



2023:DHC:7271



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

% **Reserved on: 3rd August 2023**
Pronounced on: 6th October 2023

+ W.P.(C) 13075/2019 & CM APPL No. 53328/2019

REHMAT FATIMA Petitioner

Through: Mr.Syed Hasan Isfahani and
Mr.Syed Mohd. Hassan, Advocates

versus

STATE OF NCT OF DELHI THROUGH PRINCIPAL
SECRETARY & ORS Respondents

Through: Ms. Jyoti Tyagi and Ms. Manisha,
Advocates for R-1 to 3

CORAM:

HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

J U D G M E N T

CHANDRA DHARI SINGH, J.

1. The present writ petition has been filed under Article 226 of the Constitution of India aggrieved by denial of maternity benefits and termination of petitioner who was working as contractual employee. By way of the instant writ petition, the petitioner is seeking the following reliefs-

“a) issue writ of mandamus directing the Respondents to allow the petitioner to continue on the post of stenographer on contractual basis and not to replace the petitioner with similarly situated contractual employees; and

b) issue writ of mandamus directing the respondents to pay/grant all the maternity benefits to the petitioners of maternity leave;

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c) issue writ of mandamus directing the respondents to pay the salary/remuneration to the Petitioner for period from 01.07.2019 till illegal termination of service i.e., 17.10.2019.

d) pass such and further orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the present case."

FACTUAL MATRIX

2. On 7th February 2013, the petitioner was appointed as a stenographer on a contractual basis for a period of one year with the respondent no. 3 i.e., Delhi State Consumer Forum, on the terms and conditions enumerated in the offer letter of appointment. The said contract was extended by one year on 10th March 2014, w.e.f., 11th February 2014.

3. The said contract was extended further as per the appointment letter dated 20th March 2015, w.e.f. 13th February 2015, till 31st March 2015. Pursuant to this, the appointment of the petitioner was extended from 1st April 2015 till 31st March 2016 vide an appointment letter dated 28th August 2015.

4. The tenure of the petitioner was again extended from 2nd April 2016, to 31st March 2017, vide letter dated 28th September 2016, pursuant to which petitioner was given extension from 2nd April 2017, to 31st March 2018, vide letter dated 21st July 2017.

5. The petitioner on 28th February 2018, submitted a letter to respondent no. 3's office for maternity leave of 180 days w.e.f., 1st March 2018, to 31st August 2018, and went on leave from 1st March 2018.

6. When the petitioner joined back on 28th August 2018, the respondent no. 3 did not allow the petitioner to resume her duties, since



the petitioner's contract was not extended after the expiry of the contract on 31st March 2018.

7. The petitioner was allowed to join subsequently, vide an appointment letter dated 15th November 2018, whereby, the petitioner was appointed on a contractual basis w.e.f. 8th September 2018, till 30th June 2019.

8. On 17th October 2019, the petitioner was informed that her services were no longer required and was further directed to not to come on duty from the next day. Subsequent to this, petitioner sought clarification with respect to the reasons for issuance of such directions but the Registrar of the respondent no.3 did not assign any reasons. On alleged repeated requests, petitioner was told that the proposals for extension of services of two stenographers were sent to the Finance Department but only one was approved.

9. Pursuant to the directions passed by the respondent on 17th October 2019, the petitioner regularly visited the office respondent no. 3, but she was neither allowed to join her duties nor was given any written communication in this regard. Aggrieved by this, the petitioner filed a representation dated 1st November 2019, before the Chief Minister of Delhi, and the same was forwarded for appropriate action but no substantive action has been taken yet. Hence, the present writ petition.

10. The petitioner had initially filed its petition to which the respondent no.3 filed its counter affidavit. Pursuant to which the petitioner filed its rejoined. Vide order dated 19th September 2022 the petitioner by way of an application under Order VI Rule 17 of the Code of Civil Procedure, 1908, filed an application for amendment of her writ



petition which was allowed and consequently, the petitioner filed the amended writ petition. As per the amended petition, the petitioner prayed for maternity benefits along with her re-instatement to the concerned post. The respondents filed its counter- affidavit to the said petition contending thereto, that the petitioner being a contractual employee whose term was over is not entitled to any maternity benefit. Moreover, the petitioner cannot be appointed to the said position since, the said post has been abolished.

SUBMISSIONS

(On behalf of the petitioner)

11. Learned counsel appearing on behalf of the petitioner submitted that as per Section 5 of the Maternity Benefit (Amendment) Act, 2017, (hereinafter “the Maternity Benefit Act”) the petitioner is entitled to seek the maternity benefits and while denying such benefits, the respondent is violating the petitioner’s legal rights. Section 3(o) of the said Act includes women employed for wages in any establishment and as per Section 3(n), wages include all remuneration paid to a woman in terms of a contract of employment etc. Therefore, the petitioner is entitled to the benefits.

12. It is submitted that no reasons, whatsoever, have been assigned by the Registrar or the President of respondent no. 3, for directions to the petitioner stating that she is not required to join her duties.

13. It is submitted that the acts of respondent no. 3 are arbitrary, unjustified and are in violation of principles of natural justice. It is also submitted that termination of the petitioner is violative of circular issued by the Government of Delhi in the year 2015.



14. The learned counsel for the petitioner submitted that the rights of the petitioner as laid down under Articles 14, 15(3), 16, 19(1)(g) and 42 of the Constitution of India, are being violated due to the inaction of the respondent in not allowing her the maternity benefits and by issuing the above said directions..

15. It is further submitted that the maternity benefits granted to women are substantial for their personal health as well as for the well-being of her children and denial of the same would amount to economic and social injustice.

16. It is contended that the respondent no.3 is denying maternity benefits arbitrarily and there is no valid or material reason given by the said respondent for the same.

17. It is also contended by the counsel for petitioner that the petitioner was the senior most contractual employee and she must have been given preference in service over other employees/candidates.

18. It is submitted that petitioner was duly employed when she went on maternity leave and her contract should have been duly extended. Moreover, the termination, after the petitioner joined, was illegal since no reasons were assigned behind such action and hence the petitioner prays for the maternity benefits and her re-instatement.

19. It is submitted that the petitioner objected the same stating that she was on maternity leave and her old contract should have been extended for further year. In view of the said contentions, the learned counsel for the petitioner, prayed that a writ of mandamus may be issued, thereby, directing the respondent to grant all the consequential maternity benefits



to the petitioner that are available for the regular employees of the respondent along with her reinstatement to the concerned post.

