



IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C) No.30616 of 2020

(In the matter of an application under Articles 226 and 227 of the Constitution of India, 1950).

Supriya Jena *Petitioner(s)*

-versus-

State of Odisha & Ors. *Opposite Party (s)*

Advocates appeared in the case through Hybrid Mode:

For *Petitioner(s)* : *Mr. D.P. Nanda, Sr. Adv.*
Along with associates

For *Opposite Party (s)* : *Mr. D.Mund, AGA*

CORAM:

DR. JUSTICE S.K. PANIGRAHI

DATE OF HEARING:-19.04.2024

DATE OF JUDGMENT: -25.06.2024

Dr. S.K. Panigrahi, J.

1. The Petitioner through this Writ Petition has challenged the Finance Department letter No.38444/F dated 15.11.2019 and G.A & P.G. Department letter No.15803/Gen dated 06.07.2020.
- I. **FACTUAL MATRIX OF THE CASE AS SUBMITTED BY THE PETITIONER:**
2. The brief fact of the case is that:
 - (i) The Petitioner started her career by joining in Orissa Finance Service on dated 06/07/1995 vide appointment letter of Govt. of Odisha, Finance Department Notification No. 26608/F dated 03/07/1995 and served in



different departments of the State of Odisha and lastly she was functioning as OFS (SG), Joint Director (Accounts) in Gopabandhu Academy of Administration, Bhubaneswar and presently functioning as the Financial Advisor of Odisha State Police Housing Welfare Corporation, Bhubaneswar.

- (ii) It is submitted by the petitioner that since considerable time after marriage, the petitioner failed to conceive a child, so she opted for surrogate motherhood and accordingly entered into a Gestational Surrogacy Agreement along with her husband as "Commissioning Parents" with one Mrs. Maya Gupta of Mumbai as "Surrogated Mother" on 30.01.2018.
- (iii) It is submitted by the Petitioner that the surrogate mother conceived the child who finally took birth on dated 25.10.2018. It is submitted by the petitioner that since there are no female member available in the family to look after the new born baby and after much prolonged waiting the petitioner could become a mother through surrogacy, so the petitioner applied for maternity leave on 20.10.2018 which was granted from dated 25.10.2018 to 22.04.2019. Subsequently, in continuation to the Maternity leave, on 10.04.2019 the Petitioner applied for Earned Leave of 140 days from 23.04.2019 to 09.09.2019.
- (iv) It is submitted by the Petitioner that upon joining of the petitioner on 10/09/2019, the Joint Commissioner, Gopabandhu Academy/O.P. No.4 vide Office Order No. 2948/GAA dated 18.09.2019 granted Maternity leave of the petitioner for a period of 180 days i.e. w.e.f. 25.10.2018 to 22.04.2019 as per Finance Department office Memorandum No.51856/F



dated 07.12.2011, No.17372/F dated 17.06.2016 and No.37478/F dated 01.12.2018 and allowed the petitioner to draw her pay as admissible during the period of leave. Further, the O.P. No.4 also passed order that the period of leave is counted as "Nil" towards increment under Rule-79 (a) (i) of the Orissa Service Code and also directed that the above period of leave will not be debited to her leave account.

(v) The O.P.No.5 vide letter No.3188/GAA dated 15.10.2019 while forwarding the earned leave application of the petitioner for subsequent period from 23/04/2019 to 09/09/2019, informed to the Additional Secretary to Govt., Finance Department (OFS Branch), Bhubaneswar, Odisha to sanction earned leave of the petitioner w.e.f. 23/04/2019 to 09/09/2019 (140 days) along with Advisory remark of Doctor's Certificate. It was also intimated that the petitioner has (300+11) days of E.L. to her credit as on 30.06.2019 and, accordingly, the details of leave account reflects in the Original Service Book. The O.P. No.5, therefore, requested the Additional Secretary to Govt., Finance Department to sanction E.L. for 140 days w.e.f. 23.04.2019 to 09.09.2019 as leave due in favour of the petitioner.

