

THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL, MUMBAI

ORIGINAL APPLICATION NO.167 OF 2018

DISTRICT : PUNE

Smt. Anita Baban Nikam)
Age : 35 years, Occu.: Counsellor Group B,)
R/at : River View CHS, Flat No.22, Bldg. No.2,)
Pune Nagar Rd. Opp. Wadia Bunglow,)
Yerwada, Pune 6.)...**Applicant**

Versus

1. The State of Maharashtra,)
Through Principal Secretary, Women &)
Child Development Dept., Mantralaya,)
Mantralaya, Mumbai.)
2. The Commissioner, Women & Child)
Development, 28, Queens Gaurden,)
Pune 1.)
3. The Deputy Commissioner, Estt.)
Women & Child Development,)
28 Queens Garden, Pune 1.)
4. The Divisional Commissioner, Women)
& Child Development, Pune Division,)
Pune 3, Church Road, Pune 1.)
5. The District Women & Child)
Development, 103, Chunawala)
Chamber, Shivaji Nagar, Pune 1.)
6. The Superintendent, Shashakiya)
Mulinche Kanistra/Varishta Balgruha,)
Shirur, Tal. Shirur, Dist.: Pune.)...**Respondents.**

Shri K.R. Jagdale, Advocate for the Applicant.

Ms. N.G. Gohad, Presenting Officer for the Respondents

CORAM : **SHRI A.P. KURHEKAR, MEMBER-J**

DATE : **05.07. 2019**

J U D G M E N T

1. Heard Shri K.R. Jagdale, learned Advocate for the Applicant and Ms. N.G. Gohad, learned Presenting Officer for the Respondents.

2. The Applicant has invoked the jurisdiction of this Tribunal under Section 19 of the Administrative Tribunal Act, 1985 being aggrieved by orders dated 11.01.2018 and 18.01.2018 whereby the maternity leave was rejected and recovery of pay and allowances of Rs.1,58,385/- paid to her was sought.

3. Briefly stated facts giving rise to this applicant are stated as under:-

The Applicant is female Government employee working on the post of Counsellor (Group 'B') at Children Home, Shirur, Dist.: Pune. The Respondent No.2 viz. the Commissioner Child Development by order dated 17.11.2012 appointed the Applicant on the post of Counsellor at Shirur and accordingly she joined services. On 17.09.2013, she had applied for maternity leave from 17.09.2013 which was accompanied by medical servant. She delivered a baby girl on 09.11.2013. She resumed duty on 18.03.2014. At the time of resuming the service, she had submitted an application in requisite format along with Medical Certificate of Nursing home for maternity leave from 15.09.2013 to 15.03.2014 for 182 days. The application made by the Applicant for maternity leave was processed and Superintendent of Children Home, Shirur where the Applicant was serving submitted the proposal for grant of leave to Divisional Commissioner, Women & Child Development (Respondent No. 4). While recommending the proposal, the Respondent No.5 - District Women and Child Development has opined that the Applicant is

permanent employee and entitled to maternity leave under Rule 74(1) of Maharashtra Civil Services (Leave) Rules, 1981 (hereinafter referred to as 'Leave Rules 1981'). However, the matter was referred to the Respondent No.1 - Principal Secretary, Women and Child Development, State of Maharashtra. The Respondent No.1 informed the Commissioner, Women and Child Development (Respondent No.2) that the Applicant is not permanent employee, as contemplated under Rule 74(1) of 'Leave Rules 1981' and secondly, as she has not completed one year's service while proceeding on leave, she is not entitled to leave in view of Rule 74(2) of 'Leave Rules 1981' and further directed for recovery of Pay and Allowances paid to her after she proceeded on leave. In pursuance of it, the Deputy Commissioner, Woman and Child Development by letter dated 11.01.2018 directed Superintendent Children Home, Shirur to take appropriate action and submit compliance report. Consequently, Superintendent of Children Home, Shirur passed the order on 18.01.2018 informing the Applicant that she is not entitled to maternity leave for 180 days as prayed for and further directed her to deposit the amount of Pay and Allowances of Rs.1,58,382/- paid to her by the Office.

