

Court No. - 8**Case :-** WRIT - A No. - 5114 of 2022**Petitioner :-** Smt. Satakshi Mishra**Respondent :-** State Of U.P. Thru. Prin. Secy. Secondary Edu. Dept.
Lucknow And 4 Others**Counsel for Petitioner :-** Anurag Shukla**Counsel for Respondent :-** C.S.C.**Hon'ble Alok Mathur,J.**

1. Heard Sri Anurag Shukla along with Sri Abhishek Misra and Ms. Ishit Mishra, Advocates for the petitioner and Sri Ram Pratap Singh Chauhan, learned Additional Chief Standing counsel appearing for the opposite parties.
2. The petitioner, who is working on the post of Lecturer (Hindi) in Rajkiya Balika Inter College, Hardoi, is aggrieved by the impugned order dated 30.07.2019 whereby her application for maternity leave from 18.11.2018 to 16.5.2019 has been rejected on the ground that she had previously availed maternity leave which ended on 18.5.2018, which was a period less than 2 years and hence was not entitled for the same.
3. It has been submitted by the counsel for the petitioner that the petitioner after expecting a child had applied for maternity leave for a period of 174 days from 26.11.2017 to 18.5.2018 which was duly sanctioned and the petitioner gave birth to a baby boy on 29.1.2018, but unfortunately the newborn child passed away due to cardio respiratory arrest on 30.1.2018, just a day after his birth.
4. The petitioner again conceived for the second time and applied for maternity leave for a period of 24 weeks from 18.11.2018 to 16.05.2019, which has been rejected by means of the impugned order.
5. Learned counsel for the petitioner contends that the said order would run contrary to the mandatory provisions of the Maternity Benefits Act, 1961 (hereinafter referred to as the '1961 Act'). He contends that Section 3 (h) of 1961 Act defines maternity benefit as the payment referred to in sub-section (1) of Section 5 while Section 5 (3) of 1961 Act provides that the maximum period for which any woman would be entitled to maternity benefit which shall be of 26 weeks. It is also contended that Section 6(4) of 1961 Act categorically provides that on receipt of the notice for

maternity leave, the employer shall permit such woman to absent herself from the establishment during the period for which she receives the maternity benefit.

6. It is contended that taking into consideration the mandatory provisions of 1961 Act once the petitioner had applied for maternity leave for the aforesaid period consequently there was no occasion for respondents have rejected her application. The maternity leave has been rejected on the ground that she had previously availed maternity leave which ended on 18.5.2018, which was a period less than 2 years and hence was not entitled for the same as per Rule 153(1) of the Financial Handbook.
7. Learned counsel for the petitioner contends that Section 27 of 1961 Act categorically provides that the provisions of 1961 Act shall have the effect notwithstanding anything inconsistent therewith contained in any other law whether made before or after the coming into force of 1961 Act. Learned counsel for the petitioner contends that taking into consideration the aforesaid provisions of 1961 Act more particularly when Rule 153(1) of the Financial Handbook runs contrary to the mandatory provisions of 1961 Act then considering the provisions of Section 27 of 1961 Act Rule 153(1) of the Financial Handbook Vol. II to IX would have to be read down and it is the provisions of 1961 Act which would prevail.
8. Learned Standing counsel, on the other hand, has submitted that the impugned order is in conformity with the provisions of Rule 153(1) of the Financial Handbook Volume II to IV where a restriction has been placed for grant of maternity benefits prior to 2 years having lapsed from the date of expiry of the last maternity leave granted under the Rule. It has further been submitted that the provisions of Financial Handbook volume II to IV would apply to the facts of the present case rather than the provisions of the Maternity Benefits Act, 1971. It was stated that 'health' being a state subject, the State Government was fully empowered to legislate with regard to the matters pertaining to 'health' which was a subject mentioned in list II of the 7th Schedule of the Constitution.
9. I have heard the counsel for the parties and perused the record.
10. The relevant provisions of 1961 Act which would have a direct bearing on the present case are being reproduced below for the sake of convenience:- Section 3(h) of 1961 Act reads as under:- (h)

“maternity benefit” means the payment referred to in subsection (1) of section 5. Section 5 of 1961 Act 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.