(vi) It is submitted by the petitioner that the Under Secretary to the Govt., Government of Odisha, Finance Department vide Letter No.38444/F dated 15.11.2019 intimated to the O.P. No.5 that the entire leave period of petitioner i.e. from 25.10.2018 to 09.09.2019 with reference to extant leave Rules may be examined and if necessary, the proposal for sanction of leave for the said period may be re-submitted to the Finance



Department and accordingly Service Book along with leave application of the petitioner were returned back for taking further action.

- (vii) The Petitioner contended that as per the information obtained from the Public Information Officer, Gopabandhu Academy Administration, Bhubaneswar seeking certain clarification and the P.L.O. while answering the query vide letter No.1875/GAA dated 13.07.2020 supplied the information seeking clarification regarding sanction of maternity leave of Female Govt. Servant through surrogacy.
- (viii) In the said letter the O.P. No.5 referring to the F.D. Memorandum No.51856/F dated 07.12.2011 No.17372/R dated 17.06.2016 and No.37478/F dated 01.12.2018 intimated the O.P. No.1 that the Head of Office is competent to grant maternity leave (180 days) as enhanced from time to time to the Female Govt. Servant working under Chief Administrative Control. The O.P. No.5 further informed that the maternity leave of a Female Govt. Employee is governed by Rule 194 of Odisha Service Code read with F.D.O.M. No.51856/F dated 07.12.2011 in which the provision of sub-rule (b) to Rule-194 has been modified.
- (ix) It is submitted that so far as the motherhood of Female Govt. Employee is concerned, the term "Maternity" has not been defined in Odisha Service Code i.e. by way of surrogacy or rent-a-womb. It was also stated that while the motherhood through adoption for a Female Govt. Employee is concerned, a specific F.D.O.M. No.31056/F dated 18.11.2016 is available for availing leave.
- (x) Therefore, the O.P. No.5 requested the O.P. No.1 to pass necessary clarification regarding sanction of maternity leave of Female Govt.



Employees through surrogacy or begot through rented womb. It is submitted by the petitioner that pursuant to letter No. 615 dated 19.02.2020 (As per Annexure-6), the O.P. No.1 through Under Secretary to Govt. Vide letter NO.15803/Gen dated 06.07.2020 intimated the O.P. No.5 that at present sanction of maternity leave of Female Govt. Servant through surrogacy is not available due to non- existence of specific provision for the same but the issue would be considered by Allowance Committee in future and it has been concurred by the Finance Department File No. FIN-GS2-LV-0001-2020.

- (xi) In fact, the maternity leave of a female Govt. Employee is governed under Rule-194 of the Odisha Service Code read with F.D.O.M. No.51856/F dated 07.01.2011 whereby the provision of Sub-rule- (b) of Rule-194 has been modified. The expression "Maternity" by itself has not been defined in the Service Book. Hence, there cannot be any distinction of motherhood attained by a Female Govt. Employee either through natural way or through adoption or through surrogacy procedure. The word "Maternity" as appearing in Rule-194 with advancement of Science and Technology has to carry the meaning which includes within it, the concept of motherhood attained through surrogacy procedure. It is trite to mention it here that the term "Maternity" in law and/or on fact can be established in any one of the three situations viz (1) where female employees herself conceives and carries the child (2) where a female employees engages the service of the another female to conceive a child with or without the genetic martial



being supplied by her and/or her male partner (3) where a female employee adopt a child.

- (xii) In the case of third category as stated above, when a specific F.D.O.M No.31056/F dated 18.11.2016 is available for availing the leave and for the first category of the female employees as stated above, F.D.O.M No.51851/F dated 07.12.2011 is available, so no distinction or disentitlement can be made to the second categories of the female employees and the same amount to clear violation of Article-14 and 16 of the Constitution of India.
- (xiii) It is submitted by the Petitioner that a married Female Govt. Employee cannot be discriminated insofar as the maternity benefits are concerned, only on the ground that she has obtained the baby through surrogacy because, in every sense, a commissioning mother (i.e. attains motherhood through surrogacy) is the actual mother and she takes the new born baby as soon as it is delivered. Maternity leave is not only necessary for a mother but also is essential for rearing a new born baby. A new born child needs rearing and that is the most crucial period during which the child requires the care and attention of its mother.
- (xiv) Any denial of maternity leave as contemplated under Rule-194 of the Odisha Service Code read with F.D.O.M No.51851/F dated 07.12.2011 for female employees who attains motherhood through surrogacy not only violates the right of the new born baby to develop a bond with the mother and also to be compatible in the society which is a statutory right guaranteed under the Constitution to the every citizen including the new born. Thus the Finance Department letter No. 38444/F dated



15/11/2019 as per Annexure-5 and G.A & P.G. Department letter No.15803/Gen dated.06/07/2020 as per Annexure-7 are unsustainable and are liable to be quashed.

