IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	Delivered on
04.08.2023	14.08.2023

CORAM

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

W.P.No.23983 of 2022 and
W.M.P.No.22964 of 2022

P. Yasotha ... Petitioner

versus

1. The Government of Tamilnadu,
   Rep.by its Secretary to Government,
   Human Resources Management Department,
   Secretariat, Chennai 600009.

2. The District Educational Officer,
   Gobichettipalayam,
   Erode District.

3. The Headmaster,
   Vengammaiyar Municpal High School,
   Gobichettipalayam,
   Erode District. ... Respondents

PRAYER: Writ Petition has been filed under Article 226 of the Constitution of India to issue a Writ of Certiorari Mandamus calling for the records relating to impugned order made in O.Mu.No.3832/A1/2022 dated

10.08.2022 passed by the 2nd Respondent and the order made in A.Thi.Mu.Na.Ka.No.310/2022 dated 29.07.2022 passed by the 3rd Respondent, quash the same and consequently direct the Respondents to sanction the maternity leave to the petitioner for a period one year by considering the provisions of the Maternity Benefits Act, 1961.

For Petitioners : Mr.N. Manokaran

For Respondents : Mr.V. Arun,
Additional Advocate General V
Assisted by
Mr.T. Arunkumar
Additional Government Pleader

O R D E R

This Writ Petition is filed to quash the impugned orders passed by the 3rd Respondent dated 29.07.2022, rejecting the Maternity Leave applied by the Petitioner and the order passed by the 2nd Respondent dated 10.08.2022, confirming the order of the 3rd Respondent and rejected the plea of the Petitioner.

2.(a) It is the case of the Writ Petitioner that before she joining the Government service she has married one Selvaraj on 04.06.1998. In the said wedlock, she gave birth two daughters born on 28.05.2000 and 29.04.2002 respectively. Thereafter, her husband died on 07.04.2004 due to ill-health.

The Petitioner got appointment for the post of Lab Assistant on 17.04.2017. Thereafter, she married one T. Vedamuthu on 25.01.2021. In the said wedlock she became pregnant and gave twin female children on 01.03.2022. When the petitioner became pregnant she had applied for maternity leave on 21.01.2022 for the period between 01.02.2022 and 31.12.2022. The petitioner is eligible for maternity leave of one year towards pre-and post-natal care. Her application for Maternity Leave was kept pending without consideration.

2.(b) The Respondents have misconstrued the fundamental Rule 101(a) which is applicable to State Government servants to deny her request for maternity leave stating that women employees are eligible to avail maternity leave only for two surviving children and there is no provision for grant of maternity leave for the third child. Hence according to the petitioner, the provisions of the Maternity Benefit Act, 1961 was enacted in pursuance of the constitutional guarantee enshrined in Article 42 of the Constitution, which does not impose any such restriction for availing the maternity benefit. Maternity Benefit Act is a social welfare legislation, which aims at

providing social and economic justice to the citizens. Therefore, imposing the restrictions on the ground of maternity leave on Government employees are not correct until the Maternity Benefit Act, 1961 is suitably amended. Subjects relating to population control, family planning and maternity benefits fall within the Concurrent List. Therefore in the absence of any restriction in the Maternity Benefits Act, 1961, which is a Central Act, it is not open to the respondents and even the State Government to apply two child norm on the women folk. Section 5 of the Act, 1961, does not impose any such two child norm. Therefore, the impugned orders passed by the Respondents have to be quashed.

3. The Counter filed by the 1st Respondent *inter alia* contended that the Maternity Benefit Act, 1961 is applicable to every establishment being a factory, mine or plantation including any such establishment belonging to Government and to every establishment wherein person are employed for the exhibition of equestrian, acrobatic and other performances as per section 2(1) of the said Act. As far as the Government Servant in the State of Tamil Nadu is concerned, it is the Fundamental Rule 101(a) which govern the

maternity benefit applicable to them. The Government has issued orders relating to Maternity Leave from time to time. Hence it is the contention that the Tamilnadu Government Fundamental Rules alone is applicable to the Petitioner and the Maternity Benefit Act, 1961 is not applicable.

