

Civil Misc. Writ Petition No. 24627 of 2017

Dr. Rachna Chaurasiya

Versus

State Of U.P. & Ors.

Petitioner

Respondents

**Hon'ble Krishna Murari, J.
Hon'ble Ravindra Nath Kakkar, J.**

Heard learned counsel for the petitioner and learned Standing Counsel for the State respondents.

Shorn of unnecessary details, facts relevant for the purpose of the case are as under.

Petitioner, after being duly selected by the Selection Board constituted by the Director General of Medical Education, Uttar Pradesh, Lucknow, was appointed on the post of Lecturer (Radio Diagnosis) on contractual basis in M.L.B. Medical College, Jhansi on 24.02.2009. The appointment of the petitioner was initially for a period of one year, thereafter, it was subsequently extended from time to time. Under the orders of the State Government dated 27.09.2013, petitioner along with 42 other contractual doctors, was granted promotion to the post of Assistant Professor. After facing the Selection Board constituted by the Director General of Medical Education, petitioner was promoted to the post of Associate Professor vide order dated 28.01.2015 and still continues on the post.

In the year 2016, petitioner gave birth to a child and was allowed Maternity Leave for a period of six months from 03.05.2016 to 29.10.2016. After availing the aforesaid leave, she joined the college on 04.11.2016. Husband of the petitioner is also a doctor by profession and working on the post of Associate Professor in (Anaesthesiology) in the same medical college.

Finding that child was not comfortable with the maid during the period when the petitioner and her husband went out for work, she applied for Child Care Leave for a period of three months before the Principal, respondent no. 3, Medical College vide application dated 18.05.2017. The said application was rejected vide order dated 20.05.2017 on the ground that the petitioner, being a contractual employee, is not entitled for grant of Child Care Leave.

Learned counsel for the petitioner points out that the Central Government vide office memorandum dated 11.09.2008 took a decision on the basis of recommendation of the VIth Central Pay Commission relating to enhancement of the quantum of Maternity Leave and introduction of Child Care Leave in respect of Central Government employee, which has been adopted by the State of U.P. for its

employees vide Government Order dated 11.04.2011. The aforesaid Government Order has further been clarified by yet another Government Order dated 24th September, 2014. On the strength of the aforesaid two Government Orders, it is submitted that petitioner is entitled to Child Care Leave and her application has wrongly been rejected.

Learned Standing Counsel trying to justify the impugned order submits that the Government Orders dated 11.04.2011 and 24.09.2015 referred to by the learned counsel for the petitioner only makes reference to the regular appointed female Government servant and are not applicable to female employees working on contractual basis, hence, her application for grant of Child Care Leave has rightly been rejected as the said leave is not admissible to contractual employees.

The issue for our determination is whether the female employees, who are not under regular employment, are entitled to be extended the said benefit.

Our Constitution in its preamble, promises social and economic justice. Fundamental rights are enshrined in Part III of the Constitution. Article 14 provides that the State shall not deny to any person equality before law or the equal protection of the laws within the territory of India. Article 15 provides that the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. Clause (3) of this Article empowers the State to make any special provision for women and children. The said clause reads as under.

"15 (3). Nothing in this Article shall prevent the State from making any special provision for women and children."

The Directive Principles of State Policy is contained in Part IV of the Constitution, which though are not enforceable by law, but is nevertheless available for determining the legal efficacy of the actions of the State. Article 42 contained in Part IV of the Constitution reads as under.

"42. Provision for just and humane conditions of work and maternity relief.- The State shall make provision for securing just and humane conditions of work and for maternity relief."

In consonance with the provisions of Article 42, Parliament has made the Maternity Benefit Act, 1961. Since Article 42 specifically speaks of "just and humane conditions of work" and "maternity relief, the validity of an executive or administrative action in denying maternity benefit has to be examined on the anvil of Article 42 which, though not enforceable at law, is nevertheless available for

determining the legal efficacy of the action complained of.

Section 2 of the Maternity Benefit Act, 1961 deals with the applicability of the Act. Section 3 contains definitions. The word "child" as defined in Section 3(b) includes a 'still-born' child. "Delivery" as defined in Section 3(c) means the birth of a child. "Maternity Benefit" has been defined in Section 3(h), which means the payment referred to in sub-section (1) of Section 5. "Woman" has been defined in Clause (o) of Section 3 which means "a woman employed, whether directly or through any agency, for wages in any establishment." "Wages" have been defined in Clause (n) of Section 3 which provides, inter alia, as under :

"3 (n) 'wages' means all remuneration paid or payable in cash to a woman.....".