(On behalf of the respondents)

20. *Per Contra*, learned counsels appearing on behalf of the respondents submitted that the petitioner was a contractual employee and has no legal right to claim either the continuation, regularisation, or maternity benefits on the concerned post. It is further submitted that due to the said reason the respondent no.3 never sanctioned the maternity leave of the petitioner.

21. It is submitted that in terms of petitioner's offer letter no maternity leave is admissible to her and furthermore, during the impugned period she was not on the roll of respondent no. 3 State Commission. Therefore, the petitioner not being on roll is not entitled to any benefit from the respondent no.3.

22. It is submitted that granting of maternity benefits by the Court would amount to re-writing the contract beyond the prescribed period.

23. It is further submitted that though the petitioner made a request for extension of contract vide letter dated 19th February 2018, however, the same was never approved and the contractual engagement of the petitioner came to an end on 31st March 2018 with the efflux of time.

24. It is submitted that that the service contract of the petitioner states that the services of the petitioner could be terminated at any time without any specific reason on or before the completion of contract and hence the petitioner is estopped from seeking any reason for her termination. Thus,



it is submitted that the petitioner accepted such service condition and is estopped from seeking any reason for termination of her services.

25. It is contended that the impugned termination was not against her appointment prior to her absence from services, but a new contract was entered into upon her fresh application dated 1st September 2018, consequentially a fresh contractual appointment was offered vide an offer letter dated 15th November 2018, w.e.f. 8th September 2018, till 30th June 2019, on a consolidated salary of Rs. 27,285/-, per month and without any additional amount, whatsoever.

26. It is submitted that the petitioner was only allowed to join pursuant to the fresh contract against the same terms and conditions as she initially joined at post of stenographer was not sanctioned, and her contract was not continuous.

27. It is submitted that the services of the petitioner was terminated upon the abolition of the regular post of one stenographer, on which the petitioner was appointed on a contractual basis.

28. It is, hence, submitted on behalf of the respondent that the claims raised by and on behalf of the petitioner are misconceived and there exists no entitlement in favour of the petitioner regarding maternity benefits. Therefore, it is prayed that the instant petition be dismissed.

29. Having heard both parties at length, following issues emerge before this Court-

1. Whether the petitioner is entitled for maternity benefits out of her contractual services to the respondent despite the fact that the petitioner's maternity benefits extended beyond her contractual period?



2. Whether the writ of mandamus may be issued by this Court directing the respondents to allow the petitioner to continue on the post of stenographer on contractual basis and not to replace the petitioner with similarly situated contractual employees?

30. Now this Court will adjudicate upon the issue no. 1. Before proceeding any further, this Court has reiterated the legislative intent behind enactment of the Act which is as follows:

“An Act to regulate the employment of women in certain establishments for certain periods before and after child-birth and to provide for maternity benefit and certain other benefits.”

31. To adjudicate upon the issue, the provisions of the Act invoked by the petitioner may be examined to understand the nature of claims so raised. The applicability of the Act is discussed under Section 2, which reads as under:

“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 [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."

32. In the clause 1(b) of the provision, the bare language of the statute indicates that the benefits arising out of the Act are also to be made applicable to an establishment within the meaning of law in force in a State in which ten or more persons are/were employed on any day of the preceding twelve months. The word 'establishment' has been defined under Section 3(e) of the Maternity Benefit Act as follows:

"(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;

[(iva) 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;"

33. As per the conjoint reading of the aforesaid provisions it is apparent that an establishment, in the sense as has been stipulated under



the Act, means to include an establishment in a State in which ten or more persons are employed and to which the implications under Section 2(1) are extended. Further, the petitioner has invoked Section 5 of the Maternity Benefit Act, which reads as under:

“5. Right to payment of maternity benefit.—

[(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, [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 of [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 this sub-section the days on which a woman has actually worked in the establishment, [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 4[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 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 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.]"

34. The extent of benefits regarding maternity leaves and the payment/remuneration thereto being provided under the Act are summed



up in this provision. The beneficiaries of the Act are entitled to maternity benefits at the rate of the average daily wage for the period of their actual absence that is, the period immediately preceding the day of their delivery, the actual day of their delivery and any period immediately following that day. The provision also lays down the extent to which such benefits may be granted by the employer and as such put certain bars of time period which may be sought to be claimed as maternity leave. The provision extends the protection or reliefs to surrogate and adopting mothers, which shows the intent to secure the interests of the child, irrespective of how the child may be conceived, keeping in mind the natural care that is required by a child.

35. The women who are subject matters of the Act have also been defined under Section 3(o) as under:

“(o) “woman” means a woman employed, whether directly or through any agency, for wages in any establishment.”

36. The words used ‘for wages in any establishment’ can be construed upon perusing the definition of wages which states that the same shall include the following:

“(n) “wages” means all remuneration paid or payable in cash to a woman, if the terms of the contract of employment, express or implied, were fulfilled and includes—

(1) such cash allowances (including dearness allowance and house rent allowance) as a woman is for the time being entitled to;

(2) incentive bonus; and

(3) the money value of the concessional supply of



foodgrains and other articles, but does not include—

(i) any bonus other than incentive bonus;

(ii) over-time earnings and any deduction or payment made on account of fines;

(iii) any contribution paid or payable by the employer to any pension fund or provident fund or for the benefit of the woman under any law for the time being in force; and

(iv) any gratuity payable on the termination of service;”

37. In light of the various provisions of the Act pertaining to the definition of “employer”, “establishment”, and section 5 of the Act which deals with the right to payment of maternity benefits, it evident that the Act has been deliberately kept wide enough by the legislature to cover in its ambit maximum possible employers and employees.

38. In light of which, by giving wide definitions to the words and phrases used in the act, among others ‘organisation’ and ‘employer’, it can be inferred that this is a welfare legislation and aimed at giving benefits to working women at large.

39. As per the Act, if a woman has been working at any organisation as covered in the definition of act, and she has worked there for a minimum period of eighty days, thereafter has given a notice to the employer regarding her pregnancy, she would be entitled to the benefits as per the Act.



40. Now, the question which arises for consideration is whether the woman working on contractual period maybe extended benefits beyond the period of her contract as per the Act.

