$~

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 28th January, 2019
Pronounced on: 01st February, 2019

\+ W.P.(C) 8748/2018 & CM APPL.45209/2018

DR. ANKITA BAIDYA ….Petitioner
Through: Mr. S.K. Dubey and Mr. Udit Malik, Advocates.

versus

UNION OF INDIA & ORS ... Respondents
Through: Mr. Bhagvan Swarup Shukla, CGSC for Union of India with Mr.Kamaldeep, Advocate.
Mr. Vibhor Garg, Mr. Tushar Gupta, Ms. Puja Agarwal and Mr. Deepanshu Panwar, Advs. For R-2

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

% **J U D G M E N T**

1. Oprah Winfrey once said, in a moment of sombre reflection, that "the choice to become a mother is the choice to become one of the greatest spiritual teachers there is". That may very well be, the All India Institute of Medical Sciences (AIIMS) would seek to contend – but it is also the choice of a delay of six months in obtaining the coveted and prestigious degree of DM (Doctorate of Medicine), if you happen to be an aspiring student and chance to become *enceinte* during the currency of your course. The petitioner, who so chanced to

become pregnant during the currency of her DM course, applied, to the AIIMS, for maternity leave and was informed, even while the leave, was sought and granted, that the attainment of the DM qualification, by her, would be postponed by 6 months, by reason of grant, to her, of maternity leave. Perplexed and distressed thereby, the petitioner has moved this Court.

2. The writ petition, therefore, seeks issuance of a writ of mandamus, to the AIIMS, to allow the petitioner to undertake the said DM examination in December, 2018.

3. The short issue that arises for determination, in the present writ petition is, therefore, whether a DM student in the AIIMS, who applies for maternity leave, would have to suffer a delay of 6 months in the completion of the DM course and, consequently, the award of the DM qualification.

4. Be it noted, during the pendency of this writ petition, the petitioner was permitted, *vide* order dated 30th November, 2018, to appear in the final examinations of the DM programme, which was conducted in December, 2018, without creation of any equities thereby.

5. Proceeding, then, to the facts.

6. On 1st July, 2011, the petitioner joined the Post Graduate MD course in Microbiology in the AIIMS. She cleared the final

examination of the said course in December, 2014. She, thereafter, joined as a Senior Resident in Laboratory medicine in, the AIIMS, in 2015 and, thereafter, as a Senior Resident in Microbiology in July, 2015, clearing the requisite entrance examinations on each account.

7. In January, 2016, the AIIMS issued a Prospectus for the DM programme in Infectious Disease which, it may be noted, was being introduced, for the first time in India, in the AIIMS. The petitioner applied, as a general category candidate, for the said programme in DM (Infectious Disease) and she cleared the entrance examination, in the first attempt.

8. The Prospectus for the DM programme in Infectious Disease, as issued by the AIIMS, contained various clauses setting out the terms and conditions applicable to persons/students undertaking the said programme. Clause 7 of the said Prospectus, which dealt with "leave", stipulated that the candidate would be entitled to 24 days leave in the first year, 30 days leave in the second year and 36 days in the third year. No other stipulation, regarding "leave", insofar as the DM programme in the various super specialties, including that of Infectious Diseases, was concerned, is to be found in the said Prospectus. For ready reference, Clause 7 of the Prospectus, which deals with the leave available to candidates undertaking superspeciality DM courses, may be reproduced, thus:

> "**7. Leave**
>
> 1st year: 24 days; 2nd year: 30 days; 3rd year: 36 days."

9. Consequent to clearing of the entrance examination, for the DM (Infectious Diseases) course, the petitioner joined the Medicine and Microbiology Department of the AIIMS, which administered the said programme, as Senior Resident (SR) (Academic), for the Academic Session January, 2016-December, 2018, on 1st January, 2016.

10. The Memorandum, dated 4th December, 2015, issued by the AIIMS, whereby the petitioner was informed that she had been selected as a student for the DM course, besides stipulating other conditions, applicable to the said course, specified, with respect to leave, as under:

> "He/she will be entitled for 90 days leave during three years i.e. 1st year 24, IInd Year 30 days and IIIrd year 36. If leave is extended in a year then the extended period is treated as Extra Ordinary Leave without pay and the registration period is also extended by postponing the Exam for one session."