4. The Applicant has challenged the impugned order, whereby maternity leave was rejected and recovery of Pay and Allowances was sought contending that she was appointed as permanent employee, and therefore, entitled to maternity leave of 180 days as per Rule 74(1) of 'Leave Rules 1981'.

5. The Respondents resisted the application *inter-alia* denying the entitlement of the Applicant to the maternity leave of 180 days contending that she was appointed as a temporary employee and not completed one year's service before proceeding on leave to claim the benefit of maternity leave of 180 days. The Respondents further contend that after proceeding on maternity leave, the Pay and Allowances were paid without getting the leave sanctioned, and therefore, recovery was sought. The Respondents further

contend that unless the certificate of permanency is issued in terms of Circular dated 11.09.2014 which requires three years' continuous service for permanency certificate, she cannot be termed permanent employee. As no such permanency certificate was issued to the Applicant, she cannot be termed permanent employee within the meaning of Rule 74 (1) of 'Leave Rules 1981'. With this pleading, the Respondents sought to justify the impugned action and prayed to dismiss the O.A.

6. Shri K.R. Jagdale, learned Counsel for the Applicant sought to contend that in appointment order dated 17.11.2012 (Page No.17 of Paper Book), there is no reference that the appointment is temporary, and therefore, in absence of any such stipulation in the appointment order, the Applicant will have to be termed as permanent employee and entitled to maternity leave under Rule 74(1) of 'Leave Rules 1981'. He, therefore, urged that the stand taken by the Respondents that Applicant is temporary employee, and therefore, not entitled to maternity leave is erroneous. He further referred to provisions of Maternity Benefit Act, 1961 (hereinafter referred to as 'Maternity Act 1961' for brevity) which is central enactment and submitted that in view of the provision of it, in fact, maternity leave cannot be denied to the Applicant. He also placed reliance on the judgment of Hon'ble High Court in ***Writ Petition No.3491/2018 (Archana Dahiphale V/s State of Maharashtra & Ors) decided on 19.10.2018*** wherein benefit of maternity leave was granted to contract employee, who was appointed as a Project Officer in the Office of Director General, Dr. Babasaheb Ambedkar Research and Training Institute, Pune. Shri K.R. Jagdale, learned Counsel also pointed that indeed the Government by G.R. dated 15.01.2016 deleted the condition of one year's service for grant of maternity leave of 180 days and this aspect also needs to be considered in proper perspective.

7. Per contra, Smt. N.G. Gohad, learned P.O urged that the Applicant being State Government employee is governed by 'Leave Rules 1981' and the Applicant being appointed as temporary employee, she is not entitled to maternity leave before completion of one year's service as provided under Rule 74(2) with (a) & (b) of 'Leave Rules 1981'. She has also pointed out that as she has not completed three years' of service, she was not issued certificate of permanency in terms of Circular dated 19.09.2014. As regard G.R. dated 15.01.2016, the learned P.O. submitted that it has no retrospective effect as it has come into effect from 18.01.2016 only, and therefore, the Applicant is not entitled to any benefit of the same.

8. The crux of the matter is whether the impugned action of the Respondents refusing maternity leave and order of recovery of Pay and Allowances is sustainable in law.

9. Learned Counsel for the Applicant heavily placed reliance on the decision of Hon'ble High Court in **W.P. No.3491/2018**, wherein benefit of maternity leave was granted to contract employee considering the provisions of 'Maternity Act 1961'. The Hon'ble High Court held as follows:-

"17. We now refer to the relevant decision of the Hon'ble Apex court in this context. A profitable reference can be made to the decision of the Hon'ble Supreme Court in the case of **J.K. Cotton Spinning & Weaving Mills Co.Ltd. Vs. Badri Mali – (1964)3SCR 724** where it is observed thus:-

"Indeed the concept of social justice has now become such an integral part of industrial law that it would be idle for any party to suggest that industrial adjudication can or should ignore the claims of social justice in dealing with industrial disputes. The concept of social justice is not narrow, one – sided, or pedantic, and is not confined to industrial adjudication alone. Its sweep is comprehensive. It is founded on the basis ideal of socio-economic equality and its aim is to assist the removal of socio-economic disparities and inequalities; nevertheless, in dealing with industrial matters, it does not adopt a doctrinaire approach and refuses to yield blindly to abstract notions but adopts a realistic and pragmatic approach."

