

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

CWP No.4509 of 2020.

Judgment reserved on: 01.03.2021.

Date of decision: 04.03.2021.

Sushma DeviPetitioner.

Versus

State of Himachal Pradesh and others
....Respondents.

Coram

The Hon'ble Mr. Justice Tarlok Singh Chauhan, Judge.
The Hon'ble Mr. Justice Sandeep Sharma, Judge.

Whether approved for reporting?¹ Yes

For the Petitioner : Mr. Kush Sharma, Advocate
vice Mr. Raj Negi, Advocate.

For the Respondents: Mr. Ashok Sharma, Advocate
General with Mr. Vikas
Rathore, Mr. Vinod Thakur, Mr.
Shiv Pal Manhans, Additional
Advocate Generals, Mr.
Bhupinder Thakur and Mr.
Yudhbir Singh Thakur, Deputy
Advocate Generals.

Tarlok Singh Chauhan, Judge

The short question that arises for consideration
in this petition is whether a woman employee working as

¹*Whether the reporters of the local papers may be allowed to see the Judgment?Yes*

Language Teacher on contract basis with the Government is entitled to avail maternity leave even in case where she gets the child through arrangement by surrogate parents?

2. The petitioner joined as a Language Teacher on contract basis and is currently posted at Government Senior Secondary School, Showad, District Kullu. The petitioner was blessed with a baby on 10.09.2020 through surrogacy treatment from Fortis La Femme Hospital S-549 Alknanda Don Bosco Road, Greater Kailash II, New Delhi. The petitioner had applied for maternity leave to the Principal, Government Senior Secondary School, Showad, District Kullu(respondent No.4), who in turn forwarded the same to 3rd respondent i.e. Deputy Director, Higher Education, Kullu, seeking clarification as to whether the petitioner is entitled for maternity leave on surrogacy. However, no action whatsoever was taken on the application of the petitioner, constraining her to file the instant petition, seeking therein a direction to the respondents to sanction/grant the maternity leave to the petitioner.

3. The respondents have filed short reply wherein they have not denied that the petitioner had been blessed

with a baby through surrogacy and had applied for maternity leave. The only ground taken for non grant of the leave was that as per Notification of H.P. Government issued vide Finance Department No. Fin.(C)-A(3)-1/2008 Loose dated 21.12.2017, maternity leave is admissible on adoption of a child as per Rule 43(1) of CCS (Leave) Rules 1972 for 180 days, but there is no clarification in the said notification regarding admissibility of maternity leave to a female Government employee on surrogacy.

4. We have heard the learned counsel for the parties and have gone through the material placed on record.

5. The question of becoming parents through surrogacy came to be considered by the Hon'ble Supreme Court in ***Baby Manji Yamada versus Union of India and another (2008) 13 SCC 518***. Even though, the dispute therein was between biological parents and host, however, various forms of surrogacy were discussed by the Hon'ble Supreme Court in the said judgment from paragraphs 8 to 16 which read as follows:

“8. Surrogacy is a well known method of reproduction whereby a woman agrees to become

pregnant for the purpose of gestating and giving birth to a child she will not raise but hand over to a contracted party. She may be the child's genetic mother (the more traditional form for surrogacy) or she may be, as a gestational carrier, carry the pregnancy to delivery after having been implanted with an embryo. In some cases surrogacy is the only available option for parents who wish to have a child that is biologically related to them.

9. The word "surrogate", from Latin "subrogare", means "appointed to act in the place of". The intended parent(s) is the individual or couple who intends to rear the child after its birth.

10. In "traditional surrogacy" (also known as the Straight method) the surrogate is pregnant with her own biological child, but this child was conceived with the intention of relinquishing the child to be raised by others; by the biological father and possibly his spouse or partner, either male or female. The child may be conceived via home artificial insemination using fresh or frozen sperm or impregnated via IUI (intrauterine insemination), or ICI (intra cervical insemination) which is performed at a fertility clinic. '

11. In "gestational surrogacy" (also know as the Host method) the surrogate becomes pregnant via embryo transfer with a child of which she is not the biological mother. She may have made an arrangement to relinquish it to the biological mother or father to raise, or to a parent who is themselves unrelated to the child (e. g. because the child was conceived using egg donation, germ donation or is the result of a donated embryo). The surrogate mother may be called the gestational carrier.