11. During the tenure of the aforementioned DM course being undertaken by her, the petitioner applied, to the AIIMS, for 180 days Maternity Leave, for the period 8th March, 2016 to 3rd September, 2016.

12. The said application was allowed, by the AIIMS, *vide* letter dated 18th April, 2016. The said letter reads thus:

"ALL INDIA INSTITUTE OF MEDICAL SCIENCES
ACADEMIC SECTION-I

No.F-.5-l/2016-Acad.l Ansari Nagar, New Delhi-29

Dated: 18 April 2016

MEMORANDUM

Subject:- Grant of Maternity Leave in respect of Dr. Ankita Baidya, Senior Resident (DM) in the Department of Medicine & Microbiology.

With reference to his/her letter dated 07.03.2016 on the subject cited above, Dr. Ankita Baidya, Senior Resident (DM) in the Department of Medicine & Microbiology is hereby informed that Dean has been pleased to grant Maternity Leave as under:

1. 180 days maternity leave from 08.03.2016 to 03.09.2016.

2. Her registration for DM has been extended for 180 days from 01.01.2019 to 29.06.2019. Her final examination also postponed for one session. She will appear in the final examination in May 2019.

3. On return from leave she will/has join/joined her duty in the forenoon of 30.06.2019.

Sd/-18.04
(Dr. Sanjeev Lalwani)
Registrar"

13. Mr. Vibhor Garg, learned counsel appearing for the AIIMS, emphasized the fact – which Mr. Dubey, learned counsel for the petitioner, fairly does not deny – that the petitioner never assailed the above-extracted letter dated 18th April, 2016 and availed maternity leave, as allowed by the said order.

14. Consequent to expiry of the period of her maternity leave, the petitioner rejoined the services of the AIIMS on 4th September, 2016. Since then, the writ petition asserts, that the petitioner availed only 6

days of leave for the remaining period of her DM programme, from September, 2016 to December, 2018, and the counter affidavit of the AIIMS does not dispute this fact.

15. On 23rd March, 2018, the petitioner presented her thesis for the DM programme, which was duly approved by the competent faculty member, whereafter the petitioner commenced working towards completion of the thesis, so that she could submit it at least three months prior to the final examinations, scheduled for December, 2018.

16. On 1st May, 2018, the petitioner addressed a representation, to the AIIMS, requesting that the Maternity Leave granted to her be not considered as an extension of leave admissible to her under the terms and conditions of her admission to the DM course. She relied on a government Directive dated 14th March, 2018, which ordained that Maternity Leave be considered as part of tenure and not as an extension to the leave ordinarily available.

17. This was followed by a more detailed representation, dated 15th May, 2018, in which, besides relying on notification dated 4th April, 2018, issued by the AIIMS, and the aforementioned notification dated 14th March, 2018 of the Government of NCT of Delhi, the petitioner also placed reliance on the judgment of the High Court of Kerala in ***Dr. Deepthi S. v. Director of Medical Education [W.P.(C) 14649/2012].***

18. The above representations of the petitioner were rejected by the AIIMS *vide* the impugned Memorandum dated 23rd June, 2018, which provides, no reason for the rejection, but merely states that the request had been "examined by the competent authority but the same cannot be acceded to".

19. The petitioner is, therefore, before this Court by means of the present writ petition.

Rival Contentions

20. Mr. Dubey submits that the grant of maternity leave, to his client, could never constitute a justifiable ground for extending the date of the final examination of the DM course in which she was to appear, from December, 2018 to May, 2019.

21. Apropos the clause, in the Memorandum dated 4th December, 2015 (*supra*), issued by the AIIMS, to the effect that, if leave was extended, in the first year, beyond the permissible 24 days, the extended period was to be treated as Extra Ordinary Leave without pay, and the registration period was liable to be extended by postponing the examination by one session. Mr. Dubey submits that the said clause could not apply to grant of maternity leave. He draws my attention, in this regard, to Rules 32 and 43 of the Central Civil Services (Leave) Rules, 1972 which distinguishes between Extra Ordinary Leave and maternity leave. Mr. Dubey submits that, inasmuch as maternity leave was distinct from Extra Ordinary Leave,

there could be no question of treating maternity leave as Extra Ordinary Leave and, consequently, the stipulation regarding extension of the date of the examination, which was a sequitur to treating the extended leave as Extra Ordinary Leave, would also not apply.

