RESERVED
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Court No. - 25

Case :- WRIT - A No. - 14833 of 2020

Petitioner :- Renu Chaudhary
Respondent :- State Of U.P. And 3 Others
Counsel for Petitioner :- Indra Dev
Counsel for Respondent :- C.S.C.,Ram Bilas Yadav

Hon'ble J.J. Munir,J.

The petitioner, an Assistant Teacher at the Prathmik Vidyalaya, Uncha (Composit), Shamshabad, District - Agra, impugns an order dated 20.11.2020 passed by the Basic Education Officer, Development Block, Shamshabad, District - Agra, refusing to sanction her maternity leave.

2. The petitioner is an Assistant Teacher, working with the Prathmik Vidyalaya Uncha (Composit), Shamshabad, Agra. The Institution aforesaid is established and maintained by the Uttar Pradesh Basic Education Board. The petitioner functions under the overall supervision and control of the Basic Education Officer, Agra and under the immediate control of the Headmaster, Prathmik Vidyalaya Uncha (Composit), Shamshabad, Agra. Admittedly, the petitioner was appointed to the post of Assistant Teacher on 29.06.2011 and joined services w.e.f. 01.07.2011. It is common ground between parties that at the time of entry into service, the petitioner was a married woman. Her service record shows that a son was born to her on August the 19th, 2007 and a daughter on September the 15th, 2011. Thus, a daughter was born to the petitioner soon after she joined service on July the 1st, 2011. It is perhaps for the said reason that the current leave balance account of the petitioner, that has been annexed as Annexure No. S.A.1 to the supplementary affidavit dated 18.06.2021, shows that she has availed 180 days of maternity leave, out of the total admissible of 540, leaving a balance of 360 days in the category. Though not very explicitly said by the petitioner, the availed maternity leave

would relate to the second child born to the petitioner soon after she joined service.

3. The petitioner made an application for grant of maternity leave, submitting it online on November the 10th, 2020. This application of the petitioner's has come to be rejected by the order impugned dated 20.11.2020, passed by the Basic Education Officer, Shamshabad, Agra, employing words that express reason for the rejection, that say : *"Leave applied for third child without any specific reason"*. It is this order which the petitioner seeks to assail by means of the present petition.

4. Parties have exchanged pleadings.

5. Heard Mr. Indra Dev Singh, learned Counsel for the petitioner, Mr. J.N. Maurya, the learned Chief Standing Counsel appearing for respondent no. 1 and Mr. R.V. Yadav, learned Counsel appearing for respondent nos. 2, 3 and 4.

6. Mr. Indra Dev Singh, learned Counsel for the petitioner, submits that the right to maternity leave flows from a Central Statute, that is to say, the Maternity Benefit Act, 1961, as amended by Maternity Benefit (Amendment) Act, 2017. The said Act shall hereinafter be referred to as the *"Maternity Act"*. It is urged by the learned Counsel for the petitioner that the Maternity Act has increased the maternity leave from eight weeks to twenty-two weeks. There is no restriction envisaged in the Act last mentioned regarding the count of children, on whose birth, sanction of maternity leave would depend. It is further pointed out, on the strength of the supplementary affidavit on behalf of the petitioner, that though the child now born is the third child, this is the second instance that the petitioner had applied for maternity leave. It is emphasized by Mr. Indra Dev, learned Counsel for the petitioner, that the petitioner has not applied for maternity leave thrice. She has applied twice. The first has been granted, and the second, the present one, refused. It is refused on the

ground that the child, in relation to whose birth the maternity leave is sought, is her third child, and no particular or specific reason has been pointed out why maternity leave ought not to be granted on the birth of a third child. It is submitted by the learned Counsel for the petitioner that the respondents seek to support the impugned order before this Court by falling back on the provisions of Rule 153 (1) of the U.P. Fundamental Rules, Vol. II Part II to IV of the Financial Handbook. The said rules are hereinafter referred to as *"the Rules"*.

