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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **Date of Decision: 19.8.2019**

% **W.P.(C.) No. 8884/2019**

DR. KAVITA YADAV Petitioner
Through: Mr. Sourabh Gupta and Mr. Puneet
Yadav, Advocates.

versus

THE SECRETARY, MINISTRY OF HEALTH AND FAMILY
WELFARE DEPARTMENT & ORS Respondents
Through: Mr. D.Verma, Adv. for R-2 and 3.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MR. JUSTICE RAJNISH BHATNAGAR

VIPIN SANGHI, J. (ORAL)

CM APPL. 36652/2019

Exemption allowed, subject to all just exceptions. The application stands disposed of.

W.P.(C) 8884/2019 & C.M. No. 36653/2019, C.M. No. 36654/2019

1. The petitioner assails the order dated 12.4.2019 passed by the Central Administrative Tribunal, Principal Bench, in O.A 1978/2018. The said

Original Application preferred by the petitioner has been rejected by the Tribunal as being devoid of merit. The petitioner had preferred the Original Application to seek directions to the respondents to grant her maternity benefits, and to quash the orders dated 22.7.2017, 14.11.2017 and 13.4.2018 passed by the respondents. The petitioner was appointed as a Senior Resident (Pathology) in Janakpuri, Super Speciality Hospital Society (an autonomous institute) w.e.f. 12.6.2014, for a period of one year, which could be extended further up to a maximum period of three years. The services of the petitioner were extended for one year from 12.6.2015 till 11.6.2016, and finally for the period 12.06.2016 to 11.06.2017. On 18.5.2017, the petitioner applied for earned leave on medical grounds as she was not able to attend duties from 15.5.2017 to 31.5.2017 on account of her being pregnant. On 24.5.2017, the petitioner applied for maternity leave starting from 1.6.2017. On 9.6.2017, the respondents communicated to the petitioner that as per the terms and conditions of the offer of appointment, her contract would end on 11.6.2017, which could not be extended beyond the period of three years. Thus, she was entitled to maternity leave only up to 11.6.2017. The petitioner, however, contested the said position and claimed that she was entitled to maternity benefits. Once again the respondents made it clear to the petitioner that she would be entitled to maternity leave for a period of 1.6.2017 to 11.6.2017, and not thereafter. In the aforesaid background, the respondents issued the communications which were assailed before the Tribunal. While dismissing the Original Application, the reason adopted by the Tribunal in the impugned order reads as under:-

“10. The applicant was appointed on a temporary basis as Senior Resident, initially for a period of one year extendable up to a maximum period of three years on various terms and conditions by JanakPuri Super Speciality Hospital, New Delhi, being run by JanakPuri Super Speciality Hospital Society (an autonomous institute). She was twice given extension of one year and her maximum three years period of contract was to end on 11.06.2017. The applicant due to her pregnancy was on leave from 15.05.2017 to 31.05.2017. On 24.05.2017, she further applied for maternity leave starting from 01.06.2017 indicating that her expected date of delivery was 07.07.2017. The respondents advised the applicant vide their letter dated 09.06.2017 that the same is not admissible. Vide their letter dated 14.11.2017, the applicant was advised that her tenure comes to end on 11.06.2017 and no further extension is allowed/permissible under the rules. It was further stated that maternity leave could be sought by the Applicant only for the period 01.06.2017 to 11.06.2017 and not, thereafter. It was intimated that the applicant's case has been referred to Health and Family Welfare Department and the reply is awaited.

11. The applicant filed OA No. 906/2018 seeking relief from the Tribunal for grant of maternity leave to her. The OA was disposed of at the admission stage itself directing the respondents to consider the same within a period of 30 days. As directed by the Hon'ble Tribunal, the respondents vide letter dated 13.04.2018 advised the applicant that the matter was referred to GNCT of Delhi and they have also confirmed the order dated 09.06.2017. It was once again reiterated that the

applicant was appointed as Senior Resident in JanakPuri Super Speciality Hospital Society (an autonomous institute) w.e.f. 12.06.2014, for a period of one year which can be extended further up to a maximum period of three years and that maternity leave granted for 01.06.2017 to 11.06.2017 is as per rules. A letter from Secretary, Health and Family Welfare Department, GNCT of Delhi dated 14.03.2018 was also brought to the applicant's notice.