Section 5 provides, inter alia, as under :

"5. Right to payment of maternity benefit - (1) Subject to the provisions of this Act, every woman shall be entitled to, and her employer shall be liable for, the payment of maternity benefit at the rate of the average daily wage for the period of her actual absence, that is to say, the period immediately preceding the day of her delivery, the actual day of her delivery and any period immediately following that day.

Explanation - For the purpose of this sub-section, the average daily wage means the average of the woman's wages payable to her for the days on which she has worked during the period of three calendar months immediately preceding the date from which she absents herself on account of maternity, the minimum rates of wages fixed or revised under the Minimum Wages Act, 1948 or ten rupees, whichever is the highest.

(2) No woman shall be entitled to maternity benefit unless she has actually worked in an establishment of the employer from whom she claims maternity benefit, for a period of not less than eighty days in the twelve months immediately preceding the date of her expected delivery.

Explanation - For the purpose of calculating under this sub-section the days on which a woman has actually worked in the establishment, the days for which she has been laid off or was on holidays declared under any law for the time being in force to be holidays with wages during the period of twelve months immediately preceding the date of her expected delivery shall be taken into account.

(3) The maximum period for which any woman shall be entitled to maternity benefit shall be twelve weeks of which not more than six weeks shall precede the date of her expected delivery.



Section 5A provides that if the Employees' State Insurance Act, 1948 is applied or becomes applicable to the establishment where a woman is employed, such woman shall continue to be entitled to receive the maternity benefits under this Act so long as she does not become qualified to claim maternity benefits under Section 50 of that Act.

It may be stated that Section 50 of the Employees' State Insurance Act, 1948 provides as under :

"50. Maternity benefit - The qualification of an insured woman to claim maternity benefit, the conditions subject to which such benefit may be given, the rates and period thereof shall be such as may be prescribed by the Central Government."

Section 5B of the Maternity Act speaks of payment of maternity benefit in certain cases. Section 6 provides notice of claim for maternity benefit and payment thereof. Section 8 provides that every woman entitled to maternity benefit under this Act shall also be entitled to receive from her employer a medical bonus of 250 rupees, if no pre-natal confinement or post-natal care is provided by the employer free of charge.

Section 9 contemplates leave for miscarriage or medical termination of pregnancy. Section 9A contemplates leave for tubectomy operation whereas Section 10 provides for leave for illness arising out of pregnancy, delivery, premature birth of a child or miscarriage. Section 11 provides as under :

"11. Nursing breaks - Every woman delivered of a child who returns to duty after such delivery shall, in addition to the interval for rest allowed to her, be allowed in the course of her daily work two breaks of the prescribed duration for nursing the child until the child attains the age of fifteen months."

Section 12, which contains a very significant prohibition in regard to the service of a woman employee, provides as under :

"12. Dismissal during absence or pregnancy -r-
(1) When a woman absents herself from work in accordance with the provisions of this Act, it shall be unlawful for her employer to discharge or dismiss her during or on account of such absence or to give notice of discharge or dismissal on such a day that the notice will expire during such absence, or to vary to her disadvantage any of the conditions of her service.

(2)(a) The discharge or dismissal of a woman at any time during her pregnancy, if the woman but for such discharge or dismissal would have been entitled to maternity benefit or medical bonus referred to in

Section 8, shall not have the effect of depriving her of the maternity benefit or medical bonus.

Provided that where the dismissal is for any prescribed gross misconduct, the employer may, by order in writing communicated to the woman, deprive her of the maternity benefit or medical bonus or both.

(b) Any woman deprived of maternity benefit or medical bonus, or both, or discharged or dismissed during or on account of her absence from work in accordance with the provisions of this Act, may, within sixty days from the date on which order of such deprivation or discharge or dismissal is communicated to her, appeal to such authority as may be prescribed, and the decision of that authority on such appeal, whether the woman should or should not be deprived of maternity benefit or medical bonus, or both, or discharged or dismissed shall be final.

(c) Nothing contained in this sub-section shall affect the provisions contained in sub-section (1)."

This Section prohibits dismissal of a woman employee during or on account of her absence on Maternity Leave. It ensures that the conditions of her service would not be varied to her disadvantage during her absence.