7. Mr. Indra Dev, learned Counsel for the petitioner, further submits emphatically that the first and the second child, with regard to whose birth, a female government servant is entitled to maternity leave, as a matter of right, with restriction in the case of a third child, is to be regarded as one bearing reference to children born after the government servant's entry into service. He submits that the Rule postulates two instances of maternity leave, with a gap of two years, and the right given by the Rule, if read the way the respondents urge, would be nullified in case of a female government servant, who enters service with two living children, and none of whom suffer from any kind of disability or handicap. It is urged by the learned Counsel for the petitioner that this is not the purpose or the intent of Rule 153 of the Rules. He argues that Fundamental Rule 153 is not a charter about family planning, but a concession in favour of the female government servant. It has been introduced in order to afford equal right to women to work with men in accordance with the mandate of Article 15 without any discrimination, balancing at the same time their special role in society as birth-givers to the next generation. He submits that placing a restriction of this kind on the right of a woman to maternity leave would be a violation of the Maternity Act, as amended by the Act of 2017. It is argued that the Maternity Act does not envisage any kind of a restriction in the workplace on extension of maternity benefit, and the Rules cannot be given effect to

in conflict with the Central Statute. In support of his contention, learned Counsel for the petitioner has placed reliance on the decision of the Supreme Court in **Municipal Corporation of Delhi v. Female Workers (Muster Roll) and another**[1]. Besides the authority, reliance has also been placed on the decision of this Court in **Anshu Rani v. State of U.P. and others**[2]. Learned Counsel for the petitioner further relies on the decision of a Division Bench of this Court in **Rachna Chaurasiya v. State of U.P. and others**[3]. To particularly support his submission, learned Counsel for the petitioner has relied on an unreported decision of Pradeep Kumar Singh Baghel, J. in **Smt. Neelam Shukla v. State of U.P. and others**[4].

8. Mr. R.V. Yadav, Advocate, who has been joined in his submissions by Mr. J.N. Maurya, the learned Chief Standing Counsel, submits on behalf of the respondents that under Rule 153 of the Rules, the provision for maternity leave postulates a leave specific to female government servant for a period of 180 days *vis-a-vis* one child, but, in the submission of the learned Counsel for the respondents, maternity leave cannot be sanctioned more than twice, as a matter of right or entitlement. It can be sanctioned a third time, with the condition that of the two children of a female government servant living, one suffers from an incurable disease or is handicapped. Learned Counsel for the respondents submit that it is only in case of those special circumstances about an incurable disease or handicap, afflicting one or the two living children of a female government servant, that maternity leave in case of birth of a third child is admissible under Rule 153 of the Rules. It is not admissible in any event, if the government servant has two healthy children living, and is blessed with a third child, with regard to whom she seeks maternity leave.

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1 **(2000) 3 SCC 224**
2 **2019 (3) AWC 2049**
3 **2017 (6) ALJ 454**
4 **Writ - A No. - 45265 of 2011, decided on 28.04.2015**

9. Mr. R.V. Yadav has reposed faith in the decision of a Division Bench of the Uttarakhand High Court in **State of Uttarakhand v. Urmila Masih and others**[5] to submit that the Maternity Act does not apply to a government servant, or for that matter, anyone except those specific kind of employees who are referred to under Section 2 or 3(e) thereof. It is urged that since the petitioner is an Assistant Teacher and not an employee of any of the kind of employers or establishments envisaged under Section 2(1)(a) or (b), or the establishment of the kind envisaged under Section 3(e) of the Maternity Act, it cannot be argued that the provision of Rule 153(1) of the Rules are in conflict with the Maternity Act, which is a Central Statute, covering the same field. The decision in **Municipal Corporation of Delhi** *(supra)* is one that relates to female workers engaged by the Municipal Corporation of Delhi, who are daily wagers working on muster roll. They had raised a demand for grant of maternity leave that was available to regular female workers of the Corporation, but denied to muster roll employees. An industrial dispute was raised by the Delhi Municipal Workers' Union, which led to a reference to the Industrial Tribunal in terms whether the female workers working with the Corporation on muster roll should be given any maternity benefit. Admittedly, it was a case, to which no service rules, and more particularly, leave rules, would apply. These were women workers, whose conditions of employment were hardly any and absolutely unregulated by statutory rules, except the protection of industrial laws.

10. The Court has considered rival submissions advanced by learned Counsel for both parties, perused the record and the Rules.