41. It is pertinent to reiterate the position that has been time and again taken by the Hon'ble Supreme Court as well as the various Courts of the Country regarding the extension of maternity of benefits equally across organisations, irrespective of the nature of employment of the female worker. The Hon'ble Supreme Court in ***Dr. Kavita Yadav v the Secretary, Ministry of Health and Family Welfare Department & Ors.*** 2023 SCC OnLine SC 1067 wherein after analysis provisions of the Act and legislative intent, observed as follows:

“6. We have reproduced earlier in this judgment the provisions of Section 12(2)(a) of the 1961 Act. The aforesaid provision contemplates entitlement to the benefits under the 1961 Act even for an employee who is dismissed or discharged at any time during her pregnancy if the woman, but for such discharge or dismissal, would have been entitled to maternity benefits or medical bonus. Thus, continuation of maternity benefits is in-built in the statute itself, where the benefits would survive and continue despite the cessation of employment. In our opinion, what this legislation envisages is entitlement to maternity benefits, which accrues on fulfilment of the conditions specified in Section 5(2) thereof, and such benefits can travel beyond the term of employment also. It is not co-terminus with the employment tenure. A two Judge Bench of this Court in the case of Municipal Corporation of Delhi v. Female Workers (Muster Roll) [(2000) 3 SCC 224], while dealing with a similar claim by female muster roll workers who were employed on daily wages, opined that the provisions relating to maternity benefits in the 1961 Act would be applicable in their cases as well. That dispute had reached this Court through the Industrial Tribunal and the High Court. Before both these



fora, the Union espousing the cause of the female workers was successful. In that case, point of discrimination was highlighted as regular women employees were extended the benefits of the said Act but not those who were employed on casual basis or on muster roll on daily wage basis. This Court observed, in paragraph 27 of the said judgment:—

“27. The provisions of the Act which have been set out above would indicate that they are wholly in consonance with the Directive Principles of State Policy, as set out in Article 39 and in other articles, specially Article 42. A woman employee, at the time of advanced pregnancy cannot be compelled to undertake hard labour as it would be detrimental to her health and also to the health of the foetus. It is for this reason that it is provided in the Act that she would be entitled to maternity leave for certain periods prior to and after delivery. We have scanned the different provisions of the Act, but we do not find anything contained in the Act which entitles only regular women employees to the benefit of maternity leave and not to those who are engaged on casual basis or on muster roll on daily-wage basis.”

7. Broadly, a similar view is reflected in a more recent judgment of this Court in the case of Deepika Singh v. Central Administrative Tribunal [(2022) 7 SCR 557]. Though this decision dealt with Central Civil Services (Leave) Rules, 1972, in relation to maternity leave and the 1961 Act was not directly applicable in that case, this Court analysed certain provisions of this Act to derive some guidance on a cognate legislation. This Court observed in the case of Deepika Singh (supra):—

“19. Sub-section (1) of Section 5 confers an entitlement on a woman to the payment of maternity benefits at a stipulated rate for the period of her actual absence beginning from the period immediately preceding the day of her delivery, the actual day of her delivery and any period immediately following that day. Sub-section



(3) specifies the maximum period for which any woman shall be entitled to maternity benefit. These provisions have been made by Parliament to ensure that the absence of a woman away from the place of work occasioned by the delivery of a child does not hinder her entitlement to receive wages for that period or for that matter for the period during which she should be granted leave in order to look after her child after the birth takes place.

20. The Act of 1961 was enacted to secure women's right to pregnancy and maternity leave and to afford women with as much flexibility as possible to live an autonomous life, both as a mother and as a worker, if they so desire. In Municipal Corporation of Delhi v. Female Workers (Muster Roll), a two-judge Bench of this Court placed reliance on the obligations under Articles 14, 15, 39, 42 and 43 of the Constitution, and India's international obligations under the Universal Declaration of Human Rights 1948 and Article 11 of the Convention on the Elimination of All Forms of Discrimination Against Women to extend benefits under the Act of 1961 to workers engaged on a casual basis or on muster roll on daily wages by the Municipal Corporation of Delhi. The Central Civil Services (Leave) Rules, 1972, it is well to bear in mind, are also formulated to entrench and enhance the objects of Article 15 of the Constitution and other relevant constitutional rights and protections.”

8. In the light of the ratio laid down in the aforesaid two authorities and having regard to Section 27 of the 1961 Act, which gives overriding effect to the statute on any award, agreement or contract of service, in our opinion, the High Court erred in law in holding that the appellant was not entitled to maternity benefits beyond 11th June 2017.

9. The respondents sought to distinguish the present dispute from the case of Female Workers (Muster Roll) (supra) on



the ground that the said case arose from an award of the Industrial Tribunal and that there was a finding by the Tribunal that the muster roll lady workers were working for a long period of time. But the fact remains that in law, daily-wage workers cannot be said to have continuity of service for an unlimited period. The effect of that judgment was that their tenure also stood notionally extended so far as application of maternity benefits under the 1961 Act was concerned.

10. Our independent analysis of the provisions of the 1961 Act does not lead to an interpretation that the maternity benefits cannot survive or go beyond the duration of employment of the applicant thereof. The expression employed in the legislation is maternity benefits [in Section 2(h)] and not leave. Section 5(2) of the statute, which we have quoted above, stipulates the conditions on the fulfilment of which such benefits would accrue. Section 5(3) lays down the maximum period for which such benefits could be granted. The last proviso to Section 5(3) makes the benefits applicable even in a case where the applicant woman dies after delivery of the child, for the period she would have been otherwise entitled to. Further, there is an embargo on the employer from dismissing or discharging a woman who absents herself from work in accordance with the provisions of the Act during her absence. This embargo has been imposed under Section 12(2)(a) of the Act. The expression “discharge” is of wide import, and it would include “discharge on conclusion of the contractual period”. Further, by virtue of operation of Section 27, the Act overrides any agreement or contract of service found inconsistent with the 1961 Act.

11. In our opinion, a combined reading of these provisions in the factual context of this case would lead to the conclusion that once the appellant fulfilled the entitlement criteria specified in Section 5(2) of the Act, she would be eligible for



full maternity benefits even if such benefits exceed the duration of her contract. Any attempt to enforce the contract duration term within such period by the employer would constitute “discharge” and attract the embargo specified in Section 12(2)(a) of the 1961 Act. The law creates a fiction in such a case by treating her to be in employment for the sole purpose of availing maternity benefits under the 1961 Act.”