12.....Be that as it may, the fact remains that the applicant's tenure was temporary **and for a maximum period of three years.** The case of Bharti Gupta vs. Rail India Technical and Economical services Ltd. (RITES) & Ors. W.P. (C) No. 4798/2003 in the Hon'ble High Court of Delhi decided on 09.08.2005, relied upon by the applicant is about relief of maternity benefits to an employee who was engaged on contractual basis. Further, this was provided to someone whose contract was for six months **and did not have any limit or a maximum period.** This case is, therefore, of not much help to the facts of the present OA. **Any contractual period has a certain time limit and if the conditions do not permit extension of the same period, it comes to an end at the end of the prescribed period.** In this case the three years period ended on 11.06.2017. **Grant of maternity leave beyond that period would amount to extending the period of contract, which is not permissible.** The relief sought by the applicant in the present OA is, therefore, not sustainable. The OA is devoid of merit and the same is, therefore, dismissed.

There shall be no order as to costs.” (emphasis supplied)

2. The submission of learned counsel for the petitioner is that merely because the petitioner’s appointment was contractual for a limited period of three years, which were to expire on 11.6.2017, was no ground to deny maternity leave and other benefits for the entire period of 180 days i.e till after the delivery of the child. In this regard, counsel for the petitioner has placed reliance on Section 5 of the Maternity Benefit Act, 1961, which reads as follows:-

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

Explanation.—For the purpose of this sub-section, the average daily wage means the average of the woman’s wages payable to her for the days on which she has worked during the period of three calendar months immediately preceding the date from which she absents herself on account of maternity, 1[the minimum rate of wage fixed or revised under the Minimum Wages Act, 1948 (11 of 1948) or ten rupees, whichever is the highest].

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

Provided that the qualifying period of¹⁴ [eighty days] aforesaid shall not apply to a woman who has immigrated into the State of Assam and was pregnant at the time of the immigration.

Explanation.—For the purpose of calculating under the sub-section the days on which a woman has actually worked in the establishment 3[the days for which she has been laid off or was on holidays declared under any law for the time being in force to be holidays with wages] during the period of twelve months immediately preceding the date of her expected delivery shall be taken into account.

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

Provided that the maximum period entitled to maternity benefit by a woman having two or more than two surviving children shall be twelve weeks of which not more than six weeks shall precede the date of her expected delivery:

Provided further that where a woman dies during this period, the maternity benefit shall be payable only for the days up to and including the day of her death:

Provided also that where a woman, having been delivered of a child, dies during her delivery or during the period immediately following the date of her delivery for which she is entitled for the maternity benefit, leaving behind in either case the child, the employer shall be liable for the maternity benefit for that entire period but if the child also dies during the said period, then, for the days up to and including the date of the death of the child.

(4) A woman who legally adopts a child below the age of three months or a commissioning mother shall be entitled to maternity benefit for a period of twelve weeks from the date the child is handed over to the adopting mother or the commissioning mother, as the case may be.

(5) In case where the nature of the work assigned to a woman is of such nature that she may work from home, the employer may allow her to do so after availing of the maternity benefit for such period and on such conditions as the employer and the woman may mutually agree.”

3. Learned counsel for the petitioner submits that the petitioner having worked with the respondents for a period of not less than 180 days in the 12 months immediately preceding the date of expected delivery, which was shown to be 17.7.2017, the entitlement of the petitioner to receive maternity benefit under the Act could not be questioned. In support of this submission, learned counsel for the petitioner has, firstly, placed reliance on the decision of the Supreme Court in *Municipal Corporation of Delhi Vs.*

Female Workers (Muster Roll) & Anr., (2000) 3 SCC 224. In this case, the muster roll female workers, who were sought to be denied maternity benefit under the Act by the Delhi Municipal Corporation, were granted such benefits by the Supreme Court. Learned counsel for the petitioner has argued that when daily wagers were entitled to such benefits, the petitioner, who was a contractual employee, could not be denied the same. Learned counsel also placed reliance on the decision of the Division Bench of this Court in ***Government of N.C.T. of Delhi & Ors. Vs. Shweta Tripathi & Anr.*** W.P.(C) 3089/2014, decided by the Division Bench on 9.12.2014. In this case, the respondents –GNCTD had refused to grant maternity leave of 180 days to the respondents, and had limited the said leave to 12 weeks. The Tribunal had allowed the Original Application of the respondent-applicant. This Court held that the contractual employees could not be discriminated, and even the contractual employees were entitled to maternity benefits as admissible to the regular employees.