12. "Altruistic surrogacy" is a situation where the surrogate receives no financial reward for her pregnancy or the relinquishment of the child (although usually all expenses related to the pregnancy and birth are paid by the intended parents such as medical expenses, maternity clothing, and other related expenses).

13. "Commercial surrogacy" is a form of surrogacy in which a gestational carrier is paid to carry a child to maturity in her womb and is usually resorted to by well off infertile couples who can afford the cost involved or people who save and borrow in order to complete their dream of being parents. This medical procedure is legal in several countries including in India where due to excellent medical infrastructure, high international demand and ready availability of poor surrogates it is reaching industry proportions. Commercial surrogacy is sometimes referred to by the emotionally charged and potentially offensive terms "wombs for rent", "outsourced pregnancies" or "baby farms".

14. Intended parents may arrange a surrogate pregnancy because a woman who intends to parent is infertile in such a way that she cannot carry a pregnancy to term. Examples include a woman who has had a hysterectomy, has a uterine malformation, has had recurrent pregnancy loss or has a healthy condition that makes it dangerous for her to be pregnant. A female intending parent may also be fertile and healthy, but unwilling to undergo pregnancy.

15. Alternatively, the intended parent may be a single male or a male homosexual couple.

16. Surrogates may be relatives, friends, or previous strangers. Many surrogate arrangements are made through agencies that help match up

intended parents with women who want to be surrogates for a fee. The agencies often help manage the complex medical and legal aspects involved. Surrogacy arrangements can also be made independently. In compensated surrogacies the amount a surrogate receives varies widely from almost nothing above expenses to over \$ 30,000. Careful screening is needed to assure their health as the gestational carrier incurs potential obstetrical risks.”

6. It is no longer *res integra* that a female contractual employee/adhoc employee is entitled to maternity leave at par with the female regular employee. Reference in this regard can conveniently be made to the judgment rendered by the Division Bench of this Court of which one of us (Justice Tarlok Singh Chauhan) was a member in '**State of H.P. and others versus Sudesh Kumari**' **2015 (1) Him. L.R.(DB) 36**, wherein it was held as under:

“8. The claim of maternity leave is founded on the grounds of fair play and social justice. There cannot be discrimination and if any discrimination is made, it is in breach of Articles 14 and 15 of the Constitution. Articles 41, 42, and 43 deals with the subject and we deem it appropriate to reproduce the said Articles herein:

"41. Right to work, to education and to public assistance in certain cases.- The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.

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 organization 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 co-operative basis in rural areas."

9. In case titled *Municipal Corporation of Delhi v. Female Workers and anr.*, 2000 3 SCC 224, it has been held as under:

"27. The provisions of the Act which have been set out above would indicate that they are wholly in consonance with the Directive Principles of State Policy, as set out in Article 39 and in other Articles, specially Article 42. A woman employee, at the time of advanced pregnancy cannot be compelled to undertake hard labour as it would be detrimental to her health and also to the health of the foetus. It is for this reason that it is provided in the Act that she would be entitled to maternity leave for certain periods prior to and after delivery. We have scanned the different provisions of

the Act, but we do not find anything contained in the Act which entitles only regular women employees to the benefit of maternity leave and not to those who are engaged on casual basis or on muster roll on daily wage basis.