42. In light of the aforementioned judgment, the Hon’ble Supreme Court settled the law pertaining to the accrual of the maternity benefits to the contractual employees. The Hon’ble Court held that the term used in the Section 2(h) of the Act is ‘maternity benefit’ and not leave. As per Section 5(2) of the Act, enunciates the conditions necessary for being entitled to the benefits under the Act. Furthermore, Section 5(3) of the Act, encapsulates the maximum period for which such benefits are given and as per the last proviso to Section 5(3) of the Act, it is stated that the benefits are applicable even in a case where the applicant woman dies after the delivery of her child, for the entire period she would have been otherwise entitled to. Moreover, there is a prohibition on the employer regarding termination of the employment of the woman who absents herself from work, as per Section 12 (2)(a) of the Act.

43. The Hon’ble Supreme Court in the case of ***Municipal Corporation of Delhi v. Female Workers (Muster Roll) & Anr. 2000 (3)SCC 224***, while dealing with a claim for maternity benefits by female muster roll workers who were employed on daily wages, opined that the provisions relating to maternity benefits in the 1961 Act, would be applicable in their cases as well. The relevant paragraphs of the same have been reproduced herein below:



“27. The provisions of the Act which have been set out above would indicate that they are wholly in consonance with the Directive Principles of State Policy, as set out in Article 39 and in other articles, specially Article 42. A woman employee, at the time of advanced pregnancy cannot be compelled to undertake hard labour as it would be detrimental to her health and also to the health of the foetus. It is for this reason that it is provided in the Act that she would be entitled to maternity leave for certain periods prior to and after delivery. We have scanned the different provisions of the Act, but we do not find anything contained in the Act which entitles only regular women employees to the benefit of maternity leave and not to those who are engaged on casual basis or on muster roll on daily-wage basis.”

“6. Not long ago, the place of a woman in rural areas had been traditionally her home; but the poor illiterate women forced by sheer poverty now come out to seek various jobs so as to overcome the economic hardship. They also take up jobs which involve hard physical labour. The female workers who are engaged by the Corporation on muster roll have to work at the site of construction and repairing of roads. Their services have also been utilised for digging of trenches. Since they are engaged on daily wages, they, in order to earn their daily bread, work even in an advanced stage of pregnancy and also soon after delivery, unmindful of detriment to their health or to the health of the new-born. It is in this background that we have to look to our Constitution which, in its Preamble, promises social and economic justice. We may first look at the fundamental rights contained in Part III of the Constitution. Article 14 provides that the State shall not deny to any person equality before law or the equal protection of the laws within the territory of India. Dealing with this article vis-à-vis the labour laws, this Court in Hindustan Antibiotics Ltd. v. Workmen [AIR 1967 SC 948 : (1967) 1 SCR 652 : (1967) 1 LLJ 114] has held that labour to whichever sector



it may belong in a particular region and in a particular industry will be treated on equal basis. Article 15 provides that the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. Clause (3) of this article provides as under:

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

7. In Yusuf Abdul Aziz v. State of Bombay [AIR 1954 SC 321 : 1954 SCR 930] it was held that Article 15(3) applies both to existing and future laws.

8. From Part III, we may shift to Part IV of the Constitution containing the Directive Principles of State Policy. Article 38 provides that the State shall strive to promote the welfare of 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. Sub-clause (2) of this article mandates that the State shall strive to minimise the inequalities in income and endeavour to eliminate inequalities in status, facilities and opportunities.

11. It is in the background of the provisions contained in Article 39, specially in Articles 42 and 43, that the claim of the respondents for maternity benefit and the action of the petitioner in denying that benefit to its women employees has to be scrutinised so as to determine whether the denial of maternity benefit by the petitioner is justified in law or not.

12. Since Article 42 specifically speaks of “just and humane conditions of work” and “maternity relief”, the validity of an executive or administrative action in denying maternity benefit has to be examined on the anvil of Article 42 which, though not enforceable at law, is nevertheless available for determining the legal efficacy of the action complained of.



13. Parliament has already made the Maternity Benefit Act, 1961. It is not disputed that the benefits available under this Act have been made available to a class of employees of the petitioner Corporation. But the benefit is not being made available to the women employees engaged on muster roll, on the ground that they are not regular employees of the Corporation. As we shall presently see, there is no justification for denying the benefit of this Act to casual workers or workers employed on daily-wage basis.

27. The provisions of the Act which have been set out above would indicate that they are wholly in consonance with the Directive Principles of State Policy, as set out in Article 39 and in other articles, specially Article 42. A woman employee, at the time of advanced pregnancy cannot be compelled to undertake hard labour as it would be detrimental to her health and also to the health of the foetus. It is for this reason that it is provided in the Act that she would be entitled to maternity leave for certain periods prior to and after delivery. We have scanned the different provisions of the Act, but we do not find anything contained in the Act which entitles only regular women employees to the benefit of maternity leave and not to those who are engaged on casual basis or on muster roll on daily-wage basis.

33. A just social order can be achieved only when inequalities are obliterated and everyone is provided what is legally due. Women who constitute almost half of the segment of our society have to be honoured and treated with dignity at places where they work to earn their livelihood. Whatever be the nature of their duties, their avocation and the place where they work, they must be provided all the facilities to which they are entitled. To become a mother is the most natural 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. The Maternity Benefit Act, 1961 aims to provide all these facilities to a working woman in a dignified manner so that she may overcome the state of motherhood honourably, peaceably, undeterred by the fear of being victimised for forced absence during the pre-or post-natal period.

34. Next it was contended that the benefits contemplated by the Maternity Benefit Act, 1961 can be extended only to workwomen in an “industry” and not to the muster-roll women employees of the Municipal Corporation. This is too stale an argument to be heard. Learned counsel also forgets that the Municipal Corporation was treated to be an “industry” and, therefore, a reference was made to the Industrial Tribunal, which answered the reference against the Corporation, and it is this matter which is being agitated before us.

37. Delhi is the capital of India. No other city or corporation would be more conscious than the city of Delhi that India is a signatory to various international covenants and treaties. 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) the right to work as an inalienable right of all human beings;



(b) the right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;

(c) the right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;

(d) the right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;

(e) the right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;

(f) the right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.

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.”

44. The aforesaid judgment passed by the Hon’ble Supreme Court created a spur across the Country, leading several Courts to grant benefits to the working women who had been denied such reliefs on hyper technical grounds. The findings of the Hon’ble Supreme Court laid out the nexus between the intent and objective of the framers of the Constitution in granting liberties, freedoms, and rights to its citizens, in this context to women, and the benefits which accrue to them by way of the Maternity Benefit Act.