(xv) Hence, this Writ Petition.

II. SUBMISSIONS ON BEHALF OF THE OPPOSITE PARTIES :

3. Learned counsel for the Opposite Parties earnestly made the following submissions in support of his contentions.

- (i) It is submitted that the Petitioner had joined as Joint Director (Accounts), GAA, Odisha, Bhubaneswar on 30.6.2017 (FN) as per the Finance Department Notification No. 19805/F, Dated 29.6.2017.
- (ii) He contended that the Petitioner has applied for maternity leave on 20.10.2018 which was granted from 25.10.2018 to 22.4.2019. Subsequently, in continuation of the maternity leave, she applied for Earned leave from 23.4.2019 to 9.9.2019. After availing leave, she joined in her duty on 10.9.2019.
- (iii) It is further submitted that the Opp. Party No.3 granted maternity leave in favour of the petitioner for a period of 180 days w.e.f. 25.10.2018 to 22.4.2019 vide GAA Office Order No.2948/GAA dated 18.9.2019 as per the Finance Department O.M. No.51856/F dated 7.12.2011, No. 17372/F dated 17.6.2016 and 37478/F dated 1.12.2018. But the above O.Ms. never contemplated any provision for sanction of maternity leave due to surrogacy.
- (iv) It is submitted that the Opp. Party No.5 forwarded the Earned Leave application of the petitioner along with the other required documents to



Additional Secretary to Govt,, Finance Department for sanction of her earned Leave for the period from 23.04.2019 to 09.09.2019, vide GAA letter No.3188/GAA, dated 15.10.2019.

- (v) It is submitted that with reference to the GAA letter No. 3188/GAA, dated 15.10.2019, Finance Department, vide letter No.38444/F, dated 15.11.2019 intimated that the entire leave period from 25.10.2018 to 09.09.2019 with reference to extant leave Rules may be examined and if necessary, the proposal for sanction of leave w.e.f. 25.10.2018 to 09.09.2019 may be re-submitted to Finance Department. As a sequel to the : Finance Department letter No.38444/F, dated 15.11.2019, GAA sought clarification from GA&PG Department regarding sanction of Maternity Leave for female Government servant through Surrogacy, vide letter No.615/GAA, dated 19.02.2020.
- (vi) It is submitted that the Maternity Leave of a female Government employee is governed by Rule 194 of Odisha Service Code read with F.D.O.M. No. 51856/F dated 07.12.2011 in which provision of Sub rule- b to Rule- 194 has been modified enhancing the existing limit of Maternity Leave of 90 days to 180 days. While the motherhood through adoption for a female Government employee is concerned, F.D.O.M. No.31056/F dated 18.11.2016 is available where a leave of 180 days is granted to female Government servant on adoption of a child upto one year of age in line with Maternity Leave as admissible to natural mothers for proper care of adopted child. But there is no provision of Maternity leave for the purpose of rearing of child blessed through surrogacy.



- (vii) It is submitted that GA&PG Department vide letter No.15803/Gen, dated 06.07.2020 clarified that at present sanction of Maternity Leave for female Government servant through surrogacy is not available due to non- existence of specific provision for the same, but the issue will be examined and considered by Allowance Committee of Finance Department in future with due consultation with G.A. & P.G. Department, Odisha.
- (viii) Learned counsel for the Opposite Parties, accordingly, prays for dismissal of this Writ Petition.