28. The Industrial Tribunal, which has given an award in favour of the respondents, has noticed that women employees have been engaged by the Corporation on muster roll, that is to say, on daily wage basis for doing various kinds of works in projects like construction of buildings, digging of trenches, making of roads, etc., but have been denied the benefit of maternity leave. The Tribunal has found that though the women employees were on muster roll and had been working for the Corporation for more than 10 years, they were not regularized. The Tribunal, however, came to the conclusion that the provisions of the Maternity Benefit Act had not been applied to the Corporation and, therefore, it felt that there was a lacuna in the Act. It further felt that having regard to the activities of the Corporation, which had employed more than a thousand women employees, it should have been brought within the purview of the Act so that the maternity benefits contemplated by the Act could be extended to the women employees of the Corporation. It felt that this lacuna could be removed by the State Govt. by issuing the necessary notification under the Proviso to Section 2 of the Maternity Act. This Proviso lays down as under :

"Provided that the State Government may, with the approval of the Central Government, after giving not less than two month's notice of its intention of so doing, by notification in the Official Gazette, declare that all or any of the provisions of this Act shall apply also to any other establishment or class of establishments, industrial, commercial, agricultural or otherwise."

29.....

30. We appreciate the efforts of the Industrial Tribunal in issuing the above directions so as to provide the benefit of the Act to the muster roll women employees of the Corporation. This direction is fully in consonance with the reference made to the Industrial Tribunal. The question referred for adjudication has already been reproduced in the earlier part of the judgment. It falls in two parts as under :

(i) Whether the female workers working on muster roll should be given any maternity benefit ?

(ii) If so, what directions are necessary in this regard.

31-32....

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 realise 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 victimised for forced absence during the pre or post-natal period."

10. In *Ms. Sonika Kohli & Anr. vs. Union of India*, 2004 3 SLJ 54 CAT, it has been held in paras 12 and 13, the relevant portion of which is quoted as under:

"12. An almost a new point of controversy has been raised with regard to the admissibility of maternity leave to female teachers. In some of the O.As. it has been prayed that the benefit of maternity leave, which has hitherto been denied by the respondent-Administration, be directed to be extended in accordance with the rules. Mr. R.P. Bali, learned Counsel for some of the applicants urged that the action of the respondents in denying the benefit of maternity leave like other regular employees is violative of the principles enshrined in Articles 14 and 15 of the Constitution of India as it denies the benefit of beneficial provisions of law to a female teacher. Mr. N.K. Bhardwaj, learned Counsel for the Administration urged that maternity leave is not admissible to contract employees as they are not covered by the Punjab CSR Vol.1, Part-1. According to him, the benefit of maternity leave with pay is payable to permanent/regular female employees and that the Administration is justified in carving out a distinction between the regular female teachers and the teachers appointed on part time or contract basis, as is in the present case. Let us examine the respective contentions of the parties.

13. The claim for maternity leave is founded on grounds of fair play and social justice. Before the advent of the Constitution and for a sufficiently long time, thereafter it was customary or say traditional for women to stick to their homes but now they seek

various jobs so as to attain economic independence by utilizing their talent, education, industry etc. Sometimes the jobs are taken up by them to overcome economic hardship. For a woman to become a mother is most natural phenomenon in her life. Whatever is needed to facilitate the birth of a 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 work place while carrying a baby in the womb or while bearing a child after birth. Our constitution which, in its preamble, promises social and economic justice, enshrines certain radical provisions in the form of Articles 42 and 43 which deal with the just and humane conditions of work and maternity relief as well as living wage conditions of work ensuring a decent standard of life, and full enjoyment of leisure and social and cultural opportunities. These principles are required to be followed by the State as enjoined by Article 39. In the background of these Articles, the Parliament has enacted Maternity Benefit Act, 1961 (Act No. 53 of 1961) with a view to regulate the employment of women in certain establishments for certain periods before and after child birth and to provide for maternity benefit and certain other benefits."

11. It is also apt to reproduce para 3 of the judgment delivered in Rattan Lal and others vs. State of Haryana and others, 1985 3 SLR 548.

"3. We strongly deprecate the policy of the State Government under which 'ad hoc' teachers are denied the salary and allowances for the period of the summer vacation by resorting to the fictional breaks of the type referred to above. These 'ad hoc'

teachers shall be paid salary and allowances for the period of summer vacation as long as they hold the office under this order. Those who are entitled to maternity or medical leave shall also be granted such leave in accordance with the rules."