(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.

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

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

[Provided further that] where a woman dies during this period, the maternity benefit shall be payable only for the days up to and including the day of her death: [Provided also that] where a woman, having been delivered of a child, dies during her delivery or during the period immediately following the date of her delivery for which she is entitled for the maternity benefit, leaving behind in either case the child, the

employer shall be liable for the maternity benefit for that entire period but if the child also dies during the said period, then, for the days up to and including the date of the death of the child.

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

(5) In case where the nature of 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 on such conditions as the employer and the woman may mutually agree]”

11. Section 6 of 1961 Act reads as under:-

“6. Notice of claim for maternity benefit and payment thereof.-

(1) Any woman employed in an establishment and entitled to maternity benefit under the provisions of this Act may give notice in writing in such form as may be prescribed, to her employer, stating that her maternity benefit and any other amount to which she may be entitled under this Act may be paid to her or to such person as she may nominate in the notice and that she will not work in any establishment during the period for which she receives maternity benefit.

(2) In the case of a woman who is pregnant, such notice shall state the date from which she will be absent from work, not being a date earlier than six weeks from the date of her expected delivery.

(3) Any woman who has not given the notice when she was pregnant may give such notice as soon as possible after the delivery. [

(4) On receipt of the notice, the employer shall permit such woman to absent herself from the establishment during the period for which she receives the maternity benefit.

(5) The amount of maternity benefit for the period preceding the date of her expected delivery shall be paid in advance by the employer to the woman on production of such proof as may be prescribed that the woman is pregnant, and the amount due for the subsequent period shall be paid by the employer to the woman within forty-eight hours of production of such proof as may be prescribed that the woman has been delivered of a child.

(6) The failure to give notice under this section shall not disentitle a woman to maternity benefit or any other amount under this Act if she is otherwise entitled to such benefit or amount and in any such case an Inspector may either of his own motion or on an application made to him by the woman, order the payment of such benefit or amount within such period as may be specified in the order.

12. Section 27 of 1961 Act reads as under:-

27. Effect of laws and agreements inconsistent with this Act.- (1) The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law or in the terms of any award, agreement or contract of service, whether made before or after the coming into force of this Act: Provided that where under any such award, agreement, contract of service or otherwise, a woman is entitled to benefits in respect of any matter which are more favourable to her than those to which she would be entitled under this Act, the woman shall continue to be entitled to the more favourable benefits in respect of that matter, notwithstanding that she is entitled to receive benefits in respect of other matters under this Act.

(2) Nothing contained in this Act shall be construed to preclude a woman from entering into an agreement with her employer for granting her rights or privileges in respect of any matter which are more favourable to her than those to which she would be entitled under this Act.

13. Section 28 of 1961 Act reads as under:-

“Power to make rules.- (1) The appropriate Government may, subjected to the condition of previous publication and notification in the Official Gazette, make rules for carrying out the purposes of this Act.

14. A perusal of Section 3(h) of 1961 Act, clearly reveals that maternity benefit means the payment referred to in sub-section (1) of Section 5 of 1961 Act. Section 5 of 1961 Act stipulates that every woman shall be entitled to and an employer shall be liable for the payment of maternity benefit at a certain rate. Sub-section (3) of Section 5 of 1961 Act provides that the maximum period for which any woman shall be entitled to maternity benefit shall be 26 weeks. Section 6 of 1961 Act provides that any woman employed in an establishment and entitled to any maternity benefit under the provisions of 1961 Act may give notice in writing to her employer stating that her maternity benefit be paid to her or to such person as she may nominate in the notice. Sub-section (4) of Section 6 of 1961 Act provides that on receipt of the notice, the employer shall permit such woman to absent herself from the establishment during the period for which she receives the maternity benefit.

