



IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

CWP No. 647 of 2020

Decided on: 12.06.2023

State of H.P. & Ors.

...Petitioners

Versus

Sita Devi

...Respondent

Coram:

Hon'ble Mr. Justice Tarlok Singh Chauhan, Judge.

Hon'ble Mr. Justice Virender Singh, Judge.

Whether approved for reporting?¹ Yes

For the Petitioner : Mr. I. N. Mehta, Mr. Y. W. Chauhan, Sr. Addl. A.Gs., with Mr. Ramakant Sharma, Ms. Sharmila Patial, Addl. A.Gs. and Mr. Rajat Chauhan, Law Officer.

For the Respondents : Nemo.

Tarlok Singh Chauhan, Judge (Oral)

Right to life under Article 21 of the Constitution of India includes the right to mother and to become a mother is the most natural phenomena in the life of a woman. Therefore, whatever is needed to facilitate the birth of her child to a woman, who is in service, the employer has to be considerate and sympathetic towards her, must realise the physical difficulties, which a working woman faced in performing duties at the work place while carrying a baby in the womb or while rearing up the child after birth (See: **Municipal Corporation of**

¹ Whether reporters of the local papers may be allowed to see the judgment? yes

Dlehi vs. Female Workers (Muster Roll) & Anr. 2000 (3) SCC).

2. Aggrieved by the order passed by the H.P. Administrative Tribunal (for short the 'Tribunal') whereby the respondent was granted the benefit of deemed maternity leave and thereafter consequential benefit of conferment of work-charge status on completion of 8 years service, the employer-State has filed the instant petition for the grant of following substantive reliefs:-

(i) That the order dated 21.11.2018 passed by the State Administrative Tribunal in the Original Application (D) No. 322 of 2018 may kindly be quashed and set aside.

(ii) That the medical certificate of the respondent submitted after 20 years may not be considered for the period of maternity leave as continuous service.

3. It is not in dispute that the respondent had been engaged on daily wage basis and the detail of working days spanning over two decades of service, is as under:

Detail of working days in respect of Smt. Sita Devi, wi/o Sh. Krishan Kant, District Kangra (H.P.)

| Sr. No. | Year | Days |
|---------|------|------|
| 1 | 1987 | 157 |
| 2 | 1988 | 236 |
| 3 | 1989 | 292 |
| 4 | 1990 | 252 |
| 5 | 1991 | 252 |
| 6 | 1992 | 189 |

| | | |
|----|------|-----|
| 7 | 1993 | 204 |
| 8 | 1994 | 202 |
| 9 | 1995 | 324 |
| 10 | 1996 | 156 |
| 11 | 1997 | 242 |
| 12 | 1998 | 240 |
| 13 | 1999 | 295 |
| 14 | 2000 | 312 |
| 15 | 2001 | 328 |
| 16 | 2002 | 323 |
| 17 | 2003 | 262 |
| 18 | 2004 | 337 |
| 19 | 2005 | 343 |
| 20 | 2006 | 240 |
| 21 | 2007 | 312 |
| 22 | 2008 | 289 |

4. It is also not in dispute that in the year 1996, respondent was carrying a child in her womb, which she delivered on 30.05.1996 and after availing maternity leave w.e.f. 01.06.1996 to 31.08.1996 i.e. only 3 months, the respondent assumed duties and it is only on account of pregnancy and subsequent delivery that the respondent could only put in 156 days as against the minimum requirement of 240 days in a year.

5. The learned Tribunal took these facts into account and thereafter proceeded to pass the following order:-

5. The ailment of the applicant forced her to be away from her work. Her period of maternity leave would be deemed to be continuous service in view of the provisions of

Section 25(B) (1) of the Industrial Dispute Act, which reads as under:-

25(B) (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock- out or a cessation of work which is not due to any fault on the part of the workman;

6. The instructions to the contra that the benefit of deemed continuous service is only available to the indoor patient in violation of express provision is nonest. The applicant on account of deemed continuous service completed 8 years of service upto the 01.01.2002.

7. Consequently, the original application is allowed and the period of maternity leave of the applicant is deemed to be as continuous service and the respondents are directed to consider the case of the applicant for conferment of work charge status on completion of 8 years service within two months from today. The actual financial benefits shall be restricted to three years prior to filing of the original application. The applicant shall produce certified copy of this order before the respondents/competent authority within a week.