11. The moot question involved here is :

> **Whether the restriction on the Right to Maternity Leave of a female government servant with regard to a third child would reckon towards the total count of her children living, when she makes the leave application, or the Rule takes into reckoning only such of her children as are born after her entering government service?**

5 **2019 SCC OnLine Utt 927**

12. Rule 153 of the Rules (as amended in its application to U.P. *vide* Office Memorandum No. सा-2-2017/दस-2008-216/79, dated 8th December, 2008) reads :

> "**153.** किसी महिला सरकारी सेवक को, चाहे वह स्थायी हो या अस्थायी, प्रसूति अवकाश ऐसे पूर्ण वेतन पर जो वह इस प्रकार के अवकाश पर जाने के दिनांक को आहरित कर रही हो, विभागाध्यक्ष द्वारा या किसी निम्न प्राधिकारी द्वारा, जिसे इस निमित्त शक्ति प्रत्यायोजित की जाये, निम्नलिखित के अधीन रहते हुए स्वीकृत किया जा सकता है–
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> (1) प्रसवावस्था के मामले में, प्रसूति अवकाश की अवधि अवकाश के प्रारम्भ के दिनांक से 180 दिन तक हो सकती है:
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> परन्तु ऐसा अवकाश सम्पूर्ण सेवा के दौरान जिसके अन्तर्गत अस्थायी सेवा भी है, तीन बार से अधिक स्वीकृत नहीं किया जायेगा:
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> परन्तु यह भी कि **यदि किसी महिला सरकारी सेवक के दो या अधिक जीवित बच्चे हो तो उसे प्रसूति अवकाश स्वीकृत नहीं किया जायेगा, भले ही उसे ऐसा अवकाश अन्यथा अनुमन्य हो।** फिर भी यदि महिला सरकारी सेवक के दो जीवित बच्चों में से कोई भी बच्चा जन्म से किसी असाध्य रोग से पीडि़त हो या विकलांग या अपंग हो या बाद में किसी असाध्य रोग से ग्रस्त हो जाये या विकलांग या अपंग हो जाये, तो उसे अपवाद के रूप में इस शर्त पर कि प्रसूति अवकाश सम्पूर्ण सेवा के दौरान तीन बार से अधिक स्वीकृत नहीं किया जायेगा, एक बच्चा और पैदा होने तक प्रसूति अवकाश स्वीकृत किया जा सकता है:
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> परन्तु यह और कि ऐसा अवकाश तब तक अनुमन्य नहीं होगा, जब तक कि इस नियम के अधीन स्वीकृत पिछले प्रसूति अवकाश की समाप्ति के दिनांक से कम से कम दो वर्ष की अवधि व्यतीत न हो जाये।
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> (2) गर्भपात के मामलों में, जिसके अन्तर्गत गर्भस्राव भी है, प्रसूति अवकाश की अवधि सम्बन्धित महिला सरकारी सेवक के जीवित बच्चों की संख्या का ध्यान दिये बिना प्रत्येक अवसर पर कुल छः सप्ताह तक हो सकती है, बशर्ते कि अवकाश के आवेदन-पत्र के साथ प्राधिकृत चिकित्सक का प्रमाण-पत्र हो।"

(emphasis by Court)

13. A perusal of Rule 153 shows that a female government servant, whether permanent or temporary, would be entitled to maternity leave on full pay for a period of 180 days in case of confinement from the date of commencement of leave. The first proviso restricts the right to a maximum of three maternity leaves during the entire tenure of a government servant. The second proviso restricts the right in regard to maternity leave in case the female government servant has two or more living children, in which case, she would not be entitled to maternity leave. The restriction on the entitlement to maternity leave of a female government servant, if she has two or more children living, is subject to the relaxation that where either of the two children living is suffering from an incurable disease or disabled or crippled since birth or contracts some incurable disease or becomes disabled or crippled later, the female government servant may be granted maternity leave in relation to the birth of one more child. However so, the entire maternity leave during the service tenure would not exceed thrice of what can be granted in a single instance. In other words, the maternity leave, in any case, cannot exceed the total period of 180 x 3 = 540 days. It is due to the operation of Rule 153 of the Rules that the petitioner's leave account shows the maximum leave due as 540 days. When the petitioner joined service, she had a single child, a son. The second child was born to her soon after she joined service. It is on that account that she was sanctioned maternity leave on the birth of her second child, that has been debited from her leave account.