22. Mr. Dubey further points out, in this regard, that the Prospectus of the AIIMS, governing the DM course, did not contain any such stipulation and that, therefore, the introduction of such stipulation in the letter admitting the petitioner to the DM course, being *de hors* the Prospectus, was unenforceable in law.

23. Reliance was also placed, by Mr. Dubey, on Articles 39 and 42 of the Constitution of India, as well as the Maternity Benefit Act, 1961 (hereinafter referred to as the "Maternity Benefit Act").

24. Mr. Dubey draws especial attention to Section 32 of the Maternity Benefit Act and invokes, in juxtaposition therewith, Sections 5 and 12 of the said Act, which, in his submission, would be squarely infracted if, merely because maternity leave, as granted to her, was availed by the petitioner, she was to suffer 6 months' delay in her final examinations.

25. Mr. Dubey also places reliance on the judgments of this Court in ***Vandana Kandari v. University of Delhi, 2010 SCC OnLine Del 2341,*** the High Court of Kerala in ***Dr. Deepthi S. (supra),*** the High Court of Madras in ***P. Sowmyaa v. The Secretary, Tamil Nadu Health and Family Welfare Department [W.P.(C) 6475/2018]*** and

the High Court of Madhya Pradesh in ***Priyanka Gujarkar v. Registrar General [W.P.(C) 17004/2015].***

26. Arguing on behalf of the AIIMS, Mr. Garg, learned counsel, submits, *per contra*, that the petitioner was estopped from raising the above challenge, as she has accepted the clause in the Memorandum dated 4th December, 2015 (*supra*), wherein it was specifically stipulated that if leave, in extension of the permissible periods stipulated therein was granted, it would result in postponement of her examination by one session. Having agreed to the said stipulation and having also accepted the conditions, contained in the letter dated 18th April, 2016, granting maternity leave to her, Mr. Garg submits that the petitioner could not now turn back and insist that she be permitted to write the final examination in December, 2018. Mr. Garg also sought to rely on the following clause, in the Guidelines for Academic Course, Awards and Orations at AIIMS":

> "**11. Leave**
>
> During the term of employment *the Junior Residents/Demonstrators* will be entitled leave as under:-
>
> First year – 30 days
>
> Second year – 36 days
>
> Third year – 36 days
>
> The leaves cannot be carried forward. They are not entitled to any other leave except that mentioned above. Residency as well as exam of residents who avail the 30 days leave over and above their entitlement will be extended. However, upto 30 days leave without pay in overall three years may be condoned by the Dean on

> special grounds for appearing in usual term of examination but the candidate is required to work for the extended period. However, the unavailed leave will be encashed after completion of three years. No encashment is eligible for sponsored/foreign national."
>
> (Emphasis supplied)

27. On it being pointed out, to Mr. Garg, that the above clause dealt with Junior Residents, whereas the petitioner was a Senior Resident, Mr. Garg had sought time to produce material to establish that an identical clause existed in respect of Senior Residents as well.

28. Pursuant to the grant of an opportunity, to Mr. Garg, for the said purpose, he has filed, under a cover of an index, the Minutes of the 117th Meeting of the Academic Council of the AIIMS, held on 20th November, 2018.

29. Mr. Garg relies on Agenda Item No. AC/117/8, as considered and approved in the said meeting. The said Agenda Item merits reproduction, *in extenso*, as under:

> "Item no AC/117/ 8: Regarding grant of Paternity leave and extension of tenure for academic courses if leaves extend beyond the permitted period for DM/M.Ch candidates.
>
> The proposal regarding grant of paternity leave and extension of tenure for academic courses if leaves extend beyond the permitted period for DM/M.Ch candidates was discussed.

It was informed that the Senior Resident (DM/M.Ch) are entitled for leave during the three years tenure as under:-

1st year	24 Days
2nd year	30 Days
3rd year	36 Days

If leave is extended in a year then the extended period is treated as Extra Ordinary Leave without pay and the registration period is also extended by postponing the Exam for one session). The Dean is the competent authority to condone the leave upto 30 days on the merit of each case.

Maternity leave:- Senior Resident (Non-Academic.), Senior Resident (DM/M.Ch) and Junior Residents (Acad.) are entitled for maternity leave for 180 days. However the tenure of Senior Resident (DM/M.Ch) and Junior Residents (Acad.) is extended in lieu of Maternity leave and final examination also postponed for one session.

