

HIGH COURT OF CHHATTISGARH, BILASPUR

Writ Petition (S) No.4927 of 2016

Smt. Sadhna Agrawal, W/o Chhatradhari Agrawal, aged about 49 years, working as Lecturer, Govt. Girls Higher Secondary School, Utai, District Durg (C.G.)

---- Petitioner

Versus

1. State of Chhattisgarh, Through the Secretary, Department of Education, Mahanadi Bhavan, Mantralaya, New Raipur, District Raipur (C.G.)
2. District Education Officer, Durg, District Durg (C.G.)
3. Principal, Govt. Girls Higher Secondary School, Utai, District Durg (C.G.)

---- Respondents

For Petitioner:	Mr. Ajay Shrivastava, Advocate.
For Respondents:	Mr. Gary Mukhopadhyay, Deputy Govt. Advocate and Mrs. Astha Shukla, Panel Lawyer.

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

03/01/2017

1. To become a mother is the most natural phenomenon 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 workplace while carrying a baby in the womb or while rearing up the child after birth.

2. The above-stated observation laid down by S. Saghir Ahmad, J, speaking for the Supreme Court in the matter of **Municipal Corporation of Delhi v. Female Workers (Muster Roll) and another**¹ aptly and squarely applies to the facts of the present case.
3. The superb question of law that emanates for consideration is whether a female Government servant/mother is entitled to avail maternity leave under Rule 38 of the Chhattisgarh Civil Services (Leave) Rules, 2010 (for short 'the Rules of 2010'), though she begets child through the surrogacy procedure .
4. The above-stated question of law arises in this petition on the following factual backdrop: -
5. The petitioner is Lecturer working in Government Girls Higher Secondary School, Utai. She performed marriage with Shri Chhatradhari Agrawal as per the Hindu rites. After completion of marriage of 26 years, she could not conceive and deliver a baby. Thereafter, the petitioner on consultation with her husband, decided to have a child through surrogacy procedure. In furtherance of said desire, in the month of June, 2015, an embryo was successfully transplanted in the womb of a surrogate mother. On 15-3-2016, the surrogate mother went into labour and the petitioner and her husband reached to the Indore Hospital. The surrogate mother delivered twin babies and the said twin babies were

¹ (2000) 3 SCC 224

immediately placed in the hands of the petitioner and her husband on the same day. It is pertinent to mention here that the petitioner has incurred expenses of more than Rs.8 lakhs in the surrogacy procedure. In order to take care of the newly born twin babies, the petitioner applied for maternity / child care leave to the Principal of Government Girls Higher Secondary School, Utai for maternity leave, as according to the petitioner, she is entitled for maternity leave in view of the provisions contained in Rule 38 of the Rules of 2010 which provides that maternity leave may be granted to a female Government servant with less than two surviving children up to a period of 135 days from the date of its commencement. It further provides that during such period, she will be entitled to leave salary equal to pay drawn immediately before proceeding on leave. The said application was considered by the Principal of the petitioner's college and by letter dated 29-7-2016, it has been held that there is no provision in the Rules of 2010 to grant maternity leave to female Government servant who begets child by surrogacy procedure and also sought further instructions from the District Education Officer, Durg. The petitioner finding that the time is running fast and it is necessary to look after the twin babies, she decided to file this writ petition claiming that she is entitled for maternity leave as provided in Rule 38 of the Rules of 2010.

6. Mr. Ajay Shrivastava, learned counsel for the petitioner,

would submit that Rule 38 of the Rules of 2010 makes no difference between natural mother, biological mother and a woman who has become mother through surrogacy procedure and as such, distinction cannot be made, the object being welfare and upliftment of newly born child and to develop a bond between the child and the mother which may be either a natural mother, a biological mother or a mother who has begotten a child by surrogacy procedure. Therefore, the State is absolutely unjustified in dealing the grant of maternity leave to the petitioner, as on 15-3-2016, she has begotten child by surrogacy procedure and only after four months, on 19-7-2016 it has been held by the Principal of the petitioner's school that there is no such provision in Rule 38 of the Rules of 2010.