15. A perusal of the aforesaid provisions of 1961 Act thus indicate that a woman would be entitled to give notice in writing for grant of maternity benefit and on receipt of notice the employer shall permit such woman to absent herself from the establishment during the period for which she receives the maternity benefit. The 1961 Act does not contain any such stipulation of the time difference between grant of maternity benefit for the first and second child as stipulated in Rule 153 (1) of the Financial Handbook. Section 27 of 1961 Act categorically provides that the provisions of 1961 Act shall have effect notwithstanding anything inconsistent therewith contained in any other law whether made before or after coming into force of 1961 Act. The proviso to Section 27 of 1961 Act provides that in case a woman is entitled to benefits in respect of any matter which are more favourable to her than those to which she would be entitled under 1961 Act, the woman shall continue to be entitled to the more favourable benefits in respect of that matter, notwithstanding that she would be entitled to receive benefits in respect of other matters under 1961 Act, meaning thereby that additional benefits that a woman would be entitled in terms of

agreement or contract of service would be admissible to her notwithstanding anything contained in 1961 Act. Thus, it is the additional benefits which have not been precluded but in case there is anything contrary or inconsistent to the provisions of 1961 Act pertaining to maternity benefit then it would be the 1961 Act which would be applicable.

16. In the instant case, the maternity leave so applied by the petitioner has been rejected by placing reliance on Rule 153(1) of the Financial Handbook by contending that the same contains a restriction that the second maternity leave cannot be granted where there is difference of less than two years between the end of the first maternity leave and grant of second maternity leave. Admittedly, the first maternity leave of the petitioner ended on 18.5.2018 and thus the respondents have rejected the claim of the petitioner for grant of second maternity leave. However, once 1961 Act does not contain any such stipulation accordingly it is apparent that the respondents have patently erred in placing reliance on Rule 153(1) of the Financial Handbook in rejecting the application of the petitioner for grant of maternity leave more particularly when Section 27 of 1961 Act provides that it is 1961 Act which would be applicable notwithstanding anything inconsistent contained in any other law or contract of service.
17. The provisions of Financial Handbook Volume II to IV were made by the Governor in exercise of his powers under Section 241(2)(b) of the Government of India Act, 1935 and are continuing in force on the strength of the provisions contained in Article 13 of the Constitution of India. The Financial Handbook contains rules which governed the services of the person serving in connection with the affairs of a province, and are at best in the nature of executive instructions, and are clearly not in the category of “an enactment” made by the legislature.
18. To attract the provisions of Article 254 of the constitution the first requirement is that both the laws should be enactments of the respective legislatures, that is, one of the laws should be a enactment of the Parliament while the second should be a law made by the state legislature. The Maternity Benefit Act 1961 has been enacted by the Parliament while the provisions of the Financial Handbook Volume II to IV are at best executive instructions.

19. The Supreme Court in the case of *Municipal Corpn. of Delhi v. Female Workers (Muster Roll)*, (2000) 3 SCC 224 has looked into the various provisions of the Constitution for the finding the source and power to legislate with respect to the Maternity Benefit Act, 1961, and observed as under:-

“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.

9. Article 39 provides, *inter alia*, as under:

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

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

(b)-(c)***

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

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

(f) ***”

10. Articles 42 and 43 provide as under:

“42. Provision for just and humane conditions of work and maternity relief.—The State shall make provision for securing just and humane conditions of work and for maternity relief.

43. Living wage, etc., for workers.—The State shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and,

in particular, the State shall endeavour to promote cottage industries on an individual or cooperative basis in rural areas.”

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.

20. Apart from the provisions contained in the Chapter IV of the Constitution of India it is also noticed that entry 24 of List III of VII Schedule specifically provide for maternity benefits for ready reference entry 24 is as under:-

“24. welfare of labour including conditions of work, Provident fund employers liability workmen's compensation, invalidity and old age pension and maternity benefit.”