12. The Jammu and Kashmir High Court in case titled *Tasneem Firdous vs. State and others*, 2006 2 SLJ 699, held that the employees working on contractual basis are also entitled to maternity leave. The relevant portion of para 6 of the judgment is reproduced as under:

"6. In subjective context the matter assumes a larger dimensions because it overflows the contours of an individual case or a singular instance and almost borders on the rights of women and obligation of the State to protect and preserve them, to which, besides statutory constitutional considerations, the international covenants also bind the government. Reference in this behalf may be made to "Convention on the Elimination of all Forms of Discrimination against Women" adopted by Community of nations on 18.12.1979 to which government of India too is a signatory. "

13. In paras 6 and 37 of the judgment in *Municipal Corporation of Delhi v. Female Workers and anr.*, 2000 3 SCC 224, while considering the constitutional contours of the matter, the Hon'ble apex Court observed as under:

"6 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 Chapter 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-a-vis the Labour Laws, this Court in Hindustan Antibiotics Ltd. v. Workmen, 1967 AIR(SC) 948, 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 :-

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

7-36 .

37 .."2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures :

(a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;

(b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;

(c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;

(d) To provide special protection to women during pregnancy in types of work proved to be harmful to them.

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

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

15. For the reasons discussed herein above, the LPAs are dismissed along with pending applications, if any."

7. Rule 43 of the CCS(Leave) Rules reads as under:

"43. Maternity Leave:

(1) A female Government servant (including an apprentice) with less than two surviving children may be granted maternity leave by an authority competent to grant leave for a period of 1[180 days] from the date of its commencement.

(2) During such period, she shall be paid leave salary equal to the pay drawn immediately before proceeding on leave.

NOTE:- In the case of a person to whom Employees' State Insurance Act, 1948 (34 of 1948), applies, the amount of leave salary payable under this rule shall be reduced by the amount of benefit payable under the said Act for the corresponding period.

²[(3) Maternity leave not exceeding 45 days may also be granted to a female Government servant (irrespective of the number of surviving children) during the entire service of that female Government servant in case of miscarriage including abortion on production of medical certificate as laid down in Rule 19:

Provided that the maternity leave granted and availed of before the commencement of the CCS (Leave) Amendment Rules, 1995, shall not be taken into account for the purpose of this sub-rule.]

(4) (a) Maternity leave may be combined with leave of any other kind.

(b) Notwithstanding the requirement of production of medical certificate contained in sub-rule (1) of Rule 30 or sub-rule (1) of Rule 31, leave of the kind due and admissible (including commuted leave for a period not exceeding 60 days and leave not due) upto a maximum of ¹[two years] may, if applied for, be granted in continuation of maternity leave granted under sub-rule (1).

(5) Maternity leave shall not be debited against the leave account.”

8. Once, the respondents admit that the minor child is that of the petitioner, then she is entitled to the leave akin to the persons, who are granted leave in terms of the rules (ibid). The purpose of the said rules is for proper bonding between the child and parents. Even, in the case of adoption, the adoptive mother does not give birth to the child, yet the necessity of bonding of the

mother with the adopted child has been recognized by the Central Government.

9. This issue has been considered in detail by the learned Single Judge of the Delhi High Court in **Rama Pandey versus Union of India and others 2015 Labour Industrial Cases 3921** wherein it was held that the commissioning mother's entitlement to maternity leave cannot be denied only on the ground that she did not bear the child.