4. Counsel for the petitioner has lastly placed reliance on the decision of the learned Single Judge of this Court in ***Bharti Gupta Vs. Rail India Technical & Economical Services Ltd. (Rites) & Ors.*** 2005 (84) DRJ 53, wherein, in respect of the contractual employee, whose contract ended during the pregnancy period, was granted the maternity benefit for the period beyond the contractual period.

5. Counsel for the respondents, who appears on advance notice, however supports the impugned order. He submits that since the petitioner's contract- which was a fixed term contract, and could be extended for a maximum

period of three years, was coming to an end on 11.6.2017, the petitioner was entitled to maternity benefit only till that date. He points that on earlier occasion, when the petitioner's contract was valid, and she applied for maternity leave, she had been granted maternity benefit for a period of 180 days.

6. Learned counsel further submits that the decision of the learned Single Judge in *Bharti Gupta (supra)* is distinguishable in the light of the facts taken note of therein, particularly in para 7 of the said decision.

7. Having heard learned counsels and perused the record as well as the Maternity Benefit Act, 1961, we are of the view that there is no merit in this petition.

8. Reliance placed on Section 5(2) of the said Act by the petitioner to claim that once the female employee has rendered service for 180 days continuously prior to the expected date of delivery, she would be entitled to maternity benefit is, in our view, irrelevant, since the respondents have not denied the maternity benefit to the petitioner. The only issue is whether she would be entitled to such benefit after 11.6.2017, when her contract of employment ended.

9. Sub section (1) of Section 5 of the said Act provides that subject to provisions of the Act, every women should be entitled to, and her employer shall be liable for, the payment of maternity benefit at the rate of average daily wage "*for the period of her actual absence*" The use of the expression "*actual absence*" pre-supposes that but for the maternity leave,

the women employee would be expected to remain “present”. However, where the contractual employment is time bound with an outer limit, and the same comes to an end during the period of pregnancy, or even after child birth, but during the period when the women employee would be entitled to avail of maternity benefits under the Act, there would be no question of the women employee remaining actually “absent”, since she would not be expected to remain present post the termination of her contractual employment. The purpose of the aforesaid Act is not to extend the period of the contract for which the woman employee is in service. If the submission of learned counsel for the petitioner is accepted that the petitioner should be granted leave for 180 days, despite her contract expiring within a few days from the start of maternity leave, it would clearly tantamount to unintended extension of the contractual employment.

10. We may now proceed to consider the decisions relied upon by the petitioner.

11. ***Municipal Corporation of Delhi*** (supra) specifically deals with the issue of grant of maternity benefit to female workers (muster roll) engaged by the Municipal Corporation of Delhi. The Supreme Court took note of the fact that such muster roll female employees were engaged and had served under the Municipal Corporation for years together. The award made by the Industrial Tribunal-which the Supreme Court examined, had granted the benefit of the Act to muster roll female workers who were in continuous service of the Corporation for three years or more. Pertinently, in respect of such muster roll female workers, there was no outer limit in respect of the

period for which they could be engaged. As a matter of fact they had served the corporation for long periods continuously. However, in the present case, the initial contract of the petitioner itself very clearly stipulated that the contractual employment was for, at the most, three years. It is stipulated that the contract was valid for one year and the same could be extended further, subject to the maximum period of three years. The decision in ***Municipal Corporation of Delhi*** (supra) is clearly, therefore, distinguishable and cannot be pressed into service in the facts of the present case.

12. The decision in ***Government of N.C.T. of Delhi & Ors.*** (supra) is also not attracted in the facts of the present case. In this case, the Division Bench merely held that no discrimination could be made between the contractual and regular workers in matter of grant of maternity leave under the Act. The respondents have not sought to deny any benefit to the petitioner for the contractual period. It is not the petitioner's case that the petitioner has not been granted maternity benefits for the contractual period, at the same rate as is available to the regular employees.

