



WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 18.03.2022

CORAM

THE HONOURABLE MRS.JUSTICE S.SRIMATHY

W.P. (MD)No.4898 of 2022

and

W.M.P. (MD)Nos.4040 and 4041 of 2022

A.Deepalakshmi

... Petitioner

vs.

1.The Government of Tamil Nadu,
represented by Additional Chief Secretary,
Municipal Administration and Water Supply
Department,
Fort St. George, Chennai- 600 009.

2.The Director of Municipal Administration,
No.78, Urban Administrative Building,
Santhome High Road,
Chennai- 600 028.

3.Madurai Corporation,
represented by its Commissioner,
Anna Maaligai,
Madurai- 625 020.

4.The Assistant Commissioner (Personnel),
Maduri Corporation,
Anna Maaligai, Madurai- 625 020.

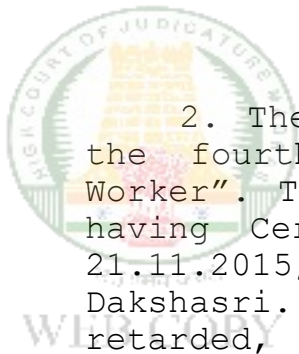
... Respondents

PRAYER: Writ Petition filed under Article 226 of the Constitution of India for issuance of Writ of Certiorarified Mandamus, to call for the records pertaining to the impugned order passed by the 4th respondent in A1/019461/2021, dated 30.12.2021, to quash the same and to direct the respondents to sanction maternity leave to the petitioner for 12 months commencing from 20.09.2021.

For Petitioner	: Mr.M.Saravanan
For R1 and R2	: Mr.N.Satheesh Kumar
	Additional Government Pleader
For R3 and R4	: Mr.K.K.Kannan

O R D E R

This Writ Petition is filed for issuance of a Writ of Certiorarified Mandamus, to quash the impugned order passed by the 4th respondent in A1/019461/2021, dated 30.12.2021 and to direct the respondents to sanction maternity leave to the petitioner for 12 months commencing from 20.09.2021.



2. The brief facts of the case are that the petitioner joined the fourth respondent Corporation on 12.04.2013 as "Unskilled Worker". The petitioner's first child was mentally retarded who is having Cerebral Palsy and she is completely immobilized. On 21.11.2015, the petitioner gave birth to another child, namely, Dakshasri. Since the petitioner's first child was mentally retarded, the petitioner and her husband decided to have one more child. The petitioner was conceived a baby on 13.09.2021 and she applied for maternity leave on 20.09.2021. The petitioner was permitted to go on maternity leave and directed to hand over charges. The petitioner submitted a representation on 10.02.2021, requesting to sanction maternity leave but without considering the praying, the fourth respondents rejected the applications, stating that the petitioner is already having two living children and as per G.O.Ms.No.237, Personnel and Administrative Reforms Department, dated 29.06.1993, the petitioner is not entitled to maternity leave. Aggrieved over the same, the petitioner has filed this Writ Petition.

3. This Writ Petition came up for admission and the respondents were directed to take instructions and submit their arguments. The case was again taken up at 2.15 pm for further arguments. Since the submission of the respondents are based on the G.O. Ms. No. 237, Personnel and Administrative Reforms Department, dated 29.06.1993 and the same is considered as counter on behalf of the respondents. The respondents submitted that the petitioner cannot be granted because as per Clause 5(i) of the G.O.Ms.No.237, wherein it clearly states that maternity leave cannot be granted if the employee is having two living children.

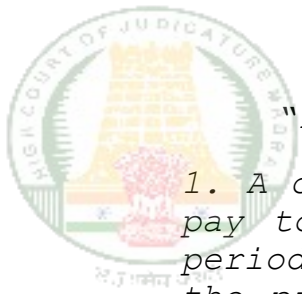
4. Heard Mr.M.Saravanan, learned Counsel appearing for the petitioner, Mr.N.Satheesh Kumar, learned Additional Government Pleader appearing for the for the first and second respondents and Mr.K.K.Kannan, learned Standing Counsel appearing for the third and fourth respondent.

5.It has been stated in G.O.Ms.No.237, that the government servant with less than 2 surviving children is allowed for maternity leave. The relevant portion of the said G.O. 237 is extracted under:

"5) The matter was examined in detail and after careful consideration the following orders are issued:

(i)A Women Government servant with less than two surviving children may be allowed maternity leave for a period of 90 days from the date of its commencement."

6.The said G.O. also states that necessary amendments to the Fundamental Rules will be issued separately. On perusal of the Fundamental Rules, instructions, under Rule 101 (a), it has been stated as under:



"Instructions under Rule 101 (a) - Maternity leave.