45. The above said judgment further led the way for granting equitable rights to women employees in an organization with respect to the maternity benefits irrespective of the nature of their employment. It was observed that the words used in the Maternity benefit Act are not to be taken in their plain meaning to say that the Act and the entitlements arising thereto, are only for the women working in industries but shall extend to women employees working in both organized and unorganized



sector. The view taken by the Hon'ble Supreme Court has been followed for the subsequent two decades and has been reiterated by the Courts of the Country.

46. The High Court of Himachal Pradesh in *State of H.P. and Ors. vs. Sudesh Kumari* and connected matter *State of H.P. and Ors. vs. Alpana*, collectively reported as **2014 SCC OnLine HP 4844**, while upholding the decision of the writ court quashing the Office Memorandum in question, on the issue of maternity benefits being extended to all employees equally held as follows:

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

9. The claim of maternity leave is founded on the grounds of fair play and social justice. There cannot be discrimination and if any discrimination is made, it is in breach of Articles 14 and 15 of the Constitution...

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



47. This Court in ***Govt. of NCT of Delhi vs. Shweta Tripathi, 2014 SCC OnLine Del 7138***, while dismissing a challenge to a decision of the Central Administrative Tribunal, whereby it was held that GNCTD could not treat two women employees differently on the question of grant of maternity benefits due to the nature of their employment, held as under:

"6. The CAT's reasoning is premised upon its previous ruling in Dr. Shilpa (supra) which has, in turn, relied upon several other judgments, including that of the Supreme Court in the Female Workers (Muster Roll) (supra) as well as Neetu Chaudhary (Smt.) v. State of Rajasthan 2008 (2) RLW 1404 (Raj). The reasoning adopted by the CAT, for proceeding in the way it did, is that the higher benefit which is given to employees who are not contractual but are borne in the establishment of the GNCTD itself, is a standard which should not have been deviated. This Court is of the opinion that keeping in mind the larger public interest subserved in the grant of maternity benefit, the GNCTD, as a model employer, which is bound by Articles 14 and 16(1), could not have discriminated between two female employees, for the purpose of maternity benefit, on the basis that one of them is a contractual employee and thus entitled to lesser extent of pay, whereas the other, being a permanent employee, could be favoured with a better term. This cannot be treated as a reasonable classification, considering the object of the rule for grant of maternity benefit."

48. In the case of ***Dr. Deepa Sharma vs. State of Uttarakhand & Ors. 2016 SCC OnLine Utt 2015***, the High Court of Uttarakhand was also faced with a similar situation where the maternity leave of the petitioner, being a contractual employee, was not sanctioned. While allowing the claims of the petitioner, the High Court passed the following observations and directions:



“10. Maternity benefit is a social insurance. There should be a system for breast feeding/nursing care at the workplace. The maternity leave is key for maternal and child health and family support. The maternity leave is of utmost importance to fight against social injustice, poverty and gender inequality.

11. The 44th Session of Indian Labour Conference (ILC) has also recommended for enhancing maternity leave under Maternity Benefit Act, 1961. This recommendation was reiterated in 45 and 46 Session of ILC.

12. A male government servant is also entitled paternity leave for a period of at least three weeks to enable the father to look after the mother and child. A female employee appointed on regular basis, contractual basis, ad hoc/tenure or temporary basis is also entitled to child adoption leave for a period of 135 days' in case of valid adoption of child below the age of one year.

13. A female government employee is also entitled to Child Care Leave (CCL), as per the recommendation of the 6 Central Pay Commission of 730 days' during the entire service. However, it will not be admissible, if the child is 18 years of age or older. The women employees shall be paid leave salary equal to the pay drawn immediately before proceeding on leave. It can be availed of in more than one spell. As per the Government of India, Department of Personnel and Training order dated 11.09.2008, it can be combined with leave of the kind due and admissible.

15. The International Labour Organization (ILO) has conducted the survey for maternity and paternity at work (Law and practice across the world) in 2014. The survey has covered the period w.e.f. 1994-2013 for duration of maternity leave across the world, maternity cash benefits, finance of maternity cash benefits, scope and eligibility requirements. The survey has also been undertaken for paternity, parental and adoption leave as well as protection



of employment during maternity and non-discrimination in employment in relation to maternity, healthy arrangement of working time and arrangement of nursing breaks.

16. We are required to make labour laws in conformity with the recommendations made by the International Labour Organization read with Article 42 of the Constitution of India.

17. According to the Article 42 of the Constitution of India, “the State is required to make provision for securing just and humane conditions of work and for maternity relief.”

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

20. Thus, the petitioner cannot be denied the maternity leave w.e.f. 07.01.2015 to 07.06.2015 with full pay. The decision to deny the maternity leave to the petitioner was arbitrary, thus, violative of Articles 14 and 16 of the Constitution of India.

21. Accordingly, the writ petition is allowed with the following mandatory directions: -

a.) Respondents are directed to grant maternity leave to the petitioner with full pay w.e.f. 07.01.2015 to 07.06.2015 within eight weeks from today.

b.) The respondent-State is also directed to grant maternity leave to all the female employees with full pay for 180 days, even working on contractual basis, ad



hoc/tenure or temporary basis.

c.) The State Government is further directed to grant at least 60 days' maternity leave to the daily wage female employees working for more than 240 days' in a block of 12 months calendar with full wages.

d.) The State Government is directed to provide every establishment to have the facility of crèche having 50 or more than 50 employees with liberty reserved to the mother to visit the crèche/nursing care at least four times daily, including the interval for rest allowed to the employees.

e.) The State Government is also directed to grant Child Care Leave (CCL) of 730 days' to all the female employees, whether appointed on regular basis, contractual basis, ad hoc/tenure or temporary basis having minor children with a rider that the child should not be more than 18 years of age or older. The female employees shall be entitled to paid leave equal to the pay drawn immediately before proceeding on leave. CCL can be combined with leave of the kind due and admissible.

f.) The State Government is also directed to grant 15 days' paternity leave to a male employee appointed on regular basis, contractual basis, ad hoc/tenure or temporary basis to enable the father to look after the mother and child. This leave can be combined with leave of any other kind.

g.) The State Government is also directed that a female employee appointed on regular basis, contractual basis, ad hoc/tenure or temporary basis, with fewer than two surviving children, on valid adoption of a child below the age of one year be granted child adoption leave for a period of 135 days' immediately after the date of valid adoption.



h.) The State Government shall not dismiss, terminate, remove any female employee whether appointed on contractual basis, ad hoc/tenure or temporary basis immediately before her delivery and thereafter to deprive her of maternity leave, adoption leave and child care leave etc.

i.) The Chief Secretary shall personally be responsible to comply with these mandatory directions in letter and spirit.”