III. COURT'S REASONING AND ANALYSIS:

4. Learned Counsel for the Opposite Party has submitted that with reference to the GAA letter No. 3188/GAA, dated 15.10.2019, Finance Department, vide letter No.38444/F, dated 15.11.2019 intimated that the entire leave period from 25.10.2018 to 09.09.2019 with reference to extant leave Rules may be examined and if necessary, the proposal for sanction of leave w.e.f. 25.10.2018 to 09.09.2019 may be re-submitted to Finance Department. As a sequel to the : Finance Department letter No.38444/F, dated 15.11.2019, GAA sought clarification from GA&PG Department regarding sanction of Maternity Leave for female Government servant through Surrogacy, vide letter No.615/GAA, dated 19.02.2020.
5. It is reiterated that Maternity Leave of a female Government employee is governed by Rule 194 of Odisha Service Code read with F.D.O.M. No. 51856/F dated 07.12.2011 in which provision of Sub rule- b to Rule- 194



has been modified enhancing the existing limit of Maternity Leave of 90 days to 180 days. While the motherhood through adoption for a female Government employee is concerned, F.D.O.M. No.31056/F dated 18.11.2016 is available where a leave of 180 days is granted to female Government servant on adoption of a child upto one year of age in line with Maternity Leave as admissible to natural mothers for proper care of adopted child. But there is no provision of Maternity leave for the purpose of rearing of child blessed through surrogacy.

6. However, this Court is of the opinion that the contention of the opposite party with respect to Sub rule- b to Rule- 194 is very rigid. In this regard, the Rajasthan High Court in the case of *Smt. Chanda Keswani W/O Shri Bhupesh v. State of Rajasthan*¹ opined that the word 'maternity leave' was not defined under the 1951 Rules, but Rule 103 of the 1951 Rules, indicated that the maternity leave might be granted to a female Government servant for a period of 180 days twice. The Court opined that prior to the substitution of Rule 103 to the 1951 Rules, there was a provision of granting maternity benefits under the Maternity Benefit Act, 1961 ('1961 Act') to the women before and after the child-birth who were employed in certain establishment for certain period. As per Section 3(b) of the 1961 Act, child included still-born child, but nowhere the words mother and child were defined under 1951 Rules or 1961 Act. The Court opined that a female could become a mother not only by giving birth to a child but also by adopting a child and now with the development of medical science, especially by the Assisted

¹ S.B. Civil Writ Petition No. 7853/2020 (Rajasthan High Court)



Reproductive Technology (ART), surrogacy was also an option for a female or couple to have their child. To this effect, the Court opined that:

“As per the provisions of the Assisted Reproductive Technology (Regulations) Act, 2021, an infertile married couple who approaches an Assisted Reproductive Technology Clinic or an Assistant Reproductive Technology Bank for the purpose of bearing a child through surrogacy, is referred to as a ‘commissioning couple’. Likewise, a commissioning mother would be the mother, who seeks to obtain a child through a rented womb of a surrogate mother. However, the commissioning mother remains the biological mother of the child and retains all rights in respect of the child. Once the surrogacy has been recognized by the Legislature, by enacting the Act of 2021 and a female can now become mother through the procedure of surrogacy, then she cannot be denied the benefit of maternity leave, after birth of the child through surrogacy process.”

7. The Rajasthan High Court further opined that the maternity meant the period during pregnancy and shortly after the child’s birth. If the maternity meant motherhood, it would not be proper to distinguish between a natural and biological mother and mother who had begotten a child through surrogacy. The Court further opined that the *“object of maternity leave is to protect the dignity of motherhood by providing for full and healthy maintenance of the woman and her child. Maternity leave is intended to achieve the object of ensuring social justice to women as the motherhood and childhood both require special attention. Not only are the health issues of the mother and the child considered while providing for*



maternity leave, but the leave is provided for creating a bond of affection between the two."

8. The provision related to the grant of maternity benefits was a beneficial provision intended to achieve social justice and therefore it must be construed beneficially. The Hon'ble SC in the case of ***B. Shah v. Presiding Officer, Labour Court, Coimbatore & Ors.***² has held in para 18 as under:

"18...it has also to be borne in mind in this connection that in interpreting provisions of beneficial pieces of legislation like the one in hand which is intended to achieve the object of doing social justice to women workers employed in the plantations and which squarely fall within the purview of Article 42 of the Constitution, the beneficent rule of construction which would enable the woman worker not only to subsist but also to make up her dissipated energy, nurse her child, preserve her efficiency as a worker and maintain the level of her previous efficiency and output has to be adopted by the Court".