4. The 3rd Respondent also filed a Counter in similar lines.

5. The Main contention of the learned counsel appearing for the Petitioner is that two children were born to the Petitioner prior to joining Government service. After joining Government service twins were born though the second marriage. Therefore, it is the contention that as she has not availed any Maternity Leave previously, the rejection of the representation cannot be sustained in the eye of law. According to him Maternity Benefit Act is a social welfare legislation which is applicable. Therefore the Fundamental Rules is contrary to the Maternity Benefit Act, which cannot be pressed into service. He has also placed much reliance on the Judgment of this Court in ***K. Umadevi vs. The Government of Tamil Nadu and others in W.P.No.22075 of 2021 dated 25.03.2022*** and the

Judgment of the Apex Court in ***Deepika Singh vs. Central Administrative Tribunal and Others [2022 SCC Online SC 1088].***

6. Learned Additional Advocate General submitted that as per G.O.Ms.No.105 Personnel and Administrative Reforms (FR-III) Department dated 7.11.2016 and G.O.Ms.No.154 Personnel and Administrative Reforms (FR-III) Department dated 5.12.2017 Maternity Leave can be granted for the birth of two children. Further, the order of the learned Single Judge of this Court in W.P.No.22075 of 2021, relied upon by the Writ Petitioner has been set aside by the Division Bench in W.A.No.1442 of 2022. Further it is his contention that the Maternity Leave benefit is not applicable to the Government servants; only the Fundamental Rules alone is applicable to them. As per the Fundamental Rules the Petitioner is not entitled for Maternity Leave for third child. When the policy of the State restricts the benefit of Maternity Leave only two deliveries, i.e., two children, the Petitioner, as a matter of right, cannot seek a benefit on the ground of Maternity Benefit Act. Said Act is not applicable to the Government Servants. He also relied upon the Judgment of the Division Bench of

Uttarakhand in State of Uttarakahnd vs. Urmila Masih and others [2019 SCC Online Utt 927] and the Judgment of the Division Bench of this Court in the ***Government of Tamil Nadu and others vs. K. Umadevi [W.A.No.1442 of 2022 dated 14.09.2022]***

7. In the light of the above submissions, now, the issue arise in the writ petition is whether the petitioner is entitled to the maternity leave benefit for the third child and whether the Maternity Benefit Act, 1961 apply to the Government Employees.

8. The facts are not disputed that the Petitioner is already having 2 children, born to her through first husband. After the death of the first husband she married second time. Through the second marriage she delivered twins after joining the service. It is relevant to extract the Section 101 of the Fundamental rules which is as follows:

"FR.101. Rules regulating the grant of -

a) Maternity leave to female Government Servants, and

b) leave on account of ill-health to members of subordinate services whose duties expose them to special risk of accident or illness are given in the following instructions.

Instructions under Rule 101 (a)-Maternity leave.

A competent authority may grant maternity leave on full pay to permanent married Government servants and to non-permanent married women Government servants, appointed on regular capacity, for a period not exceeding 365 days, which may spread on the pre-confinement rest to post confinement recuperation at the option of the et servant. Non-permanent married women Government servants, who are appointed ar capacity and join duty after delivery shall also be granted maternity leave for the period of 365 days after deducting the number of days from the date of delivery to of joining in Government service (both days inclusive) for the post confinement recuperation

Non-permanent married women Government servants, who are appointed under emergency provisions of the relevant service rules should take for maternity purposes, med leave for which they may be eligible. If however, such a Government servant is not eligible for earned leave or if the leave to her credit is less than 365 days, maternity leave may be granted for a period not

exceeding 365 days or for the period that falls short of 365 days, as the may be. Non-permanent mom women Government servants employed under the agency provisions should have completed one year of continuous service including leave periods if any, to become eligible for the grant of maternity leave:

Provided that the maternity leave referred in (1) or (ii) above shall be granted to a married man Government servant with less than two surviving children:

Provided further that in the case of a woman Government servant with two surviving den born as twins in the first delivery, maternity leave shall be granted for one more delivery.