7. On the other hand, Mr. Gary Mukhopadhyay, learned Deputy Govt. Advocate, and Mrs. Astha Shukla, learned Panel Lawyer, appearing on behalf of the State/respondents would submit that Rule 38 of the Rules of 2010 does not expressly include the female Government servant who has begotten child by surrogacy procedure. The legislature ought to have expressly included such a female Government servant who has become mother by surrogacy procedure. Since such a class of mother has not been included expressly within Rule 38 of the Rules of 2010, the State Government is absolutely justified in holding that the petitioner is not entitled for the

privilege of maternity leave and therefore the writ petition deserves to be dismissed.

8. I have heard learned counsel for the parties and also considered their rival submissions made therein and gone through the available documents with utmost circumspection.
9. At this stage, it would be appropriate to notice certain constitutional provisions in this regard. Part-III of the Constitution provides for fundamental rights. Article 14 provides that the State shall not deny to any person equality before the 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 Article 15 provides as under: -

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

10. Their Lordships of the Supreme Court in the matter of **Hindustan Antibiotics Ltd. v. The Workmen**² have held that the labour to whichever sector it may belong in a particular region and in a particular industry, will be treated on equal basis.
11. Part IV of the Constitution of India relates to Directive Principles of State Policy. Article 38 of the Constitution provides that the State shall strive to promote the welfare of

² AIR 1967 SC 948

the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life. Article 39 provides as under: -

"39. Certain principles of policy to be followed by the State.--The State shall, in particular, direct its policy towards securing--

(a) that the citizens, men and women equally, have the right to an adequate means to livelihood;

(b) xxx xxx xxx

(c) xxx xxx xxx

(d) that there is equal pay for equal work for both men and women;

(e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;

(f) xxx xxx xxx"

Articles 42 and 43 of the Constitution provide 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.

43. Living wage, etc., for workers.--The State shall endeavour to secure, by suitable legislation or economic organisation 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."

Corporation of Delhi (supra) had an occasion to consider as to whether female workers on muster roll are entitled for maternity benefit under the provisions of the Maternity Benefit Act, 1961 (for short 'the Act of 1961'). Their Lordships considered the issue in the light of the provisions contained in Articles 42 and 43 of the Constitution of India and also in view of Section 5 of the Act of 1961 and found that the provisions of the Act of 1961 are wholly in consonance with the Directive Principles of State Policy set out in Articles 39, 42 and 43 of the Constitution of India and muster roll / daily wage female workers are also entitled for maternity leave. Rejecting the plea of the Municipal Corporation of Delhi and emphasizing the relevance and significance of the doctrine of social justice as propounded by the Supreme Court in the matter of **Crown Aluminium Works v. Workmen**³, quoted with approval the following observations made by Gajendragadkar, J, in the matter of **J.K. Cotton Spg. & Wvg. Mills Co. Ltd. v. Labour Appellate Tribunal of India**⁴: -

"Indeed, the concept of social justice has now become such an integral part of industrial law that it would be idle for any party to suggest that industrial adjudication can or should ignore the claims of social justice in dealing with industrial disputes. The concept of social justice is not narrow, or one-sided, or pedantic, and is not confined to industrial adjudication alone. Its sweep is comprehensive. It is founded on the basic ideal of socio-economic equality and its aim is to assist the removal of socio-economic

3 AIR 1958 SC 30

4 AIR 1964 SC 737

disparities and inequalities; nevertheless, in dealing with industrial matters, it does not adopt a doctrinaire approach and refuses to yield blindly to abstract notions, but adopts a realistic and pragmatic approach."

13. Their Lordships while highlighting the importance of women in the Indian society have held that to become a mother is the most natural phenomenon in the life of a woman, and pertinently observed as under: -

"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 facilitates to which they are entitled. ..."

14. The Universal Declaration of 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. This was followed by a series of conventions. On 18-12-1979, the United Nations adopted the "Convention on the Elimination of all Forms of Discrimination against Women". Article 11 of this Convention provides as under: -

"Article 11

1. States/parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

(a) to (f) xxx xxx xxx

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."

(emphasis supplied)

15. The Supreme Court in **Municipal Corporation of Delhi**

(supra) reading Article 11, reproduced above, into the contract of service between the Municipal Corporation of Delhi and the women employees (muster roll) held them entitled for the benefits conceived under the Act of 1961.

