



W.P.(MD).No.4574 of 2021

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 03.04.2024

CORAM

THE HONOURABLE MRS.JUSTICE L.VICTORIA GOWRI

W.P.(MD).No.4574 of 2021

T.Ramya

... Petitioner

Vs

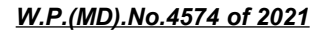
1. The Secretary to Govt. of Tamil Nadu,
Law Department,
Secretariat, Chennai.
2. The Director of Legal Studies,
Kilpauk, Chennai - 600 010.
3. The Principal,
Government Law College, Madurai.

... Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India, praying this Court to issue a Writ of Certiorarified Mandamus, calling for the records of the Na,Ka.No.317/a1/2020, dated 08.10.2020 passed by the 3rd respondent quash the same and consequently directing the 3rd Respondent to declare her probation with effect from 19.05.2017 instead of 18.08.2018 with all other service benefits.

For Petitioner : Mr.D. Selvanayagam

For Respondents : Mr.C.Satheesh
Government Advocate



The present writ petition has been filed challenging the impugned order in Na,Ka.No.317/a1/2020, dated 08.10.2020 passed by the 3rd respondent and consequently directing the 3rd Respondent to declare her probation with effect from 19.05.2017 instead of 18.08.2018 with all other service benefits.

“A woman feels keenly, thinks as clearly as man. She in her sphere does work as useful as man does in his. She has as much right to her freedom to develop her personality to the full as a man. When she marries, she does not become the husband's servant, but his equal partner. If his work is more important in life of the community, her's is more important in the life of the family. Neither can do without the other. Neither is above or under the other. They are equals.”

1.1. During June 2010, the then Secretary General of the United Nations, Ban Ki-moon, lamented, “Social, political and economic equality for women is integral to the achievement of all Millennium Development Goals.



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Until women and girls are liberated from poverty and injustice, all our goals- peace, security, sustainable development- stand in jeopardy”.

The eight point millennium development goals are extracted as follows:

- Goal 1 : Eradicate extreme poverty and hunger**
- Goal 2 : Achieve universal primary education**
- Goal 3 : Promote gender equality and empower women**
- Goal 4 : Reduce child mortality**
- Goal 5 : Improve maternal health**
- Goal 6 : Combat HIV/AIDS, malaria and other diseases**
- Goal 7 : Ensure environmental sustainability**
- Goal 8 : Develop a global partnership for development**

1.2.The inevitable tool in undoing the inequalities between men and women in the family, the community, the society, the market and the State is nothing but gender justice. Gender inequality is a global phenomena. Gender justice paves way to the fair and equitable treatment of individuals of all genders in social, economic, political and legal parlance. Realization of full



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rights, opportunities to all genders and equality between men and women could be achieved only through gender justice. Though the word gender is not explicitly mentioned anywhere in our Constitution, the word sex has been used in Articles 15(1), 16(2) and 325, which prohibits discrimination on the grounds of sex. The principle of gender equality has been enshrined in the basic structure of our Constitution. Article 39 of our Constitution provides for securing the right to an equal means of livelihood for both men and women and that both men and women have the right to equal pay. Article 42 provides for securing just and humane conditions of work and for maternity benefits. Since Article 42 categorically insists for just and humane conditions of work and maternity relief, the validity of an administrative action denying maternity benefit has to be tested on the malleus of Article 42.

1.3. Section 3 of the Maternity Benefit Act, 1961 defines the word, “child” in Section 3(b) as “still born baby”. The word “delivery” is defined in Section 3(c), the word “woman” is defined in Section 3(o) and “maternity benefit” is defined in Section 3(h). For the sake of clarity, Section 3(c), 3(h) and 3(o) are extracted as follows:



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Section (c) “delivery” means the birth of a child;

Section (h) “maternity benefit” means the payment referred to in sub-section (1) of section 5;

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

1.4.The Maternity Benefits Act, 1961 has been enacted by the Parliament in consonance with the directive principles of State policy to regulate women's employment during pregnancy as well as maternity benefits. The Maternity Benefits Act, 1961 requires the employers to provide specified period of paid maternity leave and denial of the same would amount to violation of her right of equality guaranteed under Article 14 of the Indian Constitution. In the instant case, the employer has declared probation of the writ petitioner by excluding her maternity leave, availed by her for a total number of 450 days.