The observations made by the Apex court in the case of *J.K. Cotton Spinning & Weaving Mills Co. Ltd.* based on socio-economic equality and the concept of adopting a realistic and pragmatic approach is carried forwarded by the Hon'ble Supreme Court in the case of ***Municipal Corporation of Delhi vs. Female Workers (Muster Roll)*** (*supra*) wherein the following observations are made:-

“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 phenomena 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 realize the physical difficulties which a working woman would face in performing her duties at the work place 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 victimized for forced absence during the pre or post-natal period.”

Thus, the Hon'ble Supreme Court has expressed its concern in the matter of treatment given to women and went on to observe that women constitute half the segment of our society and that they have to be honoured and treated with dignity at places where they work to earn their livelihood. Whatever be the nature of their duties and avocation, the place where they work, they must be provided with all facilities to which they are entitled to. The Apex Court has specifically observed that 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 realize the physical difficulties which a working woman would face in performing her duties at the work place 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 victimized for forced absence during the pre or post-natal period.

18. As indicated earlier, the benefits contemplated by the Maternity Benefit Act, 1961 have been extended by the Hon'ble Supreme Court not only to work women in an 'industry' but to the muster roll women employees of the Municipal Corporation working on daily wages also.

23. *in the light of these salutary provisions, the respondents cannot be heard to contend that the condition No.10 in the agreement would override the beneficial and benevolent provisions of the said Act. The stand of the respondent that the petitioner is dis-entitled to the said benefits in view of the agreement regarding the terms and conditions of her service is unsustainable in the teeth of the Section 27 of the said Act. The petitioner therefore cannot be deprived of the beneficial provisions of the said Act or any other rules which may entitle her to benefits which are more favourable than those contained in the agreement.*

24. *In our opinion, the provisions so construed, would indicate that not only is the woman employee assured of the benefits under the said Act, but if rules are framed by the State Government providing for benefits which are more favourable, then the petitioner would be entitled to the benefits which are more favourable than what is provided under the said Act.*

25. *At this juncture, we may refer to the decision of the Division Bench of this Court in the case of **Smt. Prerna Ramchandra Kalunkhe-Kulkarni in Writ Petition (L) No.6789 of 2018** to which one of us (M.S. Karnik, J.) was a party. In paragraph 17 of the said decision it has been mentioned that it is not in dispute that the women Government servants of State of Maharashtra are entitled to the benefit of 180 days of maternity leave as per the provisions of the Maharashtra Civil Services (Leave) Rules, 1981 ('Rules of 1981' for short). This Court was considering the questions as to whether the petitioner therein who was appointed on a tenure basis as a member of District Consumer Disputes Redressal Forum was entitled to the same benefits as a women Government servant of the State of Maharashtra is entitled. It has been held that having regard to 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 servant of the State of Maharashtra only as that would frustrate the principles enunciated by the Hon'ble Supreme Court in the case of (1) **J. K. Cotton Spinning & Weaving Mills Co. Ltd. Vs. Badri Mali (supra)** and (2) **Municipal Corporation of Delhi vs. Female Workers (Muster roll) and anr. (supra)**. This court thus held that for the purpose of granting maternity leave, the petitioner therein was entitled to 180 days leave as provided in the said Rules of 1981 since the petitioner therein was working on tenure basis of the District Forum established by the State Government.*

28. *It has further been observed that identical issue of granting maternity leave to women employees appointed on contract basis or on ad-hoc or temporary basis has been considered by the Allhabad High Court, the Rajasthan High Court, the Punjab & Haryana High Court and the Uttarakhand High Court and based on the law laid*

down by the Supreme Court in the case of Female Workers (Muster Roll) (supra), petitions have been allowed and directions issued to grant benefit to the employees. Though the view of the Division Bench of the Madhya Pradesh High Court is not binding on us, as the same has only persuasive value, we are nonetheless persuaded to accept the said view as we are in respectful agreement with the view taken. In this view of the matter, we hold that the petitioner, who is appointed as a Project Officer with respondent No.2 on contractual basis on a consolidated monthly honorarium of Rs.25,000/- per month is entitled to the maternity leave benefits of salary from 13th June, 2017 to 30th November, 2017.”