21. In light of the above, this Court is of the considered opinion that

the Maternity Benefit Act 1961 has been enacted by the Parliament on a subject which finds mention in entry 24 of list III, and it was totally within its competence to make such an enactment. Even if the state legislature were to make such a law, overriding the provisions contained in the Maternity Benefit Act then the said act would be reserved for assent of the President and would be enforceable only after obtaining such an assent as provided in article 254(2) of the Constitution of India.

22. Even otherwise, submissions of the learned standing counsel appearing for the State of U. P. is not convincing, considering the fact that as per Section 28 of the maternity benefits act, 1961 where it is provided that *“the appropriate government may, subject to conditions of previous publication and by notification in the Official Gazette, make rules for carrying out the purposes of this act”*. *“Appropriate Government”* in Section 3(a) has been defined as *“means in relation to an establishment being a mine 1[or an establishment wherein persons are employed for the exhibition of equestrian acrobatic and other performances] the Central Government and in relation to any other establishment, the State Government.”*

23. The State of U.P. in exercise of powers granted under Section 28 has already issued a Government Order dated 08.12.2008 and 24.03.2009 adopting the provisions of the Maternity Benefits Act for the benefit of the their employees. Further, the modifications made by the Central Government were also adopted by the State of U.P. in its Government Order dated 11th April, 2011 which has been duly considered by a coordinate bench of this Court in Writ A no.3486 of 2019 in the case of ***Ansu Rani Vs State of U.P and 2 others***, where it was held:-

“11. The aforesaid decision of the Central Government has been adopted by the State of U.P. for its employees vide Government Order dated 08.12.2008 and 24.03.2009. Subsequently, certain modifications being made by the Central Government, the same was also adopted by the State Government vide Government Order dated 11th April, 2011. The aforesaid Government Order is being reproduced hereinunder:-

*“प्रेषक,
वृन्दा सरूप,
प्रमुख सचिव,*

उ०प्र० शासन ।

सेवा में, समस्त विभागाध्यक्ष एवं प्रमुख कार्यालयाध्यक्ष,
उत्तर प्रदेश ।

वित्त (सामान्य) अनुभाग-2 लखनऊ : दिनांक : 11 अप्रैल, 2011

विषय:- महिला सरकारी सेवकों को बाल्य देखभाल अवकाश
की अनुमन्यता ।

महोदय,

उपर्युक्त विषयक कार्यालय ज्ञाप संख्या-जी-2-2017/
दस-2008-216-79, दिनांक 08-12-2008 तथा कार्यालय ज्ञाप
संख्या जी-2-573/दस-2008-216-79, दिनांक 24-3-2009
द्वारा प्रदेश की महिला सरकारी सेवकों को केन्द्र सरकार की
महिला कर्मचारियों की भांति बाल्य देखभाल अवकाश की सुविधा
कतिपय शर्तों के अधीन प्रदान की गयी थी। चूंकि भारत सरकार
द्वारा उक्त शर्तों में कतिपय संशोधन किए गए हैं अतः सम्यक्
विचारोपरान्त श्री राज्यपाल महोदय संदर्भगत शासनादेशों में
उल्लिखित शर्तों को निम्नवत् संशोधित करने की सहर्ष स्वीकृति
प्रदान करते हैं:-

(1) संबंधित महिला कर्मचारी के अवकाश लेखे में उपार्जित
अवकाश देय होते हुए भी बाल्य देखभाल अवकाश अनुमन्य
होगा ।

(2) बाल्य देखभाल अवकाश को एक कलेण्डर वर्ष के दौरान तीन
बार से अधिक नहीं दिया जायेगा ।