2.Factual Matrix:

The petitioner was selected and appointed to the post of Assistant Professor through direct recruitment conducted by T.R.B and she joined duty



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on 20.05.2015 in the 3rd respondent College. Within a period of six months from the date of her joining, she gave birth to her first child, for which, she availed 5 days and 6 months (180 days) maternity leave, ie., 185 days. After that, she gave birth to her second child, for which, she availed 9 months (270 days) maternity leave. Both the maternity leave periods were availed by the petitioner during her probation period. The first respondent passed G.O.Ms.No.232, dated 04.11.2019 by regularizing her service with effect from her date of joining i.e., 20.05.2015. However, the second respondent passed a common order, dated 29.09.2019 declaring her probation with effect from 18.08.2018, whereas, for persons, who joined duty along with her, probation was declared with effect from the month of May, 2017 ie., on completion of two years of service. Therefore, she made a representation on 11.03.2020 before the second respondent seeking to declare her probation with effect from 19.05.2017, ie., date of completion of two years from the date of her joining into service. However, the same was rejected by the third respondent vide impugned order, dated 08.10.2020. Challenging the same, this writ petition came to be filed.



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3.Submission of petitioner's counsel:

The learned counsel appearing for the petitioner submitted that the issue in the instant case is no more res-integra. This Court in ***Dr.U.Ishwarya Vs. The Director of Medical Education & others in W.P.No.12660 of 2018*** reported in ***2018(2) CTC 654*** has already discussed and upheld the aspect of excluding the period of maternity leave availed by a pregnant women for calculation of probation period. Hence, he pressed for allowing the writ petition.

4.Submission of respondent's counsel:

Per contra, the learned Government Advocate appearing for the respondents filed a counter affidavit and submitted that there is no infirmity in the impugned order passed by the third respondent and the same has been passed based upon the mandates of Section 32(2) of Tamil Nadu Government Servants (Conditions of Service) Act, 2016. That apart, he insisted that the petitioner has availed 455 days of leave from the date of her joining. Hence, the probation has been declared after excluding 455 days of leave availed by her on various accounts and has rightly declared the same with effect from 18.08.2018. Hence, pressed for dismissal of the writ petition.



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5. Heard, the learned counsel appearing for the petitioner and the learned Government Advocate appearing for the respondents. Perused the materials on record.

6. Analysis:

6.1. It is needless to state that this is a case where the petitioner, who served as Assistant Professor in the third respondent College has availed 455 days (5 days of Loss of pay/E.L + 450 days of maternity leave) during her probation service for her two deliveries. The third respondent has passed the impugned order by declaring the probation with effect from 18.08.2018, after excluding her period of leave.

6.2. As contended by the learned counsel for the petitioner, the *lis* in hand is squarely covered by the order of this Court in the case of ***U. Ishwarya Vs Director of Medical Education & Others in W.P.No.12660 of 2018*** and the relevant portions are extracted hereunder:

“9. The only point which has to be considered is whether the Petitioner, as a temporary Probationer, is entitled to Maternity Leave and if so, whether the period of Maternity Leave



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availed by the Petitioner would also come under period of service. There is no dispute with regard to the Petitioner's date of joining i.e., 20.3.2015 and completion of service on 19.3.2017. In between, the Petitioner had availed Maternity Leave for 180 days from 4.7.2015 to 3.1.2016. If the period of Maternity Leave is excluded, the Petitioner would be short of two years of service. If the period of Maternity Leave is included, the Petitioner is eligible to undergo Post-Graduate course.

10. A contention has been put forth by the learned Special Government Pleader that as per Rule 101(a) of Fundamental Rules, the Petitioner should have completed two years of service excluding Maternity Leave and based on Rule 101(a) of Fundamental Rules, approved Probationers alone are entitled to Maternity Leave. The Rule is extracted as follows:

"101(a). Maternity Leave and Explanation 1 of the Government of Tamil Nadu, approved Probationers in superior service governed by the Tamil Nadu Leave Rules, 1933 shall be eligible for Maternity Leave as for permanent Government Servants."