6. Aggrieved by the order passed by the learned Tribunal, the State has filed the instant petition. Mr. Ramakant Sharma, learned Additional Advocate General, has vehemently argued that since there is no provision in the department for granting maternity leave to the female daily wage workers in the

year 1996, therefore, the learned Tribunal could not have directed the petitioners to grant said relief. We, however, find no merit in this contention.

7. India is a signatory to various international covenants and treaties. The Universal Declaration on Human Rights adopted by the United Nations on 10.12.1948, set in motion the universal thinking that human rights are supreme and ought to be preserved at all costs. These were followed by series of conventions, which reflect on the broad international consensus on important issues of global concern.

8. Article 25(2) of the Universal Declaration of Human Rights, 1948, stipulates that "Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection."

9. Article-6 of the same Conventions reads;

"States Parties recognize that every child has the inherent right to life.

2. States Parties shall ensure to the maximum extent possible for survival and development of the child."

10. Of the international conventions, two are very relevant for the present issue and the same are "Convention on the Elimination of all Forms of Discrimination against Women" (CEDAW) and "ILO: Maternity Protection Convention 2000".

11. The United Nations signed this Convention i.e. CEDAW, on 30.07.1980. India ratified it on 19.07.1993 and acceded to it on 08.08.1993 with reservation on Article 5(e), 16(1), 16(2) and 29 of CEDAW.”

12. It was after years of deliberations at National and International level, the right of a woman employee for maternity leave has now been established as supreme by the enactment of the Maternity Benefit Act, 1961. India otherwise was required to make labour laws in conformity with the recommendations made by the International Labour Organization (ILO) read with Article 42 of the Constitution of India. According to Article 42 of the Constitution of India, “the State is required to make provision for securing just and humane conditions of work and for maternity relief”.

13. The object of ILO to conduct the survey was to promote motherhood and child care as well as gender equality. Every female employee and male employee whether appointed on regular basis, contractual basis, ad hoc basis, tenure/temporary basis have a fundamental right to reasonable duration of maternity leave as well as paternity leave, child care leave (CCL) to promote motherhood and child care under Article 21 Constitution of India read with Article 42 of the Constitution of India.

14. In **Municipal Corporation of Delhi vs. Female Workers (Muster Roll) & Anr. (2000) 3 SCC 224 (supra)**, the Hon'ble Supreme Court held that the provisions of Maternity Benefit Act, 1961 entitled maternity leave even to women engaged on casual basis or on muster roll basis daily wage and not only those in regular employment. It is further held that the provisions of the Act in this regard are wholly in consonance with the Directive Principles of the State Policy as contained in Articles 39, 42 and 43 of the Constitution of India.

15. It would be apt to reproduce the relevant observations as contained in paragraphs 6, 11, 27 and 33, which read as under:-

6. Not long ago, the place of a woman in rural areas has 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 advance 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 Chapter 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 flu's Article vis-a-vis the Labour Laws, this Court in [Hindustan Antibiotics Ltd v. Workmen](#), AIR (1967) SC 948, 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: -

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

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.

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.

33. A just social order can be achieved only when inequalities are obliterated and everyone is provided what is legally due. Women who constitute almost half of the segment of our society have to be honoured and treated with dignity at places where they work to earn their livelihood. Whatever be the nature of their duties, their avocation and the place where they work; they must be provided all the facilities to which they are entitled. To become a mother is the most natural phenomena in the life of a woman. Whatever is needed to facilitate the birth of child to a woman who is in service, the employer has to be considerate and sympathetic towards her and must realise the physical difficulties which a working woman would face in performing her duties at the work place while carrying a baby in the womb or while rearing up the child after birth. [The Maternity Benefit Act, 1961](#) aims to provide all these facilities to a working woman in a dignified manner so that she may overcome the state of motherhood honourably, peaceably, undeterred by the fear of being victimised for forced absence during the pre or post-natal period.

16. A learned Division Bench of this Court in a judgment authored by one of us (Justice Tarlok Singh Chauhan, J.), in **Sushma Devi vs. State of H.P. & Ors. 2021 (2) SLC 923**, extended the benefit of maternity leave to a contractual employee who had begotten the child through surrogacy.