1. A competent authority may grant maternity leave on full pay to permanent married women Government servants for a period not exceeding 90 days which may spread over from the pre confinement rest to post confinement recuperation at the option of the Government servant. **The maternity leave will not be admissible to married women Government servants with more than three children.** Non-permanent, married women Government servants, whether appointed in a regular capacity or under the emergency provisions of the relevant service rules should take for maternity purposes, the earned 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 90 days, maternity leave may be granted for a period not exceeding 90 days or for the period that falls short of 90 days, as the case may be. Non-permanent married women Government servants employed under the emergency 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 on and from the 29th June 1993, maternity leave shall be granted to a woman Government servant with less than two surviving children.

(with effect from 29th June 1993)

(G.O. Ms. No. 173, Personnel and Administrative Reforms Department, dated 27th June 1997.)

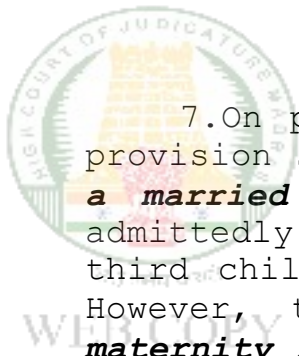
Explanation 1.—Approved probationers in superior service governed by the Tamil Nadu Leave Rules, 1933, shall be eligible for maternity leave as for permanent Government servants.

Explanation 2.—In the case of married women Government servants who are confined during the period of their leave, including extraordinary leave, the 90 days period referred to above shall be reckoned only from the date of confinement.

(G.O. Ms. No. 138, Personnel and Administrative Reforms, dated 26th February 1983—With effect from 1st April 1980.)

Explanation 3.—for the purpose of this instruction, the expression "three living children" shall not include adopted children. 139

[G.O. Ms. No. 192, P & AR (FR III) dt. 25-2-1985.]"



7. On perusing the Fundamental Rules, it is seen that the main provision states that the **maternity leave will not be admissible to a married woman, with more than three children.** In this case, admittedly the petitioner is having three children and this is the third child for which, the petitioner is seeking maternity leave. However, the proviso states **on and from the 29th June 1993, maternity leave shall be granted to a woman Government servant with less than two surviving children** Even though the proviso states that maternity leave shall be granted to the woman with less than 2 surviving children, the main clause says that maternity leave will not be admissible for more than three children. Therefore, this Court is of the considered opinion that the main section will have overriding effect than the proviso. Therefore, this Court is of the considered opinion that the petitioner is entitled to maternity leave.

8. The petitioner relied on the order rendered in W.P.(MD) Nos.9227 and 9274 of 2015 and this Court has held as follows:

"17. Unless there is a law prohibiting / restricting the number of delivery in order to have indirect control over population, then the Government cannot decline maternity leave, fixing the number of children delivered in each delivery as the basis.

18. It is appropriate to quote the highlights of the Maternity Benefit (Amendment) Bill, 2016, as passed by Rajya Sabha, on 11th August 2016, which reads as under:-

Highlights of the Bill:

The Act provides maternity leave up to 12 weeks for all women. The Bill extends this period to 26 weeks. However, a woman with two or more children will be entitled to 12 weeks of maternity leave.

An employer may permit a woman to work from home, if the nature of work assigned permits her to do so. This may be mutually agreed upon by the employer and the woman.

18.1. From the amendment proposed, it is evident that the law is marching towards upholding of rights of women in equal opportunities in employment sector and the increase in the period of maternity leave would reflect the concern for the proper growth and development of the child. When the legislation is progressive, the interpretation cannot be retrogressive."

The petitioner also relied C.W.P.No.18236 of 2015 and the High Court of Punjab and Haryana has held as follows:



"In view of the aforesaid position of facts and law, the present petition is allowed with a direction to the respondents to release payment of salary to the petitioner as Maternity Leave benefit, as envisaged under Section 5 of the Act read with Rule 8.127 of the Rules, without making any reference to Note 4 appended therein. The needful be done within three months from the date of receipt of a certified copy of this order.

The facts of the case in hand also show the insensitivity, with which the administrative machinery in the State of Haryana has dealt with the issue. This is in spite of the law having been authoritatively settled by this Court, challenge to which before the Apex Court was withdrawn by the State of Haryana and the specific observations made by this Court in Krishna Devi's case (supra) asking the Secretary of the respondent Department to sensitize the concerned officials with regard to the authoritative pronouncements of this Court so that identically placed employees are not forced to knock the doors of this Court. Apparently, the observations made by this Court have not been paid heed to by respondent no.1. What is more disturbing is the defiant attitude of the respondent MONIKA 2015.11.18 16:11 I attest to the accuracy and authenticity of this document authorities, as projected through the affidavit dated 03.10.2015, filed in response to the present petition, by Mr. R. S. Kharb, Director Elementary Education, Haryana, Panchkula, who, in spite of being made aware of the authoritative pronouncements by this Court, which were appended as Annexures with the present petition, chose to again defend the illegal action of the State.

In view of the above, respondent no. 1 - Mrs. Keshni Anand Arora, Additional Chief Secretary, Department of School Education, Haryana and respondent no. 2 - Mr. R. S. Kharb, Director Elementary Education, Haryana, Panchkula be issued notices for 27.11.2015 so as to why proceedings under the Contempt of Courts Act, 1971 be not initiated against them.