14. In **Municipal Corporation of Delhi** there was absolutely no facility extended to women workers working for the Corporation on daily-wage basis by way of maternity benefits, though these were available to their counterparts working on regular basis. Their Lordships, therefore, went into the rights of women, when engaged in any kind of work about their special needs relating to maternity leave. The principle there

proceeded on the basis that needs of women in employment emanate from their inherent nature and motherhood, where the nature and tenure of employment is irrelevant. Also, in **Municipal Corporation of Delhi**, it was held, though a dispute was raised about it, the employer fell into one of the categories to which the Maternity Act applied.

15. It was in the context of the aforesaid facts and the nature of employment that their Lordships of the Supreme Court held that the Maternity Act would apply to such women, who would be entitled to the various maternity benefits available under Sections 5, 5-A, 5-B, 9, 9-A, 10, 11 and 12 of the Act under reference. It was in the context of the aforesaid facts and nature of employment that it was held in **Municipal Corporation of Delhi** *(supra)* :

> **6.** Not long ago, the place of a woman in rural areas had been traditionally her home; but the poor illiterate women forced by sheer poverty now come out to seek various jobs so as to overcome the economic hardship. They also take up jobs which involve hard physical labour. The female workers who are engaged by the Corporation on muster roll have to work at the site of construction and repairing of roads. Their services have also been utilised for digging of trenches. Since they are engaged on daily wages, they, in order to earn their daily bread, work even in an advanced stage of pregnancy and also soon after delivery, unmindful of detriment to their health or to the health of the new-born. It is in this background that we have to look to our Constitution which, in its Preamble, promises social and economic justice. We may first look at the fundamental rights contained 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. Dealing with this article vis-à-vis the labour laws, this Court in *Hindustan Antibiotics Ltd.* v. *Workmen* [AIR 1967 SC 948 : (1967) 1 SCR 652 : (1967) 1 LLJ 114] has held that labour to whichever sector it may belong in a particular region and in a particular industry will be treated on equal basis. 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 provides as under:
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> > "15. (3) Nothing in this article shall prevent the State from making any special provision for women and children."

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11. It is in the background of the provisions contained in Article 39, specially in Articles 42 and 43, that the claim of the respondents for maternity benefit and the action of the petitioner in denying that benefit to its women employees has to be scrutinised so as to determine whether the denial of maternity benefit by the petitioner is justified in law or not.

12. 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.

13. Parliament has already made the Maternity Benefit Act, 1961. It is not disputed that the benefits available under this Act have been made available to a class of employees of the petitioner Corporation. But the benefit is not being made available to the women employees engaged on muster roll, on the ground that they are not regular employees of the Corporation. As we shall presently see, there is no justification for denying the benefit of this Act to casual workers or workers employed on daily-wage basis.

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27. 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.

28. The Industrial Tribunal, which has given an award in favour of the respondents, has noticed that women employees have been engaged by the Corporation on muster roll, that is to say, on daily-wage basis for doing various kinds of works in projects like construction of buildings, digging of trenches, making of roads, etc., but have been denied the benefit of maternity leave. The Tribunal has found that though the women employees were

> on muster roll and had been working for the Corporation for more than 10 years, they were not regularised. The Tribunal, however, came to the conclusion that the provisions of the Maternity Benefit Act had not been applied to the Corporation and, therefore, it felt that there was a lacuna in the Act. It further felt that having regard to the activities of the Corporation, which had employed more than a thousand women employees, it should have been brought within the purview of the Act so that the maternity benefits contemplated by the Act could be extended to the women employees of the Corporation. It felt that this lacuna could be removed by the State Government by issuing the necessary notification under the proviso to Section 2 of the Maternity Act. This proviso lays down as under:
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> > "Provided that the State Government may, with the approval of the Central Government, after giving not less than two months' notice of its intention of so doing, by notification in the Official Gazette, declare that all or any of the provisions of this Act shall apply also to any other establishment or class of establishments, industrial, commercial, agricultural or otherwise."
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> **29.** It consequently issued a direction to the management of the Municipal Corporation, Delhi to extend the benefits of the Maternity Benefit Act, 1961 to such muster-roll female employees who were in continuous service of the management for three years or more and who fulfilled the conditions set out in Section 5 of the Act.