16. It is well settled law that the rules and regulations in force

have to be interpreted taking into account the development of medical science and the change in society and societal conditions. The Supreme Court in the matter of **Anuj Gang v. Hotel Association of India**⁵ has held that changed social psyche and expectations are important factors to be considered in the upkeep of law. Section 30 of the Punjab Excise Act, 1914 prohibited the employment of any man under the age of 25 years or any woman in any part of premises in which liquor or intoxicating drugs were consumed by the public. This law which may have been good having regard to the social conditions as they prevailed in the 20th Century, but having regard to the present social conditions and equality to sexes guaranteed under the Constitution, the same was declared invalid.

17. Principles of Statutory Interpretation (12th Edition 2010) in Chapter-4 by Justice G.P. Singh under the heading “Later Social, Political and Economic Developments and Scientific Inventions” states, as it is possible that in some special cases a statute may have to be historically interpreted “as if one were interpreting it the day after it was passed”. But generally statutes are of the “always speaking variety” and the court is free to apply the current meaning of the statute to present day conditions⁶. There are at least two strands

⁵ (2008) 3 SCC 1 para 9

⁶ *R v. Ireland*, (1997) 4 All ER 225, p. 233 : (1997) 3 WLR 534 (HL) (LORD STEYN)

covered by this principle.

"The first is that courts must apply a statute to the world as it exists today. The second strand is that the statute must be interpreted in the light of the legal system as it exists today⁷. Reference to the circumstances existing at the time of the passing of the statute does not, therefore, mean that the language used, at any rate, in a modern statute, should be held to be inapplicable to social, political and economic developments or to scientific inventions not known at the time of the passing of the statute. "Legislative standards are generally couched in the terms which have considerable breadth. Therefore a statute may be interpreted to include circumstances or situations which were unknown or did not exist at the time of enactment of the statute⁸."

18. The Rule of Dynamic Construction was held as under by the eminent Author:

"The question again is as to what was the intentions of the law makers: Did they intend as originalists may argue, that the words of the statute be given the meaning they would have received immediately after the statute's enactment or did they intend as dynamists may contend that it would be proper for the court to adopt the current meaning of the words? The courts have now generally leaned in favour of dynamic construction⁹. But the doctrine has also its limitations. For example it does not mean that the language of an old statute can be construed to embrace something conceptually different¹⁰."

The guidance on the question as to when an old statute can apply to new state of affairs not in contemplation when the statute was enacted was furnished by Lord Wilberforce in his dissenting speech in *Royal College of Nursing of*

⁷ *McCartan Turkington Breen (a firm) v. Times Newspapers Ltd.*, (2000) 4 All ER 913, p. 926 (HL) (LORD STEYN)

⁸ *Senior Electric Inspector v. Laxminarayan Chopra*, AIR 1962 SC 159, p. 162 : 1962 (3) SCR 146

⁹ *Randal N. Grahm, A Unified Theory of Statutory Interpretation*, (2002) 23 Statute Law Review 91, p. 134

¹⁰ *Birmingham City Council v. Oakley*, (2001) 1 All ER 385, p. 396 (HL)

*the U.K. v. Dept. of health and Social Security*¹¹. Which is now treated as authoritative¹². Lord Wilberforce said: “In interpreting an Act of Parliament it is proper, and indeed necessary, to have regard to the state of affairs existing, and known by Parliament to be existing, at the time. It is a fair presumption that Parliament’s policy or intention is directed to that state of affairs. Leaving aside cases of omission by inadvertence, this being not such a case when a new state of affairs, or a fresh set of facts bearing on policy, comes into existence, the courts have to consider whether they fall within the parliamentary intention. *They may be held to do so, if they fall within the same genus of facts as those to which the expressed policy has been formulated. They may also be held to do so if there can be detected a clear purpose in the legislation which can only be fulfilled if the extension is made.* How liberally these principles may be applied must depend on the nature of the enactment, and the strictness or otherwise of the words in which it has been expressed. The courts should be less willing to extend expressed meaning if it is clear that the Act in question was designed to be restrictive or circumscribed in its operation rather than liberal or permissive. They will be much less willing to do so where the new subject matter is different in kind or dimension from that for which the legislation was passed. In any even there is one course which the courts cannot take under the law of this country: they cannot fill gaps; they cannot by asking the question, ‘What would Parliament have done in this current case, not being one in contemplation, if the facts had been before it?’ attempt themselves to supply the answer, if the answer is not to be found in the terms of the Act itself¹³”.