Explanation 1.- In the case of married women Government servants who are confined ng the period of their leave, including extraordinary leave, the 365 days period referred to e shall be reckoned only from the date of confinement.

Explanation 2 – For the purpose of this instruction, the expression "two surviving children" shall not include adopted children.

Explanation 3 – The Women Government Servants who proceeded on maternity leave prior to the 1/7/2021 and continued to be on that leave on or after that date shall also be eligible for maternity

leave for a period not exceeding 365 days."

[G.O.Ms.No.91, P & AR (FR-II) Dept. dt. 28-07-2020]
[G.O. Ms. No. 84, Human Resources Management Dept., dt. 23.8.2021.]"

9. The Rule makes it very clear that such leave can be granted to a married women Government servants with less than two surviving children, not exceeding 365 days, which may spread over from the pre-confinement rest to post confinement recuperation at the option of the Government Servant. The Fundamental Rules make it very clear that such a benefit is available to a married women only upto two surviving children and the norm two surviving children made as mandatory to avail such benefit under the said Rule.

10. With regard to the contention whether the Maternity Benefit Act will apply to the State Government servants, it is relevant to refer the Maternity Benefit Act, 1961. Section 2 of the Act reads as follows:

2. Application of Act. *[(1) It applies, in the first instance,--*

(a) to every establishment being a factory, mine or plantation including any such establishment belonging to Government and to every establishment wherein persons are employed for the exhibition of equestrian, acrobatic and other performances;

(b) to every shop or establishment within the meaning of any law for the time being in force in relation to shops and establishments in a State, in which ten or more persons are employed, or were employed, on any day of the preceding twelve months:]

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.

(2) [Save as otherwise provided in 7[sections 5A and 5B], nothing contained in this Act] shall apply to any factory or other establishment to which the provisions of the Employees' State Insurance Act, 1948 (34 of 1948), apply for the time*

being.

11. Section 3 (e) of the Maternity Benefit Act 1961 defines "Establishment"

> *3. [(e) "establishment" 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) 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.*

12. When Section 2 read in conjunction with the definition of establishment makes it very clear that only the "Establishment" defined under the Maternity Benefit Act will fall within the ambit of the Maternity

Benefit Act. Such being the position, the petitioner being a Government servant who has not employed in any of the Establishment as defined under the Maternity Benefit Act 1961, she cannot claim any benefit as per the Maternity Benefit Act. Whereas she will be governed only by the Fundamental Rules, since the very Maternity Benefit Act is not applicable to the Government Servants.

13. In this regard, in **the State of *Uttarakhand vs. Urmina Masih and others [2019 SCC Online Utt 927]*** it is held as follows:

> *"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.*
>
> *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 vs. State of Haryana & others : 2011 SCC OnLine P&H 4666. Likewise, this question did not arise for consideration even before the Madras High Court in J. Sharmila vs. The Secretary to Government Education Department and others : 2010 SCC OnLine Mad 5221."

14. Division Bench of this Court in ***The Government of Tamil nadu vs. K. Umadevi [W.A.No.1442 of 2022 dated 14.09.2022]*** in para 4.3 has held as follows:

"*4.3 Grant of maternity leave is not the fundamental right. It is either a statutory right or the right which flows from the conditions of service. Once the rights of the writ petitioner are governed by the service conditions as applicable to her, as framed by the State, the Maternity Benefit Act, 1961 would be inapplicable. This is the law, going by even the decision of the Supreme Court of India relied on behalf of the the writ petitioner in the case of Deepika Singh v Central Administrative Tribunal and Others (Civil Appeal No.5308 of 2022 arising from S.L.P.(C) No. 7772 of 2021 dated 16.08.2022), more particularly*

para : 17 Page 5 of 9 https://www.mhc.tn.gov.in/judis W.A.No.1442 of 2022 thereof. Though learned Additional Advocate General has rightly relied on the decision of the Uttarkhand High Court in the case of State of Uttarakhand v Smt.Urmila Manish and others (Special Appeal No.736 of 2019 dated 17.09.2019), since the subsequent decision of the Supreme Court also stipulates this, further discussion qua the decision of the Uttarkhand High Court is not required. We find that, in the facts of the case, it would neither be necessary nor even open to take aid from the Act of 1961, to explore, whether the writ petitioner was entitled to the benefit as claimed by her, which is inconsistent with the policy of the State, which is neither under challenge nor can be said to be illegal or arbitrary in any manner. If the reasons contained in the order under challenge are weighed keeping this in view, we find that, the order of learned Single Judge is unsustainable. The same therefore needs to be quashed and set aside."

15. Therefore, when the State has taken a policy decision that the Fundamental Rules is applicable to the Government servants, the Petitioner cannot claim any benefit under the Benefit Act, which is not applicable to the Government servants, except to the employees employed in the "Establishment" as defined under the Maternity Benefit Act, 1961. Therefore, the Division Bench of this Court has held that the Maternity

Benefit Act is not applicable to the Government Servants. The same is also binding in the case on hand.

16. A Division Bench of Kerala High Court ***in The Chairman and Managing Director, Bharat Sanchar Nigam Ltd., and Ors. vs. C.R.Velasakumari and Ors. [MANU/KE/1369/2023]*** has also held that as per Section 43-C of the Central Civil Service (Leave) Rules, 1972 when the maternity leave facility has not been availed in respect of the first two children, in respect of 3rd child, granted such leave facility. The above Judgment is not applicable to the facts of the present case. The question before the Division Bench of Kerala High Court is whether the child care leave is available under Section 43-C of the Central Civil Service (Leave) Rules, 1972 and whether the benefit under the Maternity Benefit Act is applicable or not, is not the issue before the Division Bench.

17. Much reliance has been placed in ***Deepika Singh vs. Central Administrative Tribunal and others [2022 SCC Online SC 1088].*** In the above case, when the Appellant has availed child care leave for the two

children born to her spouse from his first marriage, the application of maternity leave for her biological child was negatived by the court below. In that context, the Apex Court has granted maternity leave. Para 17 of the above judgment is as follows:

> "17. For the purpose of adopting an approach which furthers legislative policy, it would be appropriate to derive some guidance from the provisions of the Maternity Benefit Act 1961 though, it must be stated at the outset that the Act per se has no application to the PGIMER as an establishment. Nonetheless, the provisions of the Act of 1961 are indicative of the object and intent of Parliament in enacting a cognate legislation on the subject."

18. The Apex Court has extended the benefit mainly on the ground that the appellant's spouse had two biological children in his first marriage would not infringe upon the entitlement of the appellant to avail the maternity leave for her sole biological child. Only in that background the Apex Court has extended such benefit.

19. Therefore the facts of the present case is that the Petitioner is having four biological children. When the state policy and fundamental rules restrict the maternity leave for 3rd child, this Court is of the view, as the matter of right the Petitioner cannot seek maternity leave on the basis of the Maternity Benefit Act, In view of the above, the impugned orders have to be sustained. accordingly they are sustained.

20. Accordingly, the Writ Petition is dismissed. No costs. Connected W.M.P.is closed.

14.08.2023

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copy to:

1. The Secretary to Government, Government of Tamilnadu,
Human Resources Management Department, Secretariat, Chennai 600009.

2. The District Educational Officer, Gobichettipalayam, Erode District.

3. The Headmaster, Vengammaiyar Municpal High School,
Gobichettipalayam, Erode District.

N.SATHISH KUMAR, J.,
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Order in:
W.P.No.23983 of 2022

14.08.2023