However, the nature does not discriminate whether the woman is an approved Probationer or an unapproved Probationer with regard to the child birth. Whether an approved Probationer or an unapproved Probationer, she has to carry the child and the said Probationer is entitled to all the maternity benefits as that of a permanent Government servant. Any discrimination or different treatment by the Government by virtue of any Rule denying the benefits on the ground that the Candidate is not an approved Probationer itself is unreasonable and violates dignity of a



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woman and her fundamental rights and human rights. The very purpose of having Maternity Leave is to avoid hard Labour or work at the time of pregnancy as it would be detrimental to the servant/employee and also the health of foetus. Hence, the benefits given under Rule 101(a) of Tamil Nadu Fundamental Rules are equally applicable to the Petitioner herein, an unapproved Probationer and there cannot be any discrimination. The Rule has to be read in such a manner that the maternity benefit including Maternity Leave available to the Government Employee is equally applicable to other unapproved Probationers who are carrying or who are in the family way.

18. Further, the consolidated Guidelines issued with regard to Maternity Leave with full pay to married women Government Servants, in accordance with Rule 101(a) of the Fundamental Rule are as follows:

"I-Maternity: (i) Permanent married women Government Servants i.e. Approved Probationer in a service, with less than two surviving children, excluding adopted children, may be granted 180 days (6 months) Maternity Leave by the Competent Authority, which may be availed between pre-confinement rest to post-confinement recuperation at the option of the Government Servant.

(ii) Non-permanent married women Government Servants i.e. Probationer, in a service with less than two surviving children, excluding adopted children, whether appointed under regular capacity through Tamil Nadu Public Service Commission/Uniform



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Services Recruitment Board/Teachers Recruitment Board/Medical Services Recruitment Boards, Employment Exchange, etc., or under emergency provisions of the relevant Service Rules should take, for maternity purpose, the earned leave at her credit. Maternity Leave may be granted for a period of not exceeding 180 days or for the period that falls short of 180 days, after availing the earned leave as the case may be. (iii) Non-permanent married women Government Servants, employed under the emergency provisions i.e., temporarily, should have completed one year of continuous service, including leave periods, if any, to become eligible for grant of Maternity Leave of 180 days as above".

The above Guidelines also support the view of this Court that a Temporary Probationer is also entitled to 180 days of Maternity Leave. By Rule 43 of Central Civil Services (Leave) Rules, 1972, the Central Government grants Maternity Leave to female Government Servants including "apprentice". When the Central Government extends the benefit of Maternity Leave to women apprentice, the unapproved Probationers of State Government are also entitled to the same benefit and the State Government cannot deny the benefits to unapproved Probationers. Therefore, the Petitioner is entitled to 180 days of Maternity Leave from 4.7.2015 to 3.1.2016 and the said period cannot be excluded from the Service period and it has to be held that she completed two years of continuous service."



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24. If the Petitioner's Maternity Leave is taken into consideration as Service period, then the Petitioner would be completing her two years period on 19.3.2017, as the Petitioner joined duty on 20.3.2017. Hence, the Petitioner is entitled to apply for P.G. course, which she has been already permitted to do so and also entitled to join, after getting Relieving Order from the 5th Respondent. As already stated, the Petitioner is deemed to have completed two years of service on 19.3.2017 and the Maternity Leave period cannot be excluded from the Service period. The Petitioner, who is an Assistant Surgeon (General) under Category II of Clause I of Tamil Nadu Medical Services is also entitled to the benefit of Maternity Leave and the Maternity Leave period has to be taken as Service period. Therefore, she had completed her service of two years on 19.3.2017.

6.3. In yet another case, this Court in ***Tmt.C.Selvi Vs The Director of Government Examination, Chennai & Other*** in ***W.P.No.19426 of 2016***, dated 05.01.2022, has dealt with a similar issue and the relevant portion is extracted hereunder:

“5. The Maternity Benefit Act is a welfare legislation, which intends to extend benefits to the employees who avail maternity leave, without loss of any service benefits, including seniority. While dealing with this aspect, the Hon'ble Supreme Court, in the Female Workers' (Muster Roll) case (supra), had observed that such benefits which are enshrined in the



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Convention on Discrimination against Women, should be read into the contract of the services between the employer and the women employees. The relevant portion of the decision reads as follows:-

" 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 10th of December, 1948, set in motion the 4 universal thinking that human rights are supreme and ought to be preserved at all costs. This was followed by a series of Conventions. On 18th of December, 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;



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(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;



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(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. Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary."

