the grounds of fair play and social justice. There cannot be discrimination made and if made it would amount to breach of Article 14 and 15 of the Constitution.<sup>27</sup>

The maxim 'law lags behind technology' means when a new technology brings new changes in the life of people and causes legal problems in their lives then legislature, judges, lawyers and legal scholars struggle to cope up with the technological change. Assisted reproductive technologies caused various legal issues like parental rights, child rights, rights of surrogate mothers, protection of the privacy of surrogate mother and eligibility for maternity leave in Surrogacy etc. Old laws were not strong enough to deal with these new legal issues. Making new legislation is a long process. Meanwhile Judiciary has to find out the way to deliver justice on the ground Constitutional Rights, international human rights and theory of social justice etc. In all of the above cases attitude of the Judiciary was positive for the needs of Commissioning mothers. 'Best interest of the child', 'Mother – Child Bonding' and 'equal protection of law for mothers', were the prime considerations for the Courts in delivering sound justice.

### **Conclusion**

Maternity leave in surrogacy procedures is a concern for both Surrogate mother and Commissioning mothers. Commissioning mothers needed this because they will take care of the child and for the development of the child-mother bond. Surrogate mothers also need maternity leave as she carried the child for the term and suffered from labour pain. They need to heal after such a long period medication, a non-natural procedure, started from the stage of conceiving, embryo transfer, carry the foetus till delivery. The Maternity Benefit (Amendment) Act 2017 has relief only for the commissioning mothers as it grants 12 weeks leave for them after the child handed over to her. There is no consolation for the Surrogate mothers in the Act. The interest of Surrogate mothers should not be neglected. They should be entitled for equal quantum of maternity leave.

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<sup>27</sup> State of HP and others vs. Sudesh Kumari [2015 (1) Him. L.R (DB) 36]