10. A Division Bench of the Bombay High Court in **Dr. Mrs. Hema Vijay Menon versus State of Maharashtra and others AIR 2015 Bombay 231** while following the aforesaid judgment observed as under:

7. On hearing the learned counsel for the parties, it appears that the Joint Director of Higher Education, Nagpur, was not justified in refusing maternity leave to the petitioner. According to Oxford English Dictionary, maternity means- motherhood. Maternity means the period during pregnancy and shortly after the child's birth. If Maternity means motherhood, it would not be proper to distinguish between a natural and biological mother and a mother who has begotten a child through surrogacy or has adopted a child from the date of his/ her birth. 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. 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. It is said that being a mother is one of the most rewarding jobs on the earth and also one of the most challenging. To distinguish between a mother who begets a child through surrogacy and a natural mother who gives birth to a child, would result in insulting womanhood and the intention of a woman to bring up a child begotten through surrogacy, as her own. A commissioning mother like the petitioner would have the same rights and obligations towards the child as the natural mother. Motherhood never ends on the birth of the child and a commissioning mother like the petitioner cannot be refused paid maternity leave. A woman cannot be discriminated, as far as maternity benefits are concerned, only on the ground that she has obtained the baby through surrogacy. Though the petitioner did not give birth to the child, the child was placed in the secured hands of the petitioner as soon as it was born. A newly born child cannot be left at the mercy of others. A maternity leave to the commissioning mother like the petitioner would be necessary. 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.

8. As rightly pointed out on behalf of the petitioner, there is nothing in Rule 74 of the the Maharashtra Civil Services (Leave) Rules, 1961, which would disentitle a woman, who has attained motherhood through the surrogacy procedure to maternity leave. Rule 74 provides for maternity leave to a female government employee. We do not find anything in Rule 74 which disentitles the petitioner to maternity leave, like any other female government servant, only because she has attained motherhood through the route of surrogacy procedure. It is worthwhile to note that by the Government Resolution dated 28.07.1995, maternity leave is not only provided to a natural mother but is also provided to an adoptive mother, who adopts a child on its birth. The only reason for refusing maternity leave to the petitioner is that there is nothing in the Government Resolution, dated 28.07.1995 for providing maternity leave to the mother who begets the child through surrogacy. If the Government Resolution, dated 28.07.1995 provides maternity leave to an adoptive

mother, it is difficult to gauge why maternity leave should be refused to the mother, who secures the child through surrogacy. In our view, there cannot be any distinction whatsoever between an adoptive mother that adopts a child and a mother that begets a child through a surrogate mother, after implanting an embryo in the womb of the surrogate mother. In our view, the case of the mother who begets a child through surrogacy procedure by implanting an embryo created by using either the eggs or sperm of the intended parents in the womb of the surrogate mother, would stand on a better footing than the case of an adoptive mother. At least, there cannot be any distinction between the two. Right to life under [Article 21](#) of the Constitution of India includes the right to motherhood and also the right of every child to full development. If the government can provide maternity leave to an adoptive mother, it is difficult to digest the refusal on the part of the Government to provide maternity leave to a mother who begets a child through the surrogacy procedure. We do not find any propriety in the action on the part of the Joint Director of Higher Education, Nagpur, of rejecting the claim of the petitioner for maternity leave. The action of the respondent Nos. 1 to 3 is clearly arbitrary, discriminatory and violative of the provisions of Articles 14 and 21 of the Constitution of India. It is useful to refer to the unreported judgment of the Delhi High Court in the case of [Rama Pande vs. Union of India](#), and relied on by the learned counsel for the petitioner, in this regard.”

11. Similar reiteration of law can be found in the judgment rendered by the learned Single Judge of the Chhattisgarh High Court in ***Devshree Bandhe versus Chhattisgarh State Power Holding Company Limited and others 2017 Labour Industrial Cases 1506*** wherein it was held as under:

“22. According to Shorter Oxford English Dictionary (Fifth Edition), "maternity" means (1) the quality or condition of being a mother; motherhood and (2) the qualities or conduct characteristic of a mother; motherliness. According to other Oxford English Dictionaries, "maternity" means motherhood.

23. According to Black's Law Dictionary (Eighth Edition), "maternity" means the state or condition of being a mother, especially a biological one; motherhood.