As stated by Lord Bridge: “When a change in social conditions produces a novel situation, which was not in contemplation at the time when a statute is first enacted, there can be no *a priori* assumption that the enactment does not apply to the new circumstances. If the language of the enactment is wide enough to extend to those

11 (1981) 1 All ER 545, pp. 564, 565 : (1982) AC 800 : (1981) 2 WLR 279 (HL)

12 *Fitzpatrick v. Sterling Housing Association Ltd.*, (1999) 4 All ER 705, pp. 710, 721, 739-740, 744 (HL)

13 Note 11, *supra*.

circumstances, there is no reason why it should not apply¹⁴.” Thus, when in the changed circumstances the common law fiction that by marriage the wife must be deemed to have irrevocable consented to sexual intercourse in all circumstance has become anachronistic, the husband can be convicted of rape under the Sexual Offences (Amendment) Act, 1976, if he was sexual intercourse with his wife without her consent¹⁵.

On the same principles, general words are construed to include new inventions and technological advances not known at the time when the Act was passed. It has, accordingly, been held that telephone is ‘telegraph’ within the meaning of that word in the telegraph Acts, 1863 and 1869 although telephone was not invented in 1869¹⁶; that a photographic copy is ‘copy’ under the Engraving Copyright Act, 1734¹⁷; and that an electric tram car is a stage carriage within the meaning of the Stage Carriage Act, 1832¹⁸. Similarly, ‘broadcasting’ has been held to be covered by the word ‘telegraph’ as used in the phrase ‘telegraph & other works and undertaking’ in section 92(1)(a) of the British North America Act, 1867¹⁹; and radio broadcasting has been held to be included in the expression ‘postal, telegraphic, telephonic and other like services’ under section 51(5) of the Australian Constitution²⁰. Following the same principle, it has been held by the Supreme Court that the definition of ‘telegraph line’ in the Indian telegraph Act, 1885, which is included by reference in the Indian Electricity Act, 1910, is wide enough to take in electric lines used for the purpose of wireless telegraph²¹; the definition of ‘cinematograph’ contained in section 2(e) of the Cinematograph Act, 1952 and in Cinema Regulation Acts enacted by the States in 1952

14 *Combel Commodities Ltd. v. Siporex Trade, SA* (1990) 2 All ER 552, p. 557

15 *R v. R (rape : marital exemption)*, (1991) 4 All Er 481 : (1992) 1 AC 599 : (1991) 3 WLR 767 (HL)

16 *A.G. v. Edison Telephone Co. of London*, (1880) 6 QBD 244

17 *Gambart v. Ball*, (1863) 32 LJCP 166

18 *Chapman v. Kirke*, (1948) 2 All ER 556

19 *In re, regulation and Control of Radio Communications in Canada*, (1932) AC 304 (PC)

20 *R v. Brislan, Ex parte, Williams*, (1935) 54 CLR 262

21 *Senior Electric Inspector v. Laxminarayan Chopra (supra)*

will cover video cassette recorders/players (developed in 1970s) for representation of motion pictures on a television screen²²; the word 'handwriting' in section 45 of the Evidence Act, 1872 will embrace typewriting although it was only in 1874 that the first practical typewriter was marketed²³ and evidence taken of a witness in America by video conferencing in India where the accused is being tried will satisfy the requirement of evidence taken in presence of the accused under section 273 of the Criminal Procedure Code enacted in 1973 when the technique of video conferencing had not developed²⁴. ..."

19. It was further stated in the above-stated celebrated text as under:-

"When the new technological advances becoming known after the passing of the statute fall within the same genus covered by it and when its purpose would be defeated unless extension were made, the court may even be willing to strain the language a bit to cover the new advances. On these considerations section 1(1) of the Human Fertilisation and Embryology Act, 1990 which defines 'embryo' to mean 'a live human embryo where fertilization is complete' was construed to cover even an embryo produced not by fertilization but by cell nuclear replacement (CNR), a method developed by scientists after 1990, by reading the definition of embryo to mean 'a live human embryo where if it is produced by fertilisation fertilisation is complete'²⁵.