Contravention of the provisions of this Act has been made an offence under Section 21 of the Act which provides as under :

"21. Penalty for contravention of Act by employer - (1) If any employer fails to pay any amount of maternity benefit to a woman entitled under this Act or discharges or dismisses such woman during or on account of her absence from work in accordance with the provisions of this Act, he shall be punishable with imprisonment which shall not be less than three months but which may extend to one year and with fine which shall not be less than two thousand rupees but which may extend to five thousand rupees :

Provided that the court may, for sufficient reasons to be recorded in writing, impose a sentence of imprisonment for a lesser term or fine only in lieu of imprisonment.

(2) If any employee contravenes the provisions of this Act or the rules made thereunder, he shall, if no other penalty is elsewhere provided by or under this Act for such contravention, be punishable with imprisonment which may extend to one year, or with fine which may extend to five thousand rupees, or with both :

Provided that where the contravention is of any provision regarding maternity benefit or regarding payment of any other amount and such maternity benefit or amount has not already been recovered, the court shall, in addition, recover such maternity benefit

or amount as if it were a fine and pay the same to the person entitled thereto."

Cognizance of offences has been provided for in Section 23, which is reproduced as under :

"23. Cognizance of offences - (1) Any aggrieved woman, an office-bearer of a trade union registered under the Trade Unions Act,, 1926 of which such woman is a member or a voluntary organisation registered under the Societies Registration Act, 1860 or an Inspector, may file a complaint regarding the commission of an offence under this Act in any court of competent jurisdiction and no such complaint shall be filed after the expiry of one year from the date on which the offence is alleged to have been committed.

(2) No court inferior to that of a Metropolitan Magistrate or a Magistrate of the First Class shall try any offence under this Act."

Section 27 deals with the effect of laws and agreements inconsistent with this Act. Sub-section (1) provides that the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law or in the terms of any award, agreement or contract of service. Sub-section (2) of this Section, however, provides that it will be open to a woman to enter into an agreement with her employer for granting her rights or privileges in respect of any matter which are more favourable to her than those she would be entitled to under this Act.

Reference at this stage may be made to Rule 153 of the Fundamental Rules, which reads as under.

"153. Maternity Leave on full pay which a female Government servant, whether permanent or temporary, may be drawing on the date or proceeding on such leave may be granted to her by the head of the department or by a lower authority to whom power may be delegated to this behalf subject to the following:

(1) In cases of confinement the period of maternity leave may extend up to the end of three months from the date of the commencement of leave:

Provided that such leave shall not be granted for more than three times during entire service including temporary service:

Provided also that if any female Government servant has two or more living children, she shall not be granted Maternity Leave even though such leave may otherwise be admissible to her. If, however, either of the two living children of the female Government

servant is suffering from incurable disease or is disabled or crippled since birth or contracts some incurable disease or becomes disabled or crippled later, she may, as an exception, be granted Maternity Leave till one more child is born to her subject to the overall restriction that Maternity Leave shall not be granted for more than three times during the entire service.

Provided further that no such leave shall be admissible until a period of at least two years has elapsed from the date of expiry of the last Maternity Leave granted under this rule.

(2) In cases of miscarriage, including abortion, the period of Maternity Leave may extend up to a total period of six weeks on each occasion, irrespective of the number of surviving children of the female Government servant concerned, provided that the application for leave is supported by a certificate from the Authorized Medical Attendant :

Note –(1) Deleted.”

Reference may also be made to the decision taken by the Central Government on the basis of the recommendation of the VIth Central Pay Commission introducing Child Care Leave in respect of the Central Government employee vide office memorandum No. 13018/2/2008-Estt.(L) dated 11.09.2008, which was issued by Ministry of Personnel, Public Grievances and Pensions (Department of Personnel & Training). Relevant clause (c) reads as under.

“(c) Women employees having minor children may be granted Child Care Leave by an authority competent to grant leave, for a maximum period of two years (i.e. 730 days) during their entire service for taking care of upto two children whether for rearing or to look after any of their needs like examination, sickness etc. Child Care Leave shall not be admissible if the child is eighteen years of age or older. During the period of such leave, the women employees shall be paid leave salary equal to pay drawn immediately before proceeding on leave. It may be availed of in more than one spell. Child Care Leave shall not be debited against the leave account. Child Care Leave may also be allowed for the third year as leave not due (without production of medical certificate.) It may be combined with leave of the kind due and admissible.”

The aforesaid decision of the Central Government has been adopted by the State of U.P. for its employees vide Government Order dated 08.12.2008 and 24.03.2009. Subsequently, certain modifications being made by the Central Government, the same was also adopted by the State Government vide Government Order dated 11th April, 2011. The aforesaid Government Order is

being reproduced hereunder.