24. Maternity means the period during pregnancy and shortly after the child's birth. If maternity means motherhood, it would not be proper to distinguish between a natural and biological mother and a mother who has begotten a child through surrogacy. 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. 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.

25. Right to life under [Article 21](#) of the Constitution of India includes the right to motherhood and also the right of every child to full development.

26. The Supreme Court in *Lakshmi Kant Pandey* (AIR 1984 SC 469) (*supra*) while expanding the scope of right to life held that right to life includes the right to motherhood and also the right of every child to full development, and observed as under: -

"6. ... Children are a "supremely important national asset" and the future well-being of the nation depends on how its children grow and develop. The great poet Milton put it admirably when he said: "Child shows the man as morning shows the day" and the Study Team on Social Welfare said much to the same effect when it observed that "the physical and mental health of the nation is determined largely by the manner in which it is shaped in the early stages". The child is a soul with a being, a nature and capacities of its own, who must be helped to find them, to grow into their maturity, into fulness of physical and vital energy and the utmost breadth, depth and height of its emotional, intellectual and spiritual being; otherwise there cannot be a healthy growth of the nation. ..."

27. In *Municipal Corporation of Delhi* (AIR 2000 SC 1274, paras 30 and 35) (*supra*), the question before the Supreme Court was whether female workers working in muster roll in the Corporation are entitled for maternity benefit at par with regular employees under the provisions of the [Maternity Benefit Act](#),

1961. The Supreme Court noticed the constitutional provisions contained in Articles 38, 39, 42 and 43 of the Constitution of India and [Sections 2](#) and [5](#) of the Maternity Benefit Act, 1961 as well as [Article 11](#) of the "Convention on the Elimination of all Forms of Discrimination against Women" adopted by the United Nations on 18-12-1979 and held that female workers working in muster roll are entitled to all benefits conceived under the [Maternity Benefit Act, 1961](#). It was observed as under: -

"33. ... To become a mother is the most natural phenomenon in the life of a woman. Whatever is needed to facilitate the birth of child to a woman who is in service, the employer has to be considerate and sympathetic towards her and must realise the physical difficulties which a working woman would face in performing her duties at the work place while carrying a baby in the womb or while rearing up the child after birth. ..."

38. These principles which are contained in [Article 11](#), reproduced above, have to be read into the contract of service between the 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) employees of the Corporation who have been working with them on daily wages."

12. Article 42 of the Constitution of India reads 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.”

13. It was long felt that the working women were unable to devote their time towards their children due to exigencies of service. Hence, the concept of grant of child care leave was introduced to ensure the welfare of the child so as to enable the mother to avail child care leave whenever she feels that the child needs the care. This is in tune with the international covenants and treaties to which India is a signatory.

14. As rightly held by the Bombay High Court, the object of the maternity leave is to protect the dignity of motherhood by providing for full and healthy maintenance to the woman and her child. Maternity leave is intended to achieve the object of ensuring social justice to women. Motherhood and childhood both require special attention.

15. 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. To distinguish between a mother who begets a child through surrogacy and a natural mother, who gives birth to a child, would result in insulting womanhood and the intention of a woman to bring up a child begotten through surrogacy. Motherhood never ends on the birth of the child and a commissioning mother cannot be refused paid maternity leave. A woman cannot be discriminated, as far as maternity benefits are concerned, only on the ground that she has obtained the baby through surrogacy. A newly born child cannot be left at the mercy of others as it needs rearing and that is the most crucial period during which the child requires care and attention of his mother. The tremendous amount of learning that takes place in the first year of the baby's life, the baby learns a lot too. A bond of affection has also to be developed.

16. In view of the aforesaid discussion, we find merit in this petition and the same is accordingly allowed and the respondents are directed to sanction/grant maternity leave to the petitioner in terms of Rule 43(1) of the CCS

(Leave) Rules, 1972. Pending application, if any, also stands disposed of.

(Tarlok Singh Chauhan)
Judge

(Sandeep Sharma)
Judge

4th March, 2021.
(krt)

High Court of HP