49. The High Court of Madhya Pradesh in ***Smt. Brijlata Sharma vs. the State of Madhya Pradesh, 2017 SCC OnLine MP 958*** also observed that the question whether a contractual employee is entitled to the benefit of child care leave is no more *res integra* after the decision of the Hon'ble Supreme Court in ***Female Workers (Muster Roll) case*** and while observing so passed the decision in favour of the female employee holding that her claim for child care leave could not be rejected because she is a contractual teacher.

50. Further, the Punjab and Haryana High Court also upheld the view that the benefit of maternity leave and consequential benefits extend to employees who are working on contractual basis, as has been held in ***Raj Bala vs. State of Haryana, 2002 SCC OnLine P&H 1297*** and followed in ***Harjinder Kaur vs. State of Haryana and Ors., 2019 SCC OnLine P&H 1153***.

51. The Maharashtra High Court in the judgment of ***Archana vs. State of Maharashtra and Anr., 2018, SCC OnLine Bom 4136***, while deciding the issue of 'maternity benefit: entitlement to claim benefit' referred to the various pronouncements on the issue whether contractual



employees are entitled to get the benefits pertaining to maternity and held as under:

“29. In our opinion, therefore, the action of the respondents in denying the claim of the petitioner for grant of maternity benefits during her maternity leave period runs contrary to the legislative mandate flowing from the provisions of the said Act. Since this Court has already held that the benevolent object of grant of 180 days maternity leave to the woman employees cannot be and should not be limited to the women Government servants of the State of Maharashtra only, the same are also extended to the petitioner who is working as a Project Officer with the respondent No. 2 on contractual basis...”

52. Recently, this Court in ***Dr. Baba Saheb Ambedkar Hospital Govt. of NCT of Delhi and Anr. Vs. Krati Mehrotra, 2022 SCC OnLine Del 742***, dealt extensively with the issue of maternity benefit, where it was found that the maternity benefit period spilled over and beyond the tenure of the contract of the employee and held that there was no error in the order of the Central Administrative Tribunal in passing directions to the organisation/Hospital to consider the case of the employee sympathetically and to the GNCTD to release her unpaid salary, holding that the employee was entitled to maternity benefits. The employee, respondent before the Court, also preferred a fresh action and sought that her maternity benefits be extended for a period of 26 weeks from the date of her application, which was also partly allowed by the Tribunal. The Court observed that the Maternity Benefit Act is a social legislation that should be worked in a manner that progresses not only the best interest of the women employees but also of the child. The relevant portion of the judgment is reproduced hereunder:



“41. Clearly, the provisions of the 1961 Act seek to invest a woman with a statutory right to take maternity leave and seek payment for the period that she is absent from duty on account of her pregnancy, albeit in accordance with the provisions of the 1961 Act.

43. The provisions of the 1961 Act do not differentiate between a permanent employee and a contractual employee, or even a daily wage (muster roll) worker. This position stands unambiguously articulated in the judgment of the Supreme Court rendered in MCD v. Female Workers (Muster Roll).

44. Pertinently, the 1961 Act does not tie in the grant of maternity benefit to the tenure of the woman employee.

45. There are two limiting factors for the grant of maternity benefits.

(i) First, the woman employee should have worked in an establishment of her employer for a minimum period of 80 days in 12 months immediately preceding the date of her expected delivery.

(ii) Second, the maximum period for which she can avail maternity leave benefit cannot exceed 26 weeks, of which, not more than 8 weeks shall precede the date of her expected delivery.

46. For a woman employee who has two or more surviving children, although the maximum period for which she can claim maternity benefit is 12 weeks, the period preceding the date of expected delivery cannot be more than 6 weeks.

47. Therefore, linking the tenure of employment, in this case, a contractual employee, with the period for which maternity benefits can be availed by a woman employee, is not an aspect that emerges on a plain reading of the provisions of the 1961 Act.



48. Section 27 of the 1961 Act, which embeds, a non obstante clause, expounds that the provisions of the said Act would apply notwithstanding the provisions contained, inter alia, in any other law, agreement or contract of service, to the extent it is inconsistent with the provisions of the said Act.

49. The object and purpose of the 1961 Act being, to not only regulate employment but also maternity benefits which precede and follow childbirth, point in the direction that tying up the tenure of the contract with the period for which a woman employee can avail of maternity benefit is contrary to the mandate of the legislation i.e. the 1961 Act.

50. Thus, as long as conception occurs before the tenure of the contract executed between a woman employee and her employer expires, she should be entitled to, in our opinion, maternity benefits as provided under the 1961 Act.”

53. It is clear, upon considering the view that has been repeatedly taken, that the Maternity Benefit Act is a welfare and social legislation and the intent of the legislature in no manner could have been to limit or restrict the extent and scope of reliefs that may be granted to all those falling within the ambit of the Act. There is nothing in the language of the Act or in its provisions which suggests that a working expecting woman would be barred from getting the reliefs due to the sole reason of the nature of their employment.

54. In the instant case as well, the employer, i.e., the respondent, admittedly extends benefits arising out of the Maternity Benefit Act to the permanent/regular employees attached with the respondent, however, has been denying such benefits to contractual employees, such as the petitioner herein. In reference to the discussion in the foregoing



paragraphs, there is nothing to suggest that this Court shall take a separate view then that has been provided for under the Constitution of India, the Maternity Benefit Act and what has also been interpreted, established and reiterated by the Courts of the Country. The argument advanced on behalf of the respondent that the petitioner is entitled to her maternity benefits for the reason of being a contractual employee is completely devoid of merit.

55. Ancient verses, evolving jurisprudence and existing laws in India, all are unambiguously aligned towards underlining the importance of mother's love and affection for child. By not sanctioning maternity benefits, it would amount to a compulsory choice between work or motherhood for a mother. Not just that, making a mother compulsorily work even during her maternity times would have an adverse impact on child who in turn, is the future of the Nation.

56. Adverting to the facts of the instant petition, the petitioner has been working with the respondent no. 3, since the year 2013, as stenographer with a consolidated salary of Rs. 15,000/-, per month and the contract of the petitioner has been renewed in between on multiple occasions. From the same, it is apparent that she was receiving the remuneration in terms of her appointment with the respondent no. 3. As the conditions required in the aforementioned Act have been fulfilled, thus the employer ought to have given the benefits to the petitioner.