10. Before proceeding with the discussion, it would be appropriate to refer the Rule 74 of ‘Leave Rules 1981’ which is as follows:-

“74. Maternity Leave.

(1) A competent authority may, subject to the provisions of this rule, grant to a female Government servant in permanent employ, who does not have three or more living children on the date of the application, maternity leave for a period of (for amended Rule ninety days) from the date of its commencement. During such period she shall be paid leave salary equal to the pay drawn immediately before proceeding on leave. Such leave shall not be debited to the leave account.

(2) A female Government servant not in permanent employ who has put in at least one year of continuous service shall also, subject to the provisions of this rule, be eligible for maternity leave referred to in sub-rule (1), subject to the condition that the leave salary admissible during the period of maternity leave shall be regulated as follows, that is to say:-

(a) In the case of a female Government servant who has put in two or more years continuous service, the leave salary admissible shall be as provided in sub-rule (1) of the 70 of these rules; and

(b) In the case of a female Government servant who has put in continuous service for a period exceeding one year, but less than two years the leave salary admissible shall be as provided in sub-rule (2) of rule 70 of these rules.”

11. Material to note that keeping in mind the benevolent object of granting maternity leave subsequently, the State Government by G.R. dated 15.01.2016 relaxed the condition of one year's service contemplated in Rule 74(2)(d) of 'Leave Rules 1981'. True, the G.R. dated 15.01.2016 is made applicable from the date of issuance of G.R. and it has no retrospective effect. However, the fact remains that the requirement of minimum service required under Rule 74(2)(a)(b) of 'Leave Rules 1981' has been deleted subject to condition that the employee needs to execute the bond.

12. Now turning to the provisions of 'Maternity Act 1961' material to note that Section 5 of 'Maternity Act 1961' provides for grant of maternity benefit of 12 weeks where the employee has worked for a period not less than 160 days in 12 months immediately preceding the date of expected delivery. Subsequently, by way of amendment in 2019, the period of maternity leave is extended to 26 weeks and the period of minimum employment is reduced to 80 days from 160 day in 12 months immediately preceding the date of expected delivery.

13. Whereas, in the present case, the Applicant has admittedly worked for near about 10 months before proceeding on leave in 2013. As per the provisions of 'Maternity Act 1961' applicable in 2013, the Applicant was entitled to maternity benefit of 12 weeks. Whereas, she had sought leave of 182 days as a maternity leave.

14. The submission advanced by the learned Advocate for the Applicant that the Applicant was permanent employee, and therefore, her case falls in Rule 74(1) of 'Leave Rules 1981' cannot be brushed aside lightly. As stated above, there is no requirement of minimum period of service for maternity leave of 180 days as provided in Rule 74(1) of 'Leave Rules 1981'. The perusal

of appointment order dated 17.11.2012 reveals that it does not have specific stipulation that the Applicant is temporary employee. Furthermore, while forwarding the application of the Applicant for grant of maternity leave, the Respondent No.5 – District Women and Child Development Officer, Pune in his letter dated 11.05.2015 has specifically noted that the matter of the Applicant is governed by Rule 74(1) of 'Leave Rules 1981', as the Applicant is permanent employee. It has also observed that Rule 74(2) of 'Leave Rules 1981' applied to temporary employee only. Suffice to say, the Respondent No.5 also opined that the Applicant is entitled to maternity leave of 180 days under Rule 74(1) of 'leave Rules 1981'.

15. True, the Applicant has not completed three years' service for issuance of permanency certificate as contemplated in Circular dated 11.09.2014. The Respondents sought to contend that unless permanency certificate is issued in terms of Circular dated 11.09.2014, the Applicant cannot be treated in permanent service, and therefore, her case does not fall in Rule 74(1) of 'Leave Rules 1981'. So far as the aspect of issuance of permanency certificate is concerned, in my considered opinion, it cannot be related to maternity leave benefit. Indeed, the stand taken by the Respondent that unless permanency certificate is issued, the employee is not entitled to maternity benefit is opposed to the very object of grant of maternity benefit. Needless to mention that to become a mother is most natural phenomenon and maternity leave on such rigid or inpracticable stand cannot be rejected.