[Emphasis supplied]

38. These principles which are contained in Article 11, reproduced above, have to be read into the contract of service between Municipal Corporation of Delhi and the women employees (muster roll); and so read these employees immediately become entitled to all the benefits conceived under the Maternity Benefit Act, 1961. We conclude our discussion by providing that the direction issued by the Industrial Tribunal shall be complied with by the Municipal Corporation of Delhi by approaching the State Government as also the Central Government for issuing necessary Notification under the Proviso to Sub-section (1) of Section 2 of the Maternity Benefit Act, 1961, if it has not already been issued. In the meantime, the benefits under the Act shall be provided to the women (muster roll)



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employees of the Corporation who have been working with them on daily wages."

6. Likewise, in Praveena Mary's case (supra), similar benefits of inclusion of the Government employee's name in the promotional panel was extended, by taking the period of maternity leave as "service period". The relevant portion of the order, reads as follows:-

"3. It is the case of the petitioner that the period of maternity leave shall be treated as service. Prima facie, I am of the view that the period of maternity leave sanctioned by the Government shall be treated as service for at least including her in the panel for the post of Deputy Tahsildars. If the said service period is added, then, she rendered 5 years, 8 months and 23 days. The required service is 5 years. By excluding the maternity leave, it is stated that the petitioner rendered 4 years, 11 months and 22 days.

4. Furthermore, it is the case of the petitioner that if 11 days E.L. from 18.08.2010 to 28.08.2010 during the probation period is taken into consideration for counting 5 years of service, as per the instructions issued by the Commissioner of Revenue Administration by his letter dated 02.09.2013, she is eligible to be included in the panel.

5. In these circumstances, the second respondent has to get appropriate order in this regard from the first respondent to include the name of the petitioner in the panel for promotion to the post of Deputy Tahsildars for



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the year 2015 by taking into account the period of maternity leave as service or at least to take the E.L. period in between 18.08.2010 and 28.08.2010, as service."

7. In the counter affidavit filed by the respondents, it is admitted that the maternity leave availed by the petitioner between 20.05.2013 and 15.11.2013, was treated as 'full duty period'. They have also stated in the same counter affidavit that the petitioner has not lost her seniority and that the promotion was denied to the petitioner on the sole ground that there are no regulations to declare the probation by including the maternity leave period.

8. Having treated the maternity leave availed by the petitioner as a full duty period, there was absolutely no justification on the part of the respondents in delaying her declaration of probation, thereby depriving her seniority. It is needless to point out that when the maternity leave was treated as full duty period, there was a duty cast on the respondents to declare the completion of her probation on par with her immediate juniors. In the instant case, the declaration of completion of her probation ought to have been made with effect from 20.02.2015 and consequently, she should have been promoted from 23.09.2015, which is the date on which her immediate juniors were promoted.

6.4. Fully fortified by the discussions in the orders extracted *supra*,

I am of the considered view that the impugned order ought not to have been



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passed by the third respondent by excluding the maternity leave for declaration of probation. The same would amount to arbitrary exercise of administrative power by the employer violating the mandates of Articles 14, 16 and 42 of our Constitution.

9.Epilogue:

9.1.This Court is of the considered view that the provisions providing for maternity benefits under the employment and service regulations should be construed in the light of Articles 15, 41 and 42 of the Indian Constitution and the obligations under the convention on the elimination of all forms of discrimination against women (CEDAW) and the universal declaration of human rights. The case of an employee seeking for confirmation of probation without excluding her maternity leave for a period of 450 days is doubtlessly her basic human right protected under the mandates of Articles 15, 41 and 42 of the Indian Constitution. The right of a woman employee to treat her maternity leave period as duty period for the purpose of declaration of probation is certainly a right to motherhood and the right of life of her child to full development guaranteed under Article 21 of the Indian Constitution.



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9.2.In view of the same, this Court hereby quash the impugned order of the third respondent in Na,Ka.No.317/a1/2020, dated 08.10.2020 and hereby remand the matter back to the second respondent and direct the respondents to declare the probation of the petitioner without excluding the maternity leave period, (ie., $180+270=450$ days) and after excluding 5 days, availed on other heads.

10.With the above directions, this writ petition stands allowed.

There shall be no order as to costs.

03.04.2024

NCC : Yes / No

Index : Yes / No

Internet : Yes

PNM

To

1. The Secretary to Govt. of Tamil Nadu,
Law Department,
Secretariat, Chennai.

2. The Director of Legal Studies,
Kilpauk, Chennai - 600 010.

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L.VICTORIA GOWRI, J.

PNM

ORDER IN
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