9. Accordingly, right to life under Article 21 of the Constitution includes the right to motherhood and also, the right of every child to full development. If the Government could provide maternity leave to an adoptive mother, it would be wholly improper to refuse to provide maternity leave to a mother who had begotten a child through surrogacy procedure after implanting an embryo created by using either the eggs or sperm of the intended parents in the womb of surrogate mother. Therefore, this Court accedes to the submission of the petitioner.

² AIR 1978 SUPREME COURT 12



10. Maternity leave should be granted to employees who become mothers through surrogacy to ensure equal treatment and support for all new mothers, irrespective of how they become parents. Additionally, the initial period after the birth of a child is crucial for the mother's involvement in caregiving and nurturing, which is pivotal for the child's development. In this regard, Hon'ble Bombay High Court in the case of *Dr. Mrs Hema Vijay Menon v. State of Maharashtra*³, opined that:

“A newly born child needs rearing and that is the most crucial period during which the child requires the care and attention of his mother. There is a tremendous amount of learning that takes place in the first year of the baby’s life, the baby learns a lot too. Also, the bond of affection has to be developed. A mother, as already stated hereinabove, would include a commissioning mother or a mother securing a child through surrogacy. Any other interpretation would result in frustrating the object of providing maternity leave to a mother, who has begotten the child.”

11. Recognizing and supporting surrogacy as a legitimate means of becoming a parent aligns with India's progressive stance on reproductive rights and gender equality. Providing maternity leave for these mothers ensures that they have the necessary time to create a stable and loving environment for their child, promoting the well-being of both the mother and the child.
12. It is well settled law that the rules and regulations in force should be interpreted in light of advancements in medical science and changes in societal conditions. The Supreme Court in the matter of *Anuj Gang v.*

³ AIR 2015 BOMBAY 231



*Hotel Association of India*⁴ has held that changed social psyche and expectations are important to upkeep the law. The maternity benefit provisions should, therefore, be interpreted accordingly.

13. It is imperative that the provisions concerning maternity benefits are structured to encourage and support women's participation in the workforce. The Hon'ble High Court of Bombay in the case of *Deepika Singh v. Central Administrative Tribunal*⁵ in this respect, has opined that:

“The grant of maternity leave under Rules of 1972 is intended to facilitate the continuance of women in the workplace. It is a harsh reality that but for such provisions, many women would be compelled by social circumstances to give up work on the birth of a child, if they are not granted leave and other facilitative measures. No employer can perceive child birth as detracting from the purpose of employment. Child birth has to be construed in the context of employment as a natural incident of life and hence, the provisions for maternity leave must be construed in that perspective.”

14. Moreover, the Maternity Benefit Act, 1961, which aims to protect the employment of women during maternity and ensure their full health, should be interpreted in an inclusive manner that encompasses all forms of motherhood. Additionally, international conventions to which India is a signatory, such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), mandate equal

⁴ Appeal (Civil) 5657 of 2007.

⁵ Special Leave Petition (C) No. 7772 of 2021



treatment and non-discrimination in matters related to employment and maternity.

15. With respect to the aforesaid discussion and the cases cited hereinabove, this Court is inclined to quash the Finance Department letter No.38444/F dated 15/11/2019 and G.A & P.G. Department letter No.15803/Gen dated 06/07/2020. This Court hereby directs the Opposite Parties/ State to sanction 180 days maternity leave to the Petitioner, within three months of the communication of this order. It is further directed to the concerned Department of the State to incorporate this aspect in the relevant provisions of the rules to treat a child born out of surrogacy in the similar manner as a child born out of the natural process and provide the commissioning mother with all the benefits provided thereto.
16. This Writ Petition is, therefore, allowed.
17. Interim order, if any, passed earlier stands vacated.

(Dr. S.K. Panigrahi)
Judge

*Orissa High Court, Cuttack,
Dated the 25th June, 2024/*