“प्रेषक,

वृन्दा सरूप,

प्रमुख सचिव,

उ०प्र० शासन।

सेवा में,

समस्त विभागाध्यक्ष एवं प्रमुख कार्यालयाध्यक्ष,
उत्तर प्रदेश।



वित्त (सामान्य) अनुभाग-2 लखनऊ : दिनांक : 11 अप्रैल, 2011
विषय:- महिला सरकारी सेवकों को बाल्य देखभाल अवकाश की अनुमन्यता।

महोदय,

उपर्युक्त विषयक कार्यालय ज्ञाप संख्या-जी-2-2017/दस-2008-216-79, दिनांक 08-12-2008 तथा कार्यालय ज्ञाप संख्या जी-2-573/दस-2008-216-79, दिनांक 24-3-2009 द्वारा प्रदेश की महिला सरकारी सेवकों को केन्द्र सरकार की महिला कर्मचारियों की भांति बाल्य देखभाल अवकाश की सुविधा कतिपय शर्तों के अधीन प्रदान की गयी थी। चूंकि भारत सरकार द्वारा उक्त शर्तों में कतिपय संशोधन किए गए हैं अतः सम्यक् विचारोपरान्त श्री राज्यपाल महोदय संदर्भगत शासनादेशों में उल्लिखित शर्तों को निम्नवत् संशोधित करने की सहर्ष स्वीकृति प्रदान करते हैं:-

- (1) संबंधित महिला कर्मचारी के अवकाश लेखे में उपार्जित अवकाश देय होते हुए भी बाल्य देखभाल अवकाश अनुमन्य होगा।
- (2) बाल्य देखभाल अवकाश को एक कलेण्डर वर्ष के दौरान तीन बार से अधिक नहीं दिया जायेगा।
- (3) बाल्य देखभाल को 15 दिनों से कम के लिए नहीं दिया जायेगा।
- (4) बाल्य देखभाल अवकाश को साधारणतया परिवीक्षा अवधि के दौरान नहीं दिया जायेगा, ऐसे मामलों को छोड़कर जहाँ अवकाश देने वाला प्राधिकारी परिवीक्षार्थी की बाल्य देखभाल अवकाश की आवश्यकता के बारे में पूर्ण रूप से संतुष्ट न हो। इसे भी सुनिश्चित किया जायेगा कि परिवीक्षा अवधि के दौरान अवकाश दिया जा रहा है तो इस अवकाश की अवधि कम-से-कम हो।
- (5) बाल्य देखभाल अवकाश को अर्जित अवकाश के समान माना जायेगा और उसी प्रकार से स्वीकृत किया जायेगा।

2- यदि किसी महिला कर्मचारी द्वारा दिनांक 08.12.2008 के कार्यालय ज्ञाप के जारी होने के पश्चात बाल्य देखभाल के प्रयोजन हेतु अर्जित अवकाश लिया गया है तो उसके अनुरोध पर उक्त अर्जित अवकाश को बाल्य देखभाल अवकाश में समायोजित किया जा सकेगा।

3- शासनादेश संख्या जी-2-2017/दस-2008-216-79, दिनांक 08-12-2008 तथा शासनादेश संख्या जी-2-573/दस-2009-216-79 दिनांक 24-03-2009 इस सीमा तक संशोधित समझे जायेंगे।

4- संगत अवकाश नियमों में आवश्यक संशोधन यथासमय किये जायेंगे।

भवदीया,

(वृन्दा सरूप)
प्रमुख सचिव, वित्त ।"

From a perusal of the aforesaid Government Orders, it is clear that the State Government has adopted same policy as is enforced by the Central Government for grant of Maternity Leave as well as Child Care Leave to its employees.

Maternity benefit is a social insurance and the Maternity Leave is given for maternal and child health and family support. On a perusal of different provisions of the Act, 1961 as well as the policy of the Central Government to grant Child Care Leave and the Government Orders issued by the State of U.P. adopting the same for its female employees, we do not find anything contained therein which may entitle only to women employees appointed on regular basis to the benefit of Maternity Leave or Child Care Leave and not those, who are engaged on casual basis or on muster roll on daily wage basis.

The aforesaid view taken by us find full support from the dictum of Hon'ble Apex Court in the case of **Municipal Corporation of Delhi Vs. Female Workers (Muster Roll) & Anr., (2000) 3 SCC 224**. It may be relevant to produce paragraph 27 from the said report.

"The provisions of the Act which have been set out above 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."