16. In the present case, the petitioner is an employee of a primary school run by the Basic Education Board, under the overall control of the Directorate of Basic Education. It is not in issue that the Right to Maternity Leave is available to the petitioner in terms of Rule 153 of the Rules. The right, though available like any other leave, is well regulated. The question involved in this case is, therefore, quite different from that involved in **Municipal Corporation of Delhi**. Here, there is no case of a discrimination between one class of women employees and another, on the basis of the nature of their services or tenure. It is simply about the true import of the Right to Maternity Leave flowing from Rule 153. **Municipal Corporation of Delhi** is not a decision that interprets the extent of Right to Maternity Leave under Rule 153 of the Rules, or one that lays down the principle that the Maternity Act would prevail over

Rule 153. The said decision does not, therefore, come to the the petitioner's rescue.

17. The next decision that has been pressed in aid by the learned Counsel for the petitioner is **Rachna Chaurasiya** *(supra)*. There, again, the issue involved a contractual employee and a doctor, at that. In that case, the petitioner was appointed on the post of Lecturer (Radio Diagnosis) on contractual basis at the M.L.B. Medical College, Jhansi. She was appointed in the year 2009. She applied for maternity leave for a period of six months in the year 2016, which was granted. The petitioner, in the case under reference, found later on that the child was not comfortable in the maid's care, retained for the purpose. She applied for Child Care Leave for a period of three months to the Principal of the Medical College. The said application was rejected on the ground that the petitioner was a contractual employee, and therefore, not entitled to Child Care Leave. The provisions of Maternity Act, the policy of the Central Government about Child Care Leave for women employees and the State Government Policy that adopted the Central Government's, were all considered together by their Lordships of the Division Bench to hold in **Rachna Chaurasiya** thus :

> **23.** 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.

18. The issue in **Rachna Chaurasiya**, thus, again was about the nature of Child Care Leave that is innate to a woman. It was held that it cannot be denied on the ground of the nature of her services being contractual or regular. Nothing was decided in **Rachna Chaurasiya** that may bear upon the validity of the second proviso to Rule 153 of the Rules,

limiting maternity leave to a female government servant as a matter of right to a maximum of two children, with a qualified right in the case of a third.

19. In **Anshu Rani** *(supra)*, the Court had to consider the Right to Maternity Leave of a woman who was an *Anudeshak* appointed at a Purwa Madhyamik Vidyalaya. She applied for maternity leave from 01.10.2018 to 31.03.2019. She was sanctioned leave for 90 days with honorarium. She asked for the grant of maternity leave for 180 days, that was ignored by the District Basic Education Officer of Bijnor. The Officer did not assign any reason for declining the 180 days' maternity leave and limiting it to 90. In the counter affidavit, the State took a stand that it was not possible to grant maternity leave to the petitioner beyond 90 days, because of the provision made in Government Orders dated 20.11.2017 and 03.01.2018, that were annexed to the return. The Maternity Act and its provisions were dealt with after an extensive reference to various decisions about maternity leave, including that in **Municipal Corporation of Delhi** and the decision of the High Court of Kerela in **Mini. K.T. v. Senior Divisional Manager (Disciplinary Authority), Life Insurance Corporation of India, Divisional Office**[6], where it was held that the petitioner is entitled to maternity leave for a period of six months that had been refused illegally. There is no principle discernible from the decision, nor any question involved, that may have bearing on the point whether the Right to Maternity Leave provided under Rule 153 of the Rules, limited to a maximum number of two children, is, in any way, an invasion of the Right to Motherhood or a violation of the Maternity Act. The decision in **Anshu Rani** does not even examine the question whether the Maternity Act at all applies to a Purwa Madhyamik Vidyalaya, established and run by the Basic Education Board. There is no principle in **Anshu Rani**, therefore, that may be of assistance to the petitioner.

6 **W.P. (C) No. 22007 of 2012 (A), decided on 21.12.2017**

20. The last case relied upon by the learned Counsel for the petitioner, is the decision of this Court in **Smt. Neelam Shukla** *(supra).* The petitioner there was an Assistant Teacher in a primary school run by the Basic Education Board. She sought maternity leave from 28.10.2010 to 27.04.2011. She said in her application that she had two children before her appointment as an Assistant Teacher, and after joining service, given birth to a third child. Thus, the leave now sought was her first maternity leave during service. It was urged that she was entitled to 180 days leave under Rule 153 of the Rules. Her application was rejected by the authorities on the ground that the petitioner had three children, and under the Government Order dated 08.12.2008, maternity leave is admissible twice during the period of service. The stand taken by the authorities before the Court was that under Rule 153 read with Government Orders dated 04.06.1999 and 08.12.2008, the petitioner was not entitled to maternity leave for her third child. The Court, repelling the contention of the respondents in **Smt. Neelam Shukla** held :