For proceedings under the Contempt of Courts Act, 1971, the matter be placed before the appropriate Bench as per Roster, after obtaining orders of Hon'ble the Acting Chief Justice in this regard."

The petitioner also relied on Civil Writ Petition No.4229 of 2011, the High Court of Punjab and Haryana has held as follows:

"The Act nowhere restricts the benefit of payment of



maternity benefits to birth of two children. In other words, the provisions of the Act entitle the woman employee to maternity benefits for the birth of third child too. We are conscious that by Note 4 to Rule 8.127 of the Punjab Civil Services Rules Volume I Part I, the State Government intended to achieve a laudable object but such an object cannot be given effect to till the establishments of the Government are amenable to the Act. Unless an amendment is carried out in the Act, the Government cannot restrict beneficial provisions of the Act to a woman employee for the birth of a third child. Such a restriction imposed under the Rules is contrary to Section 27 of the Act and cannot sustain in the eyes of law. In Vasu Dev and Others v. Union of India and Others (2006)12 Supreme Court Cases 753 wherein the validity of Section 3 of the East Punjab Urban Rent Restriction Act, 1949 was challenged, the Hon'ble Apex Court referred to a large number of decisions on subordinate legislation and held as under:-

"118. A statute can be amended, partially repealed or wholly repealed by the legislature only.

The philosophy underlying a statute or the legislative policy, with the passage of time, may be altered but therefor only the legislature has the requisite power and not the executive. The delegated legislation must be exercised, it is trite, within the parameters of essential legislative policy. The question must be considered from another angle. Delegation of essential legislative function is impermissible. It is essential for the legislature to declare its legislative policy which can be gathered from the express words used in the statute or by necessary implication, having regard to the attending circumstances. It is impermissible for the legislature to abdicate its essential legislative functions. The legislature cannot delegate its power to repeal the law or modify its essential features..."

To similar effect is the law laid in Employees' State Insurance Corporation v. HMT Limited and Another (2008)3 Supreme Court Cases 35 as their Lordships of the Hon'ble Apex Court held as under:-

"24. We agree with the said view as also for the additional reason that the subordinate legislation cannot override the principal legislative provisions..."



Thus, we are of the opinion that Note 4 to Rule 8.127 of the Punjab Civil Services Rules Volume I Part I is not in consonance with the provisions of the Act and this cannot be given effect to and the petitioner cannot be deprived of the maternity benefit for the birth of a third child.

Since our answer to question No.2 is conclusively answered in favour of the petitioner and the petitioner is held entitled to the maternity leave under the provisions of the Act, thus, there is no need to answer rest of the two questions posed before us as it will not be fruitful to undertake issues which have become academic only.

To conclude, the answer to first question is in favour of the State. Classification made on the basis of a number of children is justifiable, however, question No.2 is answered in favour of the petitioner as the rules framed by the Government are not in conformity with the Act. Hence, till an amendment is carried in the Act, the rules framed by the State Government will not curtail the benefit which had accrued to the petitioner in view of the Act. Answers to questions No.3 and 4 are not necessary for the present controversy, hence, are left open to be answered in future as and when need arise."

9.The Fundamental Rules states the maternity leave will not be admissible to a married woman, with more than three children and therefore this Court it of the considered opinion that the woman employee is entitled to maternity benefits for the birth of third child also. Moreover, the judgments referred supra states that the woman is entitled to maternity leave unless the Act restricts / ban to have third child. Since there is no such ban the petitioner is entitled to medical leave and therefore, the respondents are directed to provide maternity leave for 12 months.

10.With the above direction, the Writ Petition is allowed. No costs. Consequently, connected miscellaneous petitions are closed.

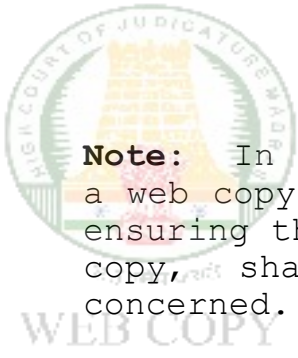
Sd/-

Assistant Registrar(CS-I)

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/ /2022

Sub Assistant Registrar(CS)



Note: In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the Advocate/litigant concerned.

To

- 1.The Additional Chief Secretary,
Government of Tamil Nadu,
Municipal Administration and Water Supply
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- 2.The Director of Municipal Administration,
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Anna Maaligai,
Madurai- 625 020.
- 4.The Assistant Commissioner (Personnel),
Maduri Corporation,
Anna Maaligai, Madurai- 625 020.

+1 CC to M/s.R.SUBRAMANIAN, Advocate (SR-13144[F] dated 21/03/2022)

+1 CC to M/s.SPL GP (SR-13172[F] dated 21/03/2022)

+1 CC to M/s.K.K.KANNAN, Advocate (SR-13262[F] dated 21/03/2022)

W.P. (MD)No.4898 of 2022

Date:18.03.2022

SA(31.03.2022) 8P 8C