We are of the considered opinion that the benefit under the Act as well as the Rules of the Government Orders providing for grant of Maternity benefits and Child Care leave are applicable to all female employees, irrespective of their nature of employment whether permanent, temporary or contractual.

In view of the aforesaid facts and discussions, order dated 20.05.2017 passed by respondent no. 3 denying Child Care Leave for a period of three months to the petitioner is arbitrary and violative of Articles 14 and 16 of the Constitution,

cannot be sustained and is hereby quashed.

Accordingly, the writ petition stands allowed with the following directions.

1. Respondents are directed to grant Maternity Leave to the petitioner with full pay as applied within 8 weeks from today.

2. The respondent-State is also directed to grant Maternity Leave to all family employees with full pay for 180 days, irrespective of nature of employment, i.e., permanent, temporary/ad hoc or contractual basis.

3. State-respondent is also directed to grant Child Care Leave of 730 days to all female employees, who are appointed on regular basis, contractual basis, ad hoc or temporary basis having minor children with the rider that the child should not be more than 18 years of age or older.

29.05.2017
OP/VKS



Court No. - 11

AFR

Case :- WRIT - A No. - 3486 of 2019

Petitioner :- Anshu Rani

Respondent :- State Of U P And 2 Others

Counsel for Petitioner :- Avadhesh Pratap Singh

Counsel for Respondent :- C. S. C., Prem Prakash Yadav

Hon'ble Prakash Padia, J.

1. The petitioner has preferred the present writ petition with a prayer to issue a Mandamus directing the respondent No.3/District Basic Education Officer, Bijnor to grant the petitioner maternity leave with honorarium from 30.12.2018 to 31.3.2019. A further prayer is also made to issue a mandamus directing the aforesaid respondents to decide the application submitted by the petitioner on 21.12.2018 forthwith.

2. Facts as contained in the writ petition are that the petitioner was initially appointed on the post of Anudeshak on 20.07.2013 at Purwa Madhyamik Vidyalaya Gowali Noorpur, District Bijnor. Subsequently, The petitioner was married with one Sunil Kumar on 18.2.2018. Due to wedlock, the petitioner has conceived and to be born a female child. In this regard Doctor advised to the petitioner to take complete bed rest. In this regard an application dated 26.9.2018 was submitted by the petitioner before the Block Education Officer as well as the District Basic Education Officer, Bijnor to grant her maternity leave from 1.10.2018 to 31.3.2019. On the aforesaid application, the District Basic Education Officer, Bijnor granted maternity leave to the petitioner only for 90 days, i.e., 1.10.2018 to 29.12.2018 with honorarium. The request was made by the petitioner to grant her maternity leave for 180 days was ignored by the District Basic Education Officer Bijnor while granting leave for 90 days. No reason whatsoever has been assigned by the aforesaid authority that under which circumstances the request for grant of maternity leave for a period of 180 days was turned down and the maternity leave was granted only for a period of 90 days.

protection in given circumstances. What employer has to consider is whether her duty attached to mother prevented her from attending employment or not. As already adverted above, motherhood is an inherent dignity of woman, which cannot be compromised.

The High Court of Madras in *W.P. No.12660 of 2017 (U. Ishwarya Vs. Director of Medical Education, Directorate of Medical Education and Others)*, decided on 22nd December, 2017 had also dealt with in great detail theory of motherhood. It is held in the aforesaid judgement that maternity leave cannot be denied and the period of maternity leave should not be kept apart or executed from service and maternity leave has to be excluded from the period of service is "null and void". The relevant paragraphs of the aforesaid judgment are reproduced below:-

"...it is not only the fundamental right of the lady to give birth to a child and also necessary for existence of mankind and without a lady, a child could not be born in the world. Even nature requires a child birth through a lady. When that is the position, the petitioner (a lady doctor in the instant case) cannot be denied the maternity leave and the period of maternity leave, which the petitioner availed, should not be kept apart or excluded from two years of service. Even in their two years of service, if maternity leave is sanctioned, the maternity leave period should be deemed to be the service period. Any rule or regulation which goes against the same is null and void,"

20. In view of the facts as narrated above, it is clear that the petitioner is entitled for maternity leave for period of six months but wholly illegally leave was granted only for a period of three months.

21. In the facts and circumstances of the case, a mandamus is issued directing the respondent No.2/District Basic Education Officer, Bijnor to provide the petitioner maternity leave with honorarium with effect from 30.12.2018 to 31.3.2019. The Writ Petition stands allowed.

22. No order as to costs.

Order date:19.04.2019

Saqlain