Paternity leave:- Senior Resident (Non-Academic.), Senior Resident (Acad.) are entitled for 15 days paternity leave but tenure is not extended.

It was proposed that *for calculating tenure extension due to paternity leave*, the total number of leave availed in 3 years would be calculated. If the total leaves availed is more than 90 days (including paternity leave), then the tenure will be extended by the extra number of days beyond 90 days. Dr. Mahesh B. Patel and Dr. S Venkatesh said that the provisions for paternity and maternity leave to SR/JR have already been notified as per CCS Rules. The Director said that exam postponement would depend on total number of leaves availed as per existing policy.

The proposal was unanimously approved."

(Emphasis supplied)

30. The judgment in ***Vandana Kandari (supra)***, Mr. Garg would submit, stands overruled by the judgment dated 7th September, 2018, of a Division Bench of this Court, in LPA 294/2018 (***Ankita Meena v. University of Delhi***).

Analysis and Conclusion

31. I have heard learned counsel at length and applied my mind to the material on record as well as the legal submissions advanced before me.

The Maternity Benefit Act, 1961, and its application to the facts:

32. The first question that arises for consideration, before one proceeds to provisions of the Maternity Benefit Act, on which Mr. Dubey places reliance, is whether the said Act applies, at all, to the petitioner, given the relationship between the petitioner and the AIIMS. Though I must confess, I had some misgivings regarding the applicability of the said Act, as the petitioner was, essentially, a student of the AIIMS, rather than an "employee" thereof, as understood in its classical sense, a reading of the Memorandum, dated 4th December, 2015 (*supra*), *in extenso*, would merit applicability of the Maternity Benefit Act even to "students" such as the petitioner. In so holding, I am also persuaded by the fact that the Maternity Benefit

Act, being in the nature of a piece of social welfare legislation, the reach and sweep thereof has to be as expansive as possible, rather than limited by any pedantic considerations of word or phrase.

33. The Preamble of the Maternity Benefit Act itself states that "it is an Act to regulate the employment of women in certain establishments for certain periods before and after childbirth and to provide for maternity benefit and certain other benefits." The Memorandum, dated 4th December, 2015 (*supra*), while referring to the selection, of the petitioner "as a student for admission to DM/M.Ch. Course", goes on to set out the leave to which the petitioner would be entitled, the payment (₹ 18,750 + ₹ 6600 Grade Pay + NPA and usual allowance as admissible under the rules, equivalent to the post of Senior Resident), to which the petitioner would be entitled during the tenure of her DM course, her entitlement to Book Allowance of ₹ 3000/-per year, her entitlement to LTC, applicability, to the petitioner, of "the code of conduct rules", vesting, in the Director of the AIIMS, of "all powers relating to discipline and disciplinary action", qua the petitioner and, perhaps most importantly, the offering, to the petitioner, of "a temporary post of Senior Resident (Academic), consequent to his/her admission to the above-mentioned course", which has its own terms and conditions, of which Clauses 1, 2, 3 and 9 may be reproduced thus:

> "1. Private practice of any kind, whatsoever, is prohibited.
>
> 2. The tenure of the post/course is for a period of three years and co-terminus with the DM/M.Ch Course.

> 3. He/she will be on probation/trial for one year. During period his/her services are liable to be terminated by the Institute at any time without assigning any reasons. In case he/she resigns from service during trial period, he will have to give one month's pay in lieu thereof. After the completion of probationary period any extension the terms of appointment, the services can be terminated by a month's notice by either side. The appointing authority however reserves the right to terminate the services of the appointee forthwith or before the expiry of the stipulated period of notice by making payments to him of a sum equivalent of the pay & allowances for the period of notice or the unexpired portion thereof.
>
> 9. Other conditions of service such as benefits of pension provident funds etc. will be as are provided under the regulations of the Institute and/or may be provided therein in future. In case he/she will be governed by the rules as applicable to student registered for similar courses at the Institute."

34. In view of the above-mentioned covenants, figuring in the Memorandum dated 4th December, 2015 (*supra)*, whereby the petitioner was admitted as a student to the DM course, I am of the view that the petitioner cannot be excluded from the benefits available under the Maternity Benefit Act.