13. Coming to the decision in ***Bharti Gupta*** (supra) we find that in this case though the appointment of the petitioner was contractual for six months, there was no outer limit to such contracts. The Court found, as a matter of fact, that the contract of the petitioner used to be extended after the expiry of the contract period, while the petitioner continued to serve. Para 7 of the order passed in ***Bharti Gupta*** (supra) may be noticed, which reads as follows:-

7. The pleadings in this case show that the petitioner, a qualified Architect had been engaged on contractual basis by the respondent RITES. Apparently, the contract was for spells of six months. As is evident from an examination of the last contract/order dated 23.5.2000, RITES was issuing the contracts/appointment letters, for fresh periods after the expiry of the previous period(s). For instance, the order dated 23.5.2000 states that the term of employment is six months from 17.4.2000 to 16.10.2000. The petitioner has further averred that her employment was continued on a routine basis and a fresh contracts were being issued subsequently. This fact has not been disputed. On the other hand, the case of the respondent RITES is that the letter by which the petitioner claimed maternity leave was in fact furnished by her on 17.11.2000. If these facts are kept in mind, it is apparent that though the period of contractual appointment came to an end on 16.10.2000, the petitioner continued to report for duties. The letter seeking leave does indicate that the petitioner would be on leave after 11.11.2000. The RITES does not dispute the existence of this letter; it only alleges that the letter in fact was given on 17.11.2000. It would thus be clear that as per the understanding of the parties and the past practice, the petitioner continued to be with the respondents organisation after 16.10.2000.

14. From the above, it would be seen that the last contract/order was dated 23.5.2000. The court took note of the fact that the order dated 23.5.2000, which stated that the term of the employment is six months was

valid for the period from 17.4.2000 to 16.10.2000. Thus, it was issued after the start of the contractual period on 17.4.2000. The Court also took note of the fact that the petitioner had averred that the petitioner's employment was continued *"on a routine basis and fresh contracts were being issued subsequently"*. This fact was not disputed by the respondent-RITES. The Court also took note of the fact that though the contract of employment as per the contract/order dated 23.5.2000 had come to an end on 16.10.2000, the petitioner continued to report for duties and serve the employer. In the light of the facts taken note of hereinabove, the learned Single Judge observed that *"it would be thus clear that as per the understanding of the parties and the past practice, the petitioner continued to be with the respondents organization after 16.10.2000"*. Paras 13 and 14 of this decision read as follows:-

"13. RITES, in my considered opinion, is an establishment covered under the Act. Equally, it is an instrumentality of State (under Article 12 of the Constitution of India) and therefore bound by Part III of the Constitution. The record shows that the petitioner continued in employment till 11.11.2000, as per the RITES itself. The last order, extending the contract of appointment by 6 months, was issued on May, 2000,; the previous period had expired on 17.4.2000. Hence, the period commenced on 17.4.2000, and continued till 16.10.2000. In view of these admitted facts, and the circumstance that the petitioner went on leave with effect from 11.11.2000, after which she delivered a baby on 5.12.2000, the RITES cannot escape its obligation to pay benefits under the Maternity Benefits Act, 1961.

14. I accordingly, partly allow the petition. A direction is issued to the respondent RITES to calculate and release all amounts payable under the Maternity Benefits Act, 1961 (including full salary for the maximum periods of leave permissible under the Act and also the bonus amount admissible) within a period of six weeks from today. No costs.”

15. From the above, it would, firstly, be seen that the learned Single Judge proceeded on the basis that the contractual term was open ended inasmuch, as, the contract was regularly being extended for a period of six months, after the expiry of the period of the contractual period itself, while the petitioner was permitted to continue to serve. Secondly, the directions issued by the learned Single Judge in the ultimate analysis appear to be fair inasmuch, as, the learned Single Judge did not return findings with regard to the specific date when the contract could be treated to have ended. In fact, the learned Single Judge treated the contract as continuing in perpetuity. It is in this background that the petitioner was granted the maternity benefit under the Act without specifying the period for which the same was so granted. The position in this case is totally different, as taken note of hereinabove. The outer limit of the petitioner’s contract was three years-as stipulated in her initial appointment itself. It is not the petitioner’s case that the respondents by their conduct waived the said outer limit of the contract of three years. Thus, the petitioner cannot insist that her contract should be continued beyond the said period of three years, and she cannot, therefore avail of maternity benefit for the period after the expiry of the contractual period. The grant of such a relief would tantamount to extending the period

of contract, which is not the purport and purpose of the Maternity Benefits Act, 1961. We, therefore, do not find any merit in the petition. Dismissed.

VIPIN SANGHI, J

RAJNISH BHATNAGAR, J

AUGUST 19, 2019

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