> Admittedly the petitioner has moved an application for maternity leave for the first time in her service. Thus she is entitled for the leave in terms of the Government Order dated 4.6.1999 and 8.12.2008. The view taken by the Basic Shiksha Adhikari is erroneous and based on misconception. Accordingly, I find that the Basic Shiksha Adhikari has not properly appreciated the grievance of the petitioner in the light of the aforementioned two Government Orders and Rule 153 of the Financial Hand Book (2) Part II to IV and has passed the order arbitrarily without application of mind.

21. A perusal of the decision in **Smt. Neelam Shukla** does not show that the provisions of Rule 153 of the Rules were brought to the Court's notice in all their detail about the right of a female government servant to seek maternity leave for the birth of her third child. A careful perusal of the second proviso to Rule 153(1) of the Rules shows that the Right to Maternity Leave is hedged in with the clear restriction that any female government servant, who has two or more children living, shall not be granted maternity leave, though such leave may otherwise be admissible

to her. The words of the second proviso are disentitling in nature and an exception to the right otherwise conferred upon a female government servant. The restriction is dependent on the fact that at the time the female government servant applies for maternity leave, whether she has two or more living children; if she has two or more living children as a rule, she is not entitled to maternity leave. It is entirely irrelevant in the scheme of Rule 153 of the Rules, whether the children were born before entering service or afterwards. The only relevant fact is that the time when she applies for leave, she has two or more children living or less than two. This clear import of the words of the second proviso in Rule 153 not being noticed by the Court in **Smt. Neelam Shukla**, the decision must be held *per incuriam.* In the clear opinion of this Court, Rule 153 of the Rules read as a whole, particularly, the second proviso to the Rule, does not spare a shadow of doubt that a female government servant, who has two children living born to her, whether before she entered service or afterwards, is not entitled to avail maternity leave, if a third child is born afterwards. The only exception would be the case where, of the two children living, one is suffering from an incurable disease or is disabled or crippled since birth, and the other contingencies envisaged in the latter part of the second proviso to Rule 153(1). The petitioner does not assert a case on the lines, where, for the third child, the second proviso makes relaxation.

22. So far as the question of Rule 153 of the Rules being in conflict with the Maternity Act or *ultra vires* the Constitution is concerned, the question fell for consideration before a Division Bench of Uttarakhand High Court on an appeal from a judgment of a learned Single Judge in **State of Uttarakhand v. Urmila Masih** *(supra).* It appears that the writ petitioner in the aforesaid case filed a writ petition, seeking to quash an order denying her maternity leave and benefits for the third child born to her. She further sought a *mandamus*, commanding the respondents to

grant maternity leave and benefits according to the Maternity Act, and to declare Rule 153 of the Rules, as adopted in the State of Uttarakhand, *ultra vires* and unconstitutional, to the extent that restrictions were placed on the grant of maternity leave to women who had two or more children living. The learned Single Judge upheld the challenge, holding in terms that are set out in the judgment of the Division Bench. It is recorded by their Lordships of the Division Bench in **State of Uttarakhand v. Urmila Masih** in the following words :

> **8.** In the order under appeal, the learned Single Judge relied on a Division Bench judgment of the Punjab and Haryana High Court, in *Ruksana* v. *State of Haryana*, 2011 SCC OnLine P&H 4666 and Article 42 of the Constitution of India, to hold that the second proviso to FR 153 was not in conformity with Section 27 of the 1961 Act, and was also against the spirit of Article 42 of the Constitution of India. The second proviso to FR 153 of the U.P. Fundamental Rules, as adopted by the State of Uttarakhand, was declared *ultra vires* and unconstitutional, and was struck down. The State Government was directed to provide maternity leave from 30.06.2015 to 09.12.2015 within six weeks from the date of the order under appeal. .....