Dealing with section 123 of the Indian Evidence Act, 1872, and the phrase 'affairs of the State', Gajendragadkar, J. observed: "If may be that when the Act was passed, the concept of Governmental functions and their extent was limited; and so was the concept of the words 'affairs of the State' correspondingly limited; but

²² *Laxmi Video Theatres v. State of Haryana*, AIR 1993 SC 2328

²³ *State v. S.J. Choudhary*, 1996(2) Scale 37, pp. 40, 41 : AIR 1996 SC 1491, p. 1496 : (1996) 2 SCC 428 (para 16).

²⁴ *State of Maharashtra v. Dr. Praful B. Desai*, 2003 AIR SCW 1885 : (2003) 4 SCC 601 : AIR 2003 SC 2053

²⁵ *R (On the application of Quintavalle) v. Secretary of State for Health*, (2002) 2 All ER 625, pp. 633, 637 (CA)

as is often said, words are not static vehicles of ideas or concepts. As the content of the ideas or concepts conveyed by respective words expand, so does the content of the words keep pace with the said expanding content of the ideas or concepts and naturally tend to widen the field of public interest which the section wants to protect²⁶.” Similarly while considering the word ‘necessaries’ in section 5 of the Admiralty Courts Act, 1861, Sinha J. observed: “Global changes and outlook in trade and commerce could be a relevant factor.- What was not considered a necessity a century back may be held to be so now²⁷.”

A distinction is said to exist in this respect between ancient statutes and statutes which are comparatively modern. The principle is thus explained by Subbarao, J.: “It is perhaps difficult to attribute to legislative body functioning in a static society that its intention was couched in terms of considerable breadth so as to take within its sweep the future developments comprehended by the phraseology used. It is more reasonable to confine its intention only to the circumstances obtaining at the time the law was made. But in modern progressive society it would be unreasonable to confine the intention of a Legislature to the meaning attributable to the word used at the time the law was made, for a modern Legislature making laws to govern society which is fast moving must be presumed to be aware of an enlarged meaning the same concept might attract with the march of time and with the revolutionary changes brought about in social, economic, political and scientific and other fields of human activity. Indeed, unless a contrary intention appears, an interpretation should be given to the words used to take in new facts and situation, if the words are capable of comprehending them²⁸.”

20. The meaning, scope, origin and types of surrogacy was considered by the Supreme Court in the matter of **Baby**

²⁶ *State of Punjab v. Sodhi Sukhdev Singh*, AIR 1961 SC 493, p. 502

²⁷ *Liverpool and London SP&I Association v. M.V. Sea Success & Asso. Ltd.* (2004) 9 SCC 512 (para 65)

²⁸ *Senior Electric Inspector v. Laxminarayan Chopra*, AIR 1962 SC 159, p. 163

Manji Yamada v. Union of India and another²⁹ as under: -

"8. Surrogacy is a well-known method of reproduction whereby a woman agrees to become pregnant for the purpose of gestating and giving birth to a child she will not raise but hand over to a contracted party. She may be the child's genetic mother (the more traditional form for surrogacy) or she may be, as a gestational carrier, carry the pregnancy to delivery after having been implanted with an embryo. In some cases surrogacy is the only available option for parents who wish to have a child that is biologically related to them.

9. The word "surrogate", from Latin "subrogare", means "appointed to act in the place of". The intended parent(s) is the individual or couple who intends to rear the child after its birth.

10. In *traditional surrogacy* (also known as the Straight method) the surrogate is pregnant with her own biological child, but this child was conceived with the intention of relinquishing the child to be raised by others; by the biological father and possibly his spouse or partner, either male or female. The child may be conceived via home artificial insemination using fresh or frozen sperm or impregnated via IUI (intrauterine insemination), or ICI (intracervical insemination) which is preformed at a fertility clinic.

14. Intended parents may arrange a surrogate pregnancy because a woman who intends to parent is infertile in such a way that she cannot carry a pregnancy to term. Examples include a woman who has had a hysterectomy, has a uterine malformation, has had recurrent pregnancy loss or has a health condition that makes it dangerous for her to be pregnant. A female intending parent may also be fertile and healthy, but unwilling to undergo pregnancy.

15. Alternatively, the intended parent may be a single male or a male homosexual couple.

16. Surrogates may be relatives, friends, or previous strangers. Many surrogate

29 (2008) 13 SCC 518

arrangements are made through agencies that help match up intended parents with women who want to be surrogates for a fee. The agencies often help manage the complex medical and legal aspects involved. Surrogacy arrangements can also be made independently. In compensated surrogacies the amount a surrogate receives varies widely from almost nothing above expenses to over \$30,000. Careful screening is needed to assure their health as the gestational carrier incurs potential obstetrical risks."