17. It is otherwise no longer *res integra* that a female employee respective of the capacity in which she is working is entitled to maternity leave at par with her female counter parts, who otherwise are regular employees. Reference in this regard can conveniently be made to the judgment render by Division Bench of this Court of which one of us (Justice Tarlok Singh Chauhan, J.) was a member, in **State of H.P. & Ors. vs. Sudesh Kumari (2015) 1 HLR DB 36**, wherein it was held as under:-

8. In law, there is no difference between a female regular employee and a contractual employee/ ad hoc employee because a female employee whether regular, temporary or ad hoc, is a female for all intents and purposes and she has a matrimonial home, matrimonial life, and after conception, she has to undergo the entire maternity period, same treatment, pains and other difficulties which a regular employee has to undergo. Thus, there is no occasion for making discrimination and if, less period of maternity leave is granted to a contractual employee, it will amount to discrimination, in terms of Article 14 of the Constitution of India.

9. The claim of maternity leave is founded on the grounds of fair play and social justice. There cannot be discrimination and if any discrimination is made, it is in breach of Articles 14 and 15 of the Constitution. Articles 41, 42, and 43 deals with the subject and we deem it appropriate to reproduce the said Articles herein:

“41.Right to work, to education and to public assistance in certain cases.- The State shall, within

the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.

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.

43. Living wage, etc., for workers.- The State shall endeavour to secure, by suitable legislation or economic organization or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries on an individual or co-operative basis in rural areas.”

10. In case titled *Municipal Corporation of Delhi v. Female Workers and anr.* (2000) 3 SCC 224, it has been held as under:

“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 regularized. 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 Govt. by issuing the necessary notification under the Proviso to Section 2 of the Maternity Act. This Proviso lays down as under :

"Provided that the State Government may, with the approval of the Central Government, after giving not

less than two month's 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."

29..... 30. We appreciate the efforts of the Industrial Tribunal in issuing the above directions so as to provide the benefit of the Act to the muster roll women employees of the Corporation. This direction is fully in consonance with the reference made to the Industrial Tribunal. The question referred for adjudication has already been reproduced in the earlier part of the judgment. It falls in two parts as under : (i) Whether the female workers working on muster roll should be given any maternity benefit ? (ii) If so, what directions are necessary in this regard.

..... 33. A just social order can be achieved only when inequalities are obliterated and everyone is provided what is legally due. Women who constitute almost half of the segment of our society have to be honoured and treated with dignity at places where they work to earn their livelihood. Whatever be the nature of their duties, their avocation and the place where they work; they must be provided all the facilities to which they are entitled. To become a mother is the most natural phenomena in the life of a woman. Whatever is needed to facilitate the birth of child to a woman who is in service, the employer has to be considerate and sympathetic towards her and must realise the physical difficulties which a working woman would face in performing her duties at the work place while carrying a baby in the womb

or while rearing up the child after birth. The Maternity Benefit Act, 1961 aims to provide all these facilities to a working woman in a dignified manner so that she may overcome the state of motherhood honourably, peaceably, undeterred by the fear of being victimised for forced absence during the pre or post-natal period.”

11. In *Ms. Sonika Kohli & Anr. vs. Union of India* reported in 2004 (3) SLJ 54 CAT, it has been held in paras 12 and 13, the relevant portion of which is quoted as under:

“12. An almost a new point of controversy has been raised with regard to the admissibility of maternity leave to female teachers. In some of the O.As. it has been prayed that the benefit of maternity leave, which has hitherto been denied by the respondent-Administration, be directed to be extended in accordance with the rules. Mr. R.P. Bali, learned Counsel for some of the applicants urged that the action of the respondents in denying the benefit of maternity leave like other regular employees is violative of the principles enshrined in Articles 14 and 15 of the Constitution of India as it denies the benefit of beneficial provisions of law to a female teacher. Mr. N.K. Bhardwaj, learned Counsel for the Administration urged that maternity leave is not admissible to contract employees as they are not covered by the Punjab CSR Vol.1, Part-1. According to him, the benefit of maternity leave with pay is payable to permanent/regular female employees and that the Administration is justified in carving out a distinction between the regular female teachers and the teachers appointed on part time or contract basis, as is in the present case. Let us examine the