35. Having said that, however, it remains to be seen whether, in postponing the final examination of the DM course, to which the petitioner was admitted, by one session, the AIIMS infracted, in any manner, the provisions of the said Act. Mr. Dubey has, in this connection, relied on Section 27 of the Maternity Benefit Act, and

juxtaposed the said provision with Sections 5 and 12 thereof. It may be appropriate to address these provisions, seriatim.

36. Section 5 of the Maternity Benefit Act reads thus:

> "**5. Right to payment of maternity benefits**
>
> (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.
>
> ***Explanation:*** For the purpose of this sub-section, the average daily wage means the average of the woman's wages payable to her for the days on which she has worked during the period of three calendar months immediately preceding the date from which she absents herself on account of maternity, the minimum rate of wage fixed or revised under the Minimum Wages Act, 1948 (11 of 1948) or ten rupees, whichever is the highest.
> (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.
>
> ***Explanation*:** For the purpose of calculating under this sub-section the days on which a woman has actually worked in the establishment, the days for which she has been laid off or was on holidays declared under any law for the time being in force to be holidays with wages during the period of twelve months immediately

preceding the date of her expected delivery shall be taken into account.

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

PROVIDED 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 FURTHER 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."

37. Quite clearly, Section 5 of the said Act deals with the right to payment of maternity benefits, and with the wages, to which a woman employee, availing maternity leave, would be entitled. The said provision would not, in any way, stand infracted by the clause in the communication dated 4th December, 2015, which permitted postponement of the examination by one term in the case of extension of leave beyond the number of days prescribed in the said clause, which had nothing to do with the wages to which the petitioner would be entitled for the period of her maternity leave.

38. Coming, now, to Section 12 of the Maternity Benefit Act, which was pressed into service, by Mr. Dubey, with somewhat greater

emphasis than was accorded to Section 5 thereof, the said provision reads as under:

> "**12. Dismissal during absence of pregnancy –**
>
> (1) When a woman absents herself from work in accordance with the provisions of this Act, it shall be unlawful for her employer to discharge or dismiss her during or on account of such absence or to give notice of discharge or dismissal on such a day that the notice will expire during such absence, *or to vary to her disadvantage any of the conditions of her service*.
>
> (2)(a) The discharge or dismissal of a woman at any time during her pregnancy, if the woman but for such discharge or dismissal would have been entitled to maternity benefit or medical bonus referred to in section 8, shall not have the effect of depriving her of the maternity benefit or medical bonus: Provided that where the dismissal is for any prescribed gross misconduct, the employer may, by order in writing communicated to the woman, deprive her of the maternity benefit or medical bonus or both.
>
> (b) Any woman deprived of maternity benefit or medical bonus, or both, or discharged or dismissed during or on account of her absence from work in accordance with the provisions of this Act, may, within sixty days from the date on which order of such deprivation or discharge or dismissal is communicated to her, appeal to such authority as may be prescribed, and the decision of that authority on such appeal, whether the woman should or should not be deprived of maternity benefit or medical bonus, or both, or discharged or dismissed shall be final.
>
> (c) Nothing contained in this sub-section shall affect the provisions contained in sub-section (1)."
>
> (Emphasis supplied)

39. Mr. Dubey seeks to rely on Section 12 of the Maternity Benefit Act by contending that the clause, in the Memorandum dated 4th December, 2015 (*supra*), or, consequently, in the letter, dated 18th April, 2016 (whereby maternity leave was granted to the petitioner), permitting postponement of the examination by one session, would infract sub-Section (1) thereof, as it would, "vary to the disadvantage", of the petitioner, "the conditions of her service". Quite frankly, I am unable to appreciate this submission. I do not see how the postponement, of the final examination of the petitioner, from December, 2018 to May 2019, amounts to a "variance in the condition of service" of the petitioner. Rather, the contention, of the AIIMS, is that it was, by incorporating the said condition, only enforcing the clause, in the letter dated 4th December, 2015, whereby the petitioner's session could be extended by one term in the event of availing of leave, by her, over and above the period stipulated in the said clause.

40. The submission of Mr. Dubey that the said clause amounted to a variation of the condition of the services of the petitioner also, does not, therefore, commend acceptance.

41. In view of my findings, hereinabove, regarding the applicability of Sections 5 and 12 of the Maternity Benefit Act, to the facts of the present case, the applicability of Section 27, thereto, would also, *ipso facto*, stand ruled out. Section 27 of the Maternity Benefit Act reads thus:

> "**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."