57. Moreover, as per the offer letters, the petitioner had to work for certain fixed hours similar to the other staff of the respondent no. 3. Therefore, the petitioner was being paid remuneration for her services



and was also required to work as per a specific fixed time scheduled. It is therefore, established that the petitioner falls within the ambit of the Act.

58. This Court is of the view that under Section 5 of the Act, the petitioner is entitled to the maternity benefits, despite the fact that such petitioner's contract ended during her pregnancy. The Act has incorporated within itself a suo-motu extension of such benefits to such employee and hence, the benefits would accrue to the said employee despite the period of her contract has ended. Upon fulfillment of the conditions specified in Section 5(2) of the Act, the maternity benefits extend beyond the contractual period of her employment of the petitioner.

59. The Act creates a fiction in favour of the petitioner to be treated as an employee of the respondent no. 3 for the purpose of giving her the maternity benefits to which she is entitled to. The attempt to enforce the contract duration term within such period by the respondent no.3 is "discharge" and attract the embargo specified in Section 12(2)(a) of the 1961 Act and does not fall within the exception as enunciated under proviso to the Section 12(2)(a) since, there is no allegation of gross misconduct of the petitioner made by the respondent no.3.

60. It is ironic that the petitioner in the instant case, worked with the State Consumer Forum as a stenographer, is a court staff and assisted in the dispensation of justice by the Forum, however, she had to herself approach this Court for justice since she was not being able to secure the benefits that were necessary for the best interest and welfare of her own child.

61. This Court is of the considered view that the State being a model employer, is expected to act in line of Constitution and set the benchmark



for other employers. Under the veil of contractual service, principles of natural justice and facets of constitutionality cannot be given go bye.

62. The social welfare legislation of the Maternity Benefit Act certainly does not discriminate on the basis of the nature of employment of the beneficiaries. It is also certain that the mere creation of the welfare legislation is not enough. A duty is cast upon the State and also upon all those who are the subjects of the Act, to uphold the integrity, the objective and the provisions of the legislation in its true letter and spirit. Moreover, even the Constitution of India advances the ideals which have been culminated and translated into the Maternity Benefit Act.

63. Therefore, in view of the discussions, the facts, circumstances, the submissions made and the contentions raised, this Court is of the considered view that the respondent no. 3 should have extended the benefits and reliefs under the Act to the petitioner as were being extended. The law stands settled in this regard that the nature of employment shall not decide whether a woman employee would be entitled to maternity benefits.

64. Accordingly, issue no. 1 is decided by this Court.

65. Now this Court will adjudicate upon the issue no. 2 i.e., *Whether the writ of mandamus may be issued by this Court directing the respondents to allow the petitioner to continue on the post of stenographer on contractual basis and not to replace the petitioner with similarly situated contractual employees?*

66. It is the submissions of the petitioner that after her maternity leave, she was allowed to join subsequently vide an appointment letter dated 15th November 2018, whereby, the petitioner was appointed on a



contractual basis w.e.f., 8th September 2018, till 30th June 2019. However, on 17th October 2019, the petitioner was directed by the Registrar of the respondent no.3 that her services are terminated. Pursuant to which, the petitioner sought for reasons behind such directions but the Registrar did not assign any reasons.

67. The respondent submitted in this regard that the services of the petitioner were terminated on the ground that there was abolition of one post of stenographer hence, the petitioner could not be appointed at the said position.

68. Under Article 311 of the Constitution of India, the State or any of its instrumentalities may create any position or abolish any such discretion vests with the said authority. The employee whose position has been abolished, if terminated or dismissed from the service, such termination or dismissal from the service does not amount violation of the fundamental right. Since, the post itself has been abolished and there is no such wrongful action done against the employee, it is merely an executive decision taken by the authority in the best interest of the public authority.

69. It is a well- settled law that the Hon'ble Supreme Court enunciated the aforesaid principle in the judgment of ***M. Ramanatha Pillai v. State of Kerala***, (1973) 2 SCC 650 as follows:

“15. The next question is whether abolition of post is dismissal or removal within the meaning of Article 311. This question has directly not come up for decision in this Court. There are however observations on this aspect in three decisions of this Court. These are Parshotam Lal Dhingra v. Union of India [AIR 1958 SC 36 : 1958 SCR 828 : 1958 SCJ 217 : (1958) 1 Lab LJ 544] , Champaklal



Chimanlal Shah v. Union of India [AIR 1964 SC 1854 : (1964) 5 SCR 190 : (1964) 1 Lab LJ 752] and Moti Ram Deka v. General Manager, N.&F. Railways, Maligaon, Pandu [AIR 1964 SC 600 : (1964) 5 SCR 683 : (1964) 2 Lab LJ 467] .

16. Article 311 as it stood prior to the Constitution Fifteenth Amendment Act, 1963 enacted that no person as mentioned in Article 311(1) shall be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. After the Constitution Fifteenth Amendment Act, 1963 Article 311 states that no person mentioned in Article 311(1) shall be dismissed or removed or reduced in rank except after an enquiry in which he has been informed of all the charges against him and giving a reasonable opportunity of being heard in respect of those charges. Further, where it is proposed, after such enquiry, to impose on him any such penalty of dismissal, removal or reduction in rank he has to be given an opportunity of making representation to the penalty proposed.

17. Article 309 provides that subject to the provisions of the Constitution, Acts of the appropriate Legislature may regulate the recruitment and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State. Therefore, Acts in respect of terms and conditions of service of persons are contemplated. Such Acts of Legislature must however be subject to the provisions of the Constitution. This attracts Article 310(1). The proviso to Article 309 makes it competent to the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union and for the Governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment and the conditions of service of persons appointed, to such services and posts under the Union and the State. These Rules and the exercise of power



conferred on the delegate must be subject to Article 310. The result is that Article 309 cannot impair or affect the pleasure of the President or the Governor therein specified. Article 309 is, therefore, to be read subject to Article 310.