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respective contentions of the parties. 13. The claim for maternity leave is founded on grounds of fair play and social justice. Before the advent of the Constitution and for a sufficiently long time, thereafter it was customary or say traditional for women to stick to their homes but now they seek various jobs so as to attain economic independence by utilizing their talent, education, industry etc. Sometimes the jobs are taken up by them to overcome economic hardship. For a woman to become a mother is most natural phenomenon in her life. Whatever is needed to facilitate the birth of a child to a women who is in service, the employer has to be considerate and sympathetic towards her and must realize the physical difficulties which a working women would face in performing her duties at work place while carrying a baby in the womb or while bearing a child after birth. Our constitution which, in its preamble, promises social and economic justice, enshrines certain radical provisions in the form of Articles 42 and 43 which deal with the just and humane conditions of work and maternity relief as well as living wage conditions of work ensuring a decent standard of life, and full enjoyment of leisure and social and cultural opportunities. These principles are required to be followed by the State as enjoined by Article 39. In the background of these Articles, the Parliament has enacted Maternity Benefit Act, 1961 (Act No. 53 of 1961) with a view to regulate the employment of women in certain establishments for certain periods before and after child birth and to provide for maternity benefit and certain other benefits.....”

12. It is also apt to reproduce para 3 of the judgment delivered in Rattan Lal and others vs. State of Haryana and others reported in 1985 (3) SLR 548 .

“3. We strongly deprecate the policy of the State Government under which 'ad hoc' teachers are denied the salary and allowances for the period of the summer vacation by resorting to the fictional breaks of the type referred to above. These 'ad hoc' teachers shall be paid salary and allowances for the period of summer vacation as long as they hold the office under this order. Those who are entitled to maternity or medical leave shall also be granted such leave in accordance with the rules.”

13. The Jammu and Kashmir High Court in case titled Tasneem Firdous vs. State and others reported in 2006 (II) S.L.J 699, held that the employees working on contractual basis are also entitled to maternity leave. The relevant portion of para 6 of the judgment is reproduced as under:

6. In subjective context the matter assumes a larger dimensions because it overflows the contours of an individual case or a singular instance and almost borders on the rights of women and obligation of the State to protect and preserve them, to which, besides statutory constitutional considerations, the international covenants also bind the government. Reference in this behalf may be made to “Convention on the Elimination of all Forms of Discrimination against Women” adopted by Community of nations on 18.12.1979 to which government of India too is a signatory.....”

14. In paras 6 and 37 of the judgment in Municipal Corporation of Delhi v. Female Workers and anr. (2000) 3

SCC 224, supra, while considering the constitutional contours of the matter, the Hon'ble apex Court observed as under:

"6..... 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 Chapter 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-a-vis the Labour Laws, this Court in Hindustan Antibiotics Ltd. v. Workmen, AIR 1967 SC 948 : 1967 (1) SCR 652, 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 :- "(3) Nothing in this article shall prevent the State from making any special provision for women and children".

7-36.....

37....."2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures :

(a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;

(b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;

(c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;

(d) To provide special protection to women during pregnancy in types of work proved to be harmful to them.

3. Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary."

15. Having said so, the office memorandum dated 31.7.2009 and circular dated 2.9.2009, made by the State are quashed and all female employees whether on contract, ad hoc, permanent and temporary are held entitled to materiality leave at par with the regular employees.

18. The object of maternity leave is to protect the dignity of motherhood by providing full and healthy maintenance to the woman and her child, maternity leave is intended to achieve the social justice to women, motherhood and childhood, both require special attention.

19. The respondent in the instant case was a daily wage woman employee at the time of advance pregnancy could not

have been compelled to undertake hard labour, as it would have been detrimental to not only to her health and safety but also to the child health, safety and growth. The maternity leave is a fundamental human right of the respondent, which could not have been denied. Therefore, clearly the action of the petitioner is violative of Articles 29 and 39D of the Constitution of India.

20. In view of the aforesaid discussion and for the reasons stated above, we find no merit in this petition and the same is accordingly dismissed, so also pending applications, if any.

Parties are left to bear their own costs.

(Tarlok Singh Chauhan)
Judge

(Virender Singh)
Judge

12th June, 2023
(sanjeev)