16. It is rightly pointed out by the learned Advocate for the Applicant that the Applicant was appointed on substantial vacant post as seen from appointment order dated 17.11.2012. The perusal of order further reveals that in view of decision of Hon'ble High Court in **Writ Petition No.585/1985**, 50 posts of Counsellors were created and in pursuance of it, the Applicant

undergone the process of selection and appointed on the post of Counsellor. As such, there is no denying that the post held by her is substantive and was specially created by the Government in pursuance of decision of Hon'ble High Court in Writ Petition. Apart, admittedly, till date the Applicant is in service and she has completed near about six years' service as a Counsellor. In terms of Circular dated 11.09.2014, it was the responsibility of the Head of Department to issue permanency certificate at the end of tenure of three years. However, no steps are taken to that effect till date for no fault on the part of Applicant. It is nowhere the case of the Respondents that the Applicant is not entitled to permanency certificate though she has completed three years' service.

17. Even assuming for a moment that the Applicant is in temporary employment, in that event also, in my considered opinion, in view of the decision of Hon'ble Bombay High Court in Writ Petition No.3491/2018 decided on 19.10.2018 (cited supra), the benefit of maternity leave cannot be refused to the Applicant. In that matter, the Hon'ble High Court has granted maternity leave to contract employees, who were working in the Office of Director General, Dr. Babasaheb Ambedkar Research and Training Institute, Pune. The Respondents were directed to pay the salaries to the Petitioners therein for the period of maternity leave from 13th June, 2017 to 13th November, 2017. The Hon'ble High Court considered the provisions of 'Maternity Act 1961' and held when the benefit of maternity leave has been extended to the Women working in Industry as well as Muster Roll Women employees working in Municipal Corporation on Daily Wages, there is no reason to deny the benefit of maternity leave to employee appointed temporary on contract basis in view of benevolent object for grant of maternity leave. The Hon'ble High Court concluded that even contract employee cannot be deprived of the beneficial provisions of 'Maternity Act

1961' or any other Rules which may entitle her to benefits which are more favourable to employees. As such, the benefit of maternity leave was granted to contractual employees, who were appointed on consolidated pay of Rs.25,000/- p.m.

18. Thus, the position emerges that having regard to the benevolent object of grant of maternity leave to the women employees vis-à-vis the concept of social justice, the benefit of 180 days' maternity leave has been granted on sympathetic considerations unfettered by the Rules in favour of contract woman employee, tenure woman employee, muster role woman employee, daily wages woman employee by the Hon'ble High Court, and therefore, in my considered opinion, the principles enunciated in these authorities are squarely attracted to the present case.

19. In the present case, the Applicant is on far better footing. She is appointed on vacant and substantive post. This being the position, it would be just and inhuman as well as arbitrary to deny the maternity leave of 180 days. As stated above, the requirement of minimum service for availing 180 days maternity leave is deleted by G.R. dated 15.01.2016. Therefore, the present case needs to be considered as a special case, so as to extend the benefit of maternity leave of 180 days to the Applicant. It would be harsh and iniquitous to recover the Pay and Allowances paid to the Applicant for the period of maternity leave. As such, the impugned order of recovery of Pay and Allowances paid to the Applicant for the period of maternity leave is unsustainable in law. As an exceptional case, the Applicant deserves ex-post-facto sanction for 180 days' maternity leave.

19. The totality of aforesaid discussion leads me to sum-up that the impugned orders are not sustainable in law and O.A. deserves to be allowed. Hence, the following order.

ORDER

- (A) The Original Application is allowed.
- (B) The impugned orders of recovery dated 29th December, 2017, 11th January, 2018 and 18th November, 2018 are quashed and set aside.
- (C) The Applicant's leave period for 180 days be treated as maternity leave and necessary orders be issued to that effect.
- (D) No order as to costs.

Sd/-

(A.P. KURHEKAR)
Member(J)

Place : Mumbai
Date : 05.07.2019
Dictation taken by : V.S. MANE.