21. Rule 38 of the Rules of 2010 provides as under: -

"38. Maternity leave.-(1) Maternity leave may be granted to a female Government servant with less than two surviving children up to a period of 135 days from the date of its commencement. During such period, she will be entitled to leave salary equal to pay drawn immediately before proceeding on leave.

(2) Such leave shall not be debited against the leave account.

(3) Maternity leave may be combined with leave of any other kind.

(4) Maternity leave may also be granted to a female Government servant (irrespective of the number of surviving children) in cases of miscarriage including abortion, subject to the condition that the leave shall be limited to the period recommended by the appropriate medical authority subject to a maximum of forty five days during the entire service.

Note--An abortion induced under the Medical Termination of Pregnancy Act, 1971 shall also be considered a case of 'abortion' for the purpose of this rule, but however no leave shall be granted under this rule in cases of 'threatened abortion'."

22. The above-stated provisions relating to grant of maternity benefit is benevolent and beneficial provision contained in the said Rule. It is well settled law of construction that in

interpreting provisions of beneficial pieces of legislation, which is intended to achieve the social justice, must be construed beneficially. The Supreme Court in the matter of **B. Shah v. Presiding Officer, Labour Court, Coimbatore and others**³⁰ has held that beneficial construction to be extended to beneficial legislation like the Maternity Benefits Act which effectuates directive principles of state policy and observed as under: -

"18. ... It has also to be borne in mind in this connection that in interpreting provisions of beneficial pieces of legislation like the one in hand which is intended to achieve the object of doing social justice to women workers employed in the plantations and which squarely fall within the purview of Article 42 of the Constitution, the beneficent rule of construction which would enable the woman worker not only to subsist but also to make up her dissipated energy, nurse her child, preserve her efficiency as a worker and maintain the level of her previous efficiency and output has to be adopted by the Court."

23. According to Shorter Oxford English Dictionary (Fifth Edition), "maternity" means (1) the quality or condition of being a mother; motherhood and (2) the qualities or conduct characteristic of a mother; motherliness. According to other Oxford English Dictionaries, "maternity" means motherhood.

24. According to Black's Law Dictionary (Eighth Edition), "maternity" means the state or condition of being a mother, especially a biological one; motherhood.

25. Maternity means the period during pregnancy and shortly

30 (1977) 4 SCC 384

after the child's birth. If maternity means motherhood, it would not be proper to distinguish between a natural and biological mother and a mother who has begotten a child through surrogacy. The object of maternity leave is to protect the dignity of motherhood by providing for full and healthy maintenance of the woman and her child. Maternity leave is intended to achieve the object of ensuring social justice to women. Motherhood and childhood both require special attention. Not only are the health issues of the mother and the child considered while providing for maternity leave but the leave is provided for creating a bond of affection between the two.

26. Similar issue came-up before a Division Bench of the Bombay High Court recently in the matter of **Dr. Mrs. Hema Vijay Menon v. State of Maharashtra and others**³¹ decided on 22-7-2015 in which the Division Bench has clearly held that to distinguish between a mother who begets a child through surrogacy and a natural mother who gives birth to a child, would result in insulting womanhood and the intention of a woman to bring up a child begotten through surrogacy, as her own, and observed as under: -

"It is said that being a mother is one of the most rewarding jobs on the earth and also one of the most challenging. To distinguish between a mother who begets a child through surrogacy and a natural mother who gives birth to a child, would

31 AIR 2015 Bombay 231

result in insulting womanhood and the intention of a woman to bring up a child begotten through surrogacy, as her own. A commissioning mother like the petitioner would have the same rights and obligations towards the child as the natural mother. Motherhood never ends on the birth of the child and a commissioning mother like the petitioner cannot be refused paid maternity leave. A woman cannot be discriminated, as far as maternity benefits are concerned, only on the ground that she has obtained the baby through surrogacy. Though the petitioner did not give birth to the child, the child was placed in the secured hands of the petitioner as soon as it was born. A newly born child cannot be left at the mercy of others. A maternity leave to the commissioning mother like the petitioner would be necessary. A newly born child needs rearing and that is the most crucial period during which the child requires the care and attention of his mother. There is a tremendous amount of learning that takes place in the first year of the baby's life, the baby learns a lot too. Also, the bond of affection has to be developed. A mother, as already stated hereinabove, would include a commissioning mother or a mother securing a child through surrogacy. Any other interpretation would result in frustrating the object of providing maternity leave to a mother, who has begotten the child."