23. The question about the overriding effect of the Maternity Act *vis-a-vis* Rule 153 of the Rules (the said Rule as amended in its application to Uttarakhand being in no way materially different from the Rules in force in U.P.) was considered with reference to the provisions of Section 27 of the Maternity Act in **State of Uttarakhand v. Urmila Masih**, holding thus :

> **11.** As noted hereinabove, Section 27 of the 1961 Act relates to effect of laws and agreements inconsistent with the 1961 Act, and, in the light of the non-obstante clause in Section 27(1), the 1961 Act shall have effect notwithstanding anything inconsistent therewith contained in any other law whether made after or before the coming into force of the 1961 Act. Any law inconsistent with the 1961 Act would cease to apply in view of the non-obstante clause in Section 27 of the 1961 Act. It is only if the 1961 Act is applicable, would the question of inconsistency between the said Act and the second proviso to FR 153 arise for consideration.
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> **13.** Section 3(e) of the 1961 Act defines "establishment" to means (i) a factory; (ii) a mine; (iii) a plantation; (iv) an establishment wherein persons are employed for the exhibition of equestrian, acrobatic and other performances; (iv) a shop or establishment; or (v) an establishment to which the provisions of this Act have been declared under sub-section (1) of Section 2 to be applicable.
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> **14.** Reference to an establishment belonging to Government in Section 2(1)(a) of the 1961 Act must be read in conjunction with Section 3(e) thereof, and, when so read, it would only mean that a factory, a mine, a plantation of the Government, would alone fall within the ambit of Section 2(1)(a) of the 1961 Act.
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> **15.** The respondent-writ petitioner is, admittedly, a government servant. Government servants are not employed in Government factories, mines and plantations, and would not therefore fall within the ambit of Section 2(1)(a) of the 1961 Act, as the Act itself is inapplicable to Government servants. The question of the second proviso to FR 153, being contrary to the provisions of 1961 Act, does not therefore arise. The applicability of 1961 Act to government servants was not in issue before the Punjab and Haryana High Court in *Ruksana* v. *State of Haryana*, 2011 SCC OnLine P&H 4666. Likewise, this question did not arise for consideration even before the Madras High Court in *J. Sharmila* v. *The Secretary to Government Education Department*, 2010 SCC OnLine Mad 5221.
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> **18.** Since the 1961 Act is, itself, inapplicable to government servants, the question, of the second proviso to FR 153 being inconsistent with the provisions of the 1961 Act, does not arise. Section 27 of the 1961 Act cannot, therefore, form the basis of declaring the second proviso to FR 153 *ultra vires* the provisions of the 1961 Act.

24. Like the writ petitioner in **State of Uttarakhand v. Urmila Masih**, the petitioner here is an Assistant Teacher, employed with an institution established and maintained by the Uttar Pradesh Basic Education Board. She is governed by the Service Rules applicable to teachers of primary schools maintained by the Board and other rules, including the Rules that apply, amongst other things, in the matter of grant of leave. The petitioner is, in no way, employed in an establishment as defined in Section 3(e) of the Maternity Act read with Section 2(1)

thereof. She is not employed in a factory, a mine, a plantation, an establishment wherein persons are employed for the exhibition of equestrian, acrobatic and other performances or a shop or establishment of any kind or a factory, a mine or a plantation of the Government. Clearly, the petitioner is not an employee of an establishment to which the Maternity Act applies.

25. I am in respectful agreement with their Lordships of the Division Bench in **State of Uttarakhand v. Urmila Masih** that in the case of establishments to which the Maternity Act does not apply, there is no question of conflict with the leave rules of the employers of such establishments and the Maternity Act, so as to bring in Section 27 of the said Act that gives it overriding effect. There is clearly no conflict between the second proviso to Rule 153 of the Rules and the Maternity Act, which does not apply to the establishment of the Basic Education Board or its maintained schools. The petitioner, therefore, cannot claim any right founded on the provisions of the Maternity Act in derogation of Rule 153 of the Rules. The submissions of learned Counsel for the petitioner that assert rights based on Section 27 of the Maternity Act must, therefore, be rejected.

26. In view of what has been said above, the answer to the question involved is that the restriction on the Right to Maternity Leave of a female government servant, with regard to the birth of her child, would be reckoned with reference to the number of children living at the time she applies for maternity leave, irrespective of the fact whether the two children living were born before or after she entered government service.

27. In the result, this petition **fails** and stands ***dismissed***.

28. Costs easy.

Order Date :- December the 24th, 2021
I. Batabyal **(J.J. Munir, J.)**