19. When Article 311 states that no person shall be dismissed, removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him it affords a protection and security of government service. Article 311 applies to all government servants holding permanent, temporary or officiating post. The protection afforded by Article 311 is however limited to the imposition of three major penalties. These are dismissal, removal or reduction in rank. The words “dismissed”, “removed” and “reduced in rank” are technical words. Both in the case of removal or dismissal there is a stigma. It also involves loss of benefit. There may also be an element of personal blame worthiness of the government servant. Reduction in rank is also a punishment. The expression “rank” in Article 311(2) has reference to a person's classification and not to his particular place in the same cadre in the hierarchy of the service to which he belongs. Merely sending back a servant to his substantive post has been held not to be a reduction in rank as a punishment since he had no legal right to continue in officiating post. The striking out of a name from the panel has been held to affect future rights of promotion and to be a reduction in rank.

20. A reduction in rank is a punishment if it carries penal consequences with it. In Dhingra case it has been said that whether a servant is punished by way of reduction in rank is to be found by applying one of the two following tests: Whether the servant has a right to the post or the rank or whether evil consequences such as forfeiture of pay or allowances, loss of seniority in his substantive rank, stoppage or postponement of future chances of promotion follow as a result of the order.



21. Any and every termination of service cannot amount to dismissal or removal. A termination of service brought about by the exercise of contractual right is not by itself dismissal or removal. (See Satish Chandra Anand v. The Union of India). [AIR 1953 SC 250 : 1953 SCR 655 : 1953 SCJ 323] Again, termination of service by compulsory retirement in terms of a specific rule regulating the conditions of service is not tantamount to infliction of a punishment and does not attract Article 311 (2). (See Syam Lal v. State of U.P. and the Union of India). [AIR 1954 SC 369 : (1955) 1 SCR 26 : 1954 SCJ 493] Similarly the retirement of a permanent servant on his attaining the age of superannuation does not amount to his removal within the meaning of Article 311(2). In these cases the termination of service does not carry with it the penal consequences of loss of pay or allowances.

23. A post may be abolished in good faith. The order abolishing the post may lose its effective character if it is established to have been made arbitrarily, mala fide or as a mask of some penal action within the meaning of Article 311(2).

36. The abolition of post may have the consequence of termination of service of a government servant. Such termination is not dismissal or removal within the meaning of Article 311 of the Constitution. The opportunity of showing cause against the proposed penalty of dismissal or removal does not therefore arise in the case of abolition of post. The abolition of post is not a personal penalty against the government servant. The abolition of post is an executive policy decision. Whether after abolition of the post the Government servant who was holding the post would be offered any employment under the State would therefore be a matter of policy decision of the Government because the abolition of post does not confer on the person holding the abolished post any right to hold the post.

39. The right to hold a post comes to an end on the abolition of the post which a Government servant holds. Therefore, a



Government servant cannot complain of a violation of Article 19(1)(f) and Article 31 of the Constitution when the post is abolished.”

70. The Supreme Court in the judgment of ***Avas Vikas Sansthan v. Engineers Assn., (2006) 4 SCC 132*** has further enunciated the law pertaining to the employment of the person whose post has been abolished as follows:

“Power to abolish civil posts

50. *It is settled law that the power to abolish any civil post is inherent in every sovereign Government and such abolition will not entail any right on the person holding the abolished post the right to re-employment or to hold the same post. In the present case, the State Government was benevolent enough to float a scheme to absorb such employees whose posts were abolished. Therefore, in our opinion, the arguments advanced by the counsel for the respondents with regard to unfairness meted out to the employees of the Avas Vikas Sansthan hold no water.*

51. *With regard to 604 employees of AVS, it was argued that the State of Rajasthan had no legal obligation to offer alternative employment to the erstwhile employees of AVS. But the State of Rajasthan in all fairness did frame a scheme and offered employment in other local bodies of the Government. Thus, the terms and conditions of such alternative employment cannot be challenged. We are of the opinion, that the decision of the High Court granting relief of re-employment with pay protection, seniority and pension is erroneous. We, therefore, direct the State of Rajasthan to strictly adhere to and implement its decision to offer employment in other local bodies in letter and spirit.*

52. *We further make it clear that all the erstwhile employees, if not already employed, should be employed in the local bodies as per the scheme formulated by the Government of*



Rajasthan on a war footing.”

71. Now adverting to the facts of the case, the petitioner is seeking re-instatement to the position which has been abolished by the respondent no.3.

72. This Court is of the view that the petitioner is not entitled for re-instatement since, the said post of the stenographer does not exist anymore and this Court cannot issue a writ of mandamus to re-instate the petitioner to a position which is not in existence.

73. The writ of mandamus is issued in cases, where there is a vested right. In the present case the petitioner does not have a vested right of being appointed to the said position which has been abolished. Since, the petitioner is a contractual employee and as per the terms of the employment, the petitioner is appointed on a temporary and contractual basis, which may or may not be extended by the respondent no.3, as it deems fit. Moreover, the petitioner consented to such terms and conditions as elucidated in the above stated offer letter.

74. Under Article 226, this Court shall abstain from intervening in the functioning of the public authority unless, such interference is warranted due to certain illegalities in the policy of public authority or in the discretion exercised of such public authority. In the present case, no such intervention by Court under Article 226 is required.

75. Accordingly, issue no. 2 is decided by this Court.



CONCLUSION

76. Accordingly, considering the entirety of the matter and the law laid down by the Hon'ble Supreme Court and the other High Courts, the instant petition is partially allowed with the following directions:

- I. The respondent no.3 shall release all the medical, monetary and other benefits that accrued in favour of the petitioner on account of her pregnancy, as per the terms of the Maternity Benefit Act, 2017.
- II. Since, no extreme medical or other exigencies have been presented by the petitioner, *ante-natal* or *post-natal*, she shall be entitled to the benefits for the time period as provided under the Maternity Benefit Act, 2017, of 26 weeks.
- III. The needful shall be done by the respondent no.3 within a period of three months from the date of receipt of this order.

77. In view of the aforesaid terms, the instant petition stands partially allowed to the extent of maternity benefits in favour of the petitioner, as discussed above. However, this Court does not find any merits in the petitioner's contentions with regard to the relief sought for issuance of writ of mandamus, for the petitioner's reinstatement at the post of stenographer on contractual basis since the said post has been abolished by respondent No.3 itself.



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78. It is, however, made clear that the decision as aforesaid has been made in the peculiar facts and circumstances of the instant case and shall not be treated as a precedent.

79. Pending applications, if any, stand disposed of.

80. The judgment be uploaded on the website forthwith.

(CHANDRA DHARI SINGH)
JUDGE

OCTOBER 6, 2023
Dy/db/ryp

Signature Not Verified

Digitally Signed
By: DAMINIYADAV
Signing Date: 07.10.2023
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