27. Right to life under Article 21 of the Constitution of India includes the right to motherhood and also the right of every child to full development. If the Government can provide maternity leave to an adoptive mother, it would be wholly improper to refuse to provide maternity leave to a mother who begets a child through the surrogacy procedure and as such, there cannot be any distinction between an adoptive mother who adopts a child and a mother who begets a child through surrogacy procedure after implanting an embryo

created by using either the eggs or sperm of the intended parents in the womb of the surrogate mother.

28. Similar is the proposition laid down by the Madras High Court in the matter of K. Abirami v. Assistant Elementary School Officer and another decided on 5-8-2015 in which the Madras High Court has held that there is no immoral and unethical about the woman having obtained a child through surrogate arrangement and the purpose of granting maternity leave is for proper bonding between the child and parents.

29. Similarly, the Kerala High Court in the matter of **P. Geetha v.**

Kerala Livestock Development Board Ltd.,

Thiruvananthapuram and another³² decided on 6-1-2015

has held thus,

"74. Thus, to conclude, this Court declares that there ought not to be any discrimination of a woman as far as the maternity benefits are concerned only on the ground that she has obtained the baby through surrogacy. It is further made clear that, keeping in view that dichotomy of maternity or motherhood, the petitioner is entitled to all the benefits an employee could have on post-delivery, sans the leave involving the health of the mother after the delivery. In other words, the child specific statutory benefits, if any, can, and ought to, be extended to the petitioner."

30. In the matter of **Rama Pandey v. Union of India & others**³³,

the Delhi High Court has held that,

"A female employee, who is the commissioning mother, would be entitled to apply for maternity

32 2015 LAB. I. C. 2209

33 2015 LAB. I. C. 3921

leave under sub-rule (1) of Rule 43 of the Central Civil Services (Leave) Rules, 1972."

31. It is not in dispute that the petitioner has begotten twin children by surrogacy procedure at a renowned hospital namely Suyash Hospital, Indore. It is also not in dispute that the petitioner is working as Lecturer in Government Girls Higher Secondary School, Utai and she is claiming the privilege of maternity leave invoking Rule 38 of the Rules of 2010, but the same has been declined on the ground that there is no provision in the said Rule including the female Government servant who has begotten a child by surrogacy procedure.

32. In view of the aforesaid legal analysis, it is quite apparent that no distinction can be made by the State Government to a natural mother, a biological mother and a mother who has begotten child by surrogacy procedure, as right to life under Article 21 of the Constitution of India includes the right to motherhood and also the right to every child to full development. Therefore, the State Government is absolutely unjustified in refusing maternity leave to the petitioner who has begotten twin children by surrogacy procedure. Accordingly, the impugned order rejecting the application of the petitioner for grant of maternity leave is set aside and it is held that the petitioner is entitled for maternity leave as provided under Rule 38 of the Rules of 2010. Admittedly, the

petitioner has not undergone any prenatal phase which in fact, was undergone by the surrogate mother whose rights are not in issue//is before this Court. The petitioner is required to be treated as mother with new born babies and she is entitled to the benefits of postnatal phase with effect from the date of birth of children i.e. 15-3-2016.

33. The writ petition is allowed to the extent indicated herein-above. No order as to cost(s).

Sd/-
(Sanjay K. Agrawal)
Judge

HIGH COURT OF CHHATTISGARH, BILASPUR

Writ Petition (S) No.4927 of 2016

Smt. Sadhna Agrawal

Versus

State of Chhattisgarh and others

HEAD NOTE

A female Government servant, who has begotten a child by procedure of surrogacy, is entitled for maternity leave under Rule 38 of the Chhattisgarh Civil Services (Leave) Rules, 2010.

एक महिला शासकीय कर्मचारी जिसने सरोगेसी की प्रक्रिया द्वारा बच्चे को जन्म दिया है, उसे छ.ग. सिविल सेवा (अवकाश) नियम 2010 के नियम 38 के अंतर्गत मातृत्व अवकाश की पात्रता होगी ।