(3) बाल्य देखभाल को 15 दिनों से कम के लिए नहीं दिया
जायेगा ।

(4) बाल्य देखभाल अवकाश को साधारणतया परिवीक्षा अवधि के
दौरान नहीं दिया जायेगा, ऐसे मामलों को छोड़कर जहाँ अवकाश
देने वाला प्राधिकारी परिवीक्षार्थी की बाल्य देखभाल अवकाश की
आवश्यकता के बारे में पूर्ण रूप से संतुष्ट न हो। इसे भी
सुनिश्चित किया जायेगा कि परिवीक्षा अवधि के दौरान अवकाश
दिया जा रहा है तो इस अवकाश की अवधि कम-से-कम हो ।

(5) बाल्य देखभाल अवकाश को अर्जित अवकाश के समान माना
जायेगा और उसी प्रकार से स्वीकृत किया जायेगा ।

2- यदि किसी महिला कर्मचारी द्वारा दिनांक 08.12.2008 के
कार्यालय ज्ञाप के जारी होने के पश्चात बाल्य देखभाल के
प्रयोजन हेतु अर्जित अवकाश लिया गया है तो उसके अनुरोध पर
उक्त अर्जित अवकाश को बाल्य देखभाल अवकाश में समायोजित
किया जा सकेगा ।

3- शासनादेश संख्या जी-2-2017/दस-2008-216-79,
दिनांक 08-12-2008 तथा शासनादेश संख्या
जी-2-573/दस-2009-216-79 दिनांक 24-03-2009 इस
सीमा तक संशोधित समझे जायेंगे ।

4- संगत अवकाश नियमों में आवश्यक संशोधन यथासमय किये
जायेंगे ।

भवदीया,
(वृन्दा सरूप)
प्रमुख सचिव, वित्त ।”

24. Once the provisions of the Maternity Benefit Act, 1961 has been adopted by the State of U.P. as held by this Court in the case of *Anshu Rani Vs State of U. P.* then the said Act of 1961 would apply with full force irrespective of the provisions contained in the Financial Handbook which is merely an executive instruction and would in any case be subsidiary to the legislation made by the Parliament. The judgment of *Anshu Rani (Supra)* has been followed and approved in *D. Snehkiran Raghuvansi Vs. V.C. King George'S Medical University Gandhi Memorial & Ors.* passed in writ petition No.6532 (S/S) of 2020.

25. In light of the above discussions, the summary of issues determined are as under:-

(1) The Maternity Benefits Act, 1961 has been enacted by the Parliament in exercise of powers under Entry 24 in List III of the Seventh Schedule of the Constitution of India and to secure the goals stated in Articles 38, 39, 42 and 43 of the Constitution of India and also to give effect to the provisions contained in Article 15 (3) of the Constitution.

(2) The provision of Financial Handbook are pre-Constitutional executive instructions and would be subsidiary to the Act of Parliament and in case of any inconsistency, the statutory enactment framed by the Parliament would prevail and hence the provisions of Maternity Benefits Act, 1961 would prevail over the provisions of Financial Handbook and, therefore, provision of Rule 153 (1) of the Financial Handbook Volume I to IV are read down with regard to admissibility of leave to a woman with regard to second pregnancy which would be governed by Maternity Benefits Act, 1961 and not Rule 153 (1) of the Financial Handbook Volume II to IV.

(3) The State Government already having adopted the provisions of Maternity Benefits Act, 1961 as per Government Order dated 11.4.2011, as recorded by this Court in the case of *Anshu Rani Vs. State of U.P.* passed in Writ A No.3486 of 2019, makes it abundantly clear that the provisions of Maternity Benefits Act, 1961 would prevail over any other law.

26. In light of the above, the writ petition is **allowed** and the order dated 30.7.2019 is quashed, and the respondents are directed to grant maternity benefit to the petitioner in terms of the Maternity Benefit Act 1961. They are also directed to pass appropriate order in this regard within a period of 4 weeks from the date a certified copy of the order is produced before the competent authority.

Dated: 18.8.2022

RKM

(Alok Mathur, J.)