42. Mr. Dubey relies on the first part of Section 27(1) (*supra*), which accords the provision of Maternity Benefit Act overriding pre-eminence over anything inconsistent contained in any other law or any award or contract in service. His submission is that the clause, in the communication dated 4th December, 2015, whereby the petitioner was admitted to the DM course, stipulating that leave, if extended beyond the permissible limits mentioned in the said clause, i.e. 24 days in the first year, 30 days in the second year and 36 days in the third year, would result in postponement of the examination by one session, if extended to maternity leave, would infract Section 5 and 12 of the Maternity Benefits Act. Section 27 would, in such circumstances, Mr. Dubey would seek to contend, kick in with full force, and would operate in favour of the petitioner irrespective of the aforementioned

clause contained in the communication dated 4th December, 2015 (*supra*).

43. I have already held that the clause, in the Memorandum, dated 4th December, 2015 (*supra)*, or the stipulation, in the letter, dated 18th April, 2016, whereby the petitioner was granted maternity leave, to the effect that grant of such leave would result in the postponement, of the petitioner's final examination, by one session, does not violate either Section 5 or Section 12 of the Maternity Benefit Act. Per corollary, the applicability of Section 27 of the said Act would also stand ruled out.

44. The reliance, by Mr. Dubey, on the Maternity Benefit Act has, therefore, necessarily to be characterised as misplaced.

The "extension" clause in the Memorandum dated 4th December, 2015:

45. Adverting, now, to the clause, in the Memorandum dated 4th December, 2015, permitting postponement of the examination of the petitioner (hereinafter referred to, for the sake of convenience, as "the extension clause"), one finds that the clause is somewhat peculiarly worded. It first stipulates that the petitioner was entitled to 90 days leave during three years, with her entitlement, for the first, second and third year being 24 days, 30 days and 36 days, respectively. It then goes on to talk of "extension of leave in a year", and ordains that, "if leave *is extended in a year*", then *"the extended period* is treated as

Extra Ordinary Leave without pay and the registration period is also extended by postponing the Exam for one session".

46. Three questions come to mind, when one reads this clause, viz.

(i) What does the clause mean?

(ii) Was this clause meant to apply, at all, to the availing of maternity leave?

(iii) Is this clause enforceable at law?

47. I proceed, therefore, to examine the three issues, enumerated in para 46 (*supra)*, which arise from a reading of the extension clause as contained in the Memorandum dated 4th December, 2015, seriatim.

What does the "extension clause" mean?

48. A reading of the extension clause makes it immediately apparent that *it does not postulate* that *availment* of leave in excess of the periods stipulated therein would result in extension of the registration period by postponement of the examination. What it postulates, instead, is that *extension* of leave, beyond the said stipulated periods, would result in such extension of registration period and postponement of examination.

49. In my opinion, it would be folly to confuse the concept of *availment of leave in excess of* the periods stipulated in the extension clause, with *extension of leave beyond* the periods stipulated in the extension clause. These are two different concepts.

50. The concept of "extension", when applied for leave as ordinarily understood, connotes carrying the leave *beyond the period for which it was originally granted.* An "extension", etymologically speaking, can only be to something which already exists, and cannot itself exist *in vacuo*. "Extension of leave", therefore, would presuppose grant of leave, already existing, in the first place. It is only when leave, already granted, is extended, that "extension of leave" could be said to have taken place.

51. P. Ramanatha Aiyar, in his classic tome the "Advanced Law Lexicon" defines "extension" as "the act of extending or stretching out; enlargement in any direction, in length, breadth circumference, *the continuance of an existing thing*". In ***Provash Chandra Dalui v. Biswanath Banerjee, AIR 1989 SC 1834***, the Supreme Court held that, in connection with a lease, "the word 'extension' when used in its proper and usual sense… means a *prolongation* of the lease." In ***Hamiduddin Saladhuddin v. State of U.P., 2006 (1) All LJ 717***, it was held, by the High Court of Allahabad, that "the term 'extension' means enlargements, expansion, lengthen, prolong etc., *which is permissible only where an incumbent is already in service,* but after he has ceased to be the holder of the post and is not in service, he cannot claim 'extension'". For leave to be 'extended', therefore, leave must

exist in the first place. It is only, therefore, where existing leave is extended beyond the periods stipulated in the extension clause in the Memorandum dated 4th December, 2015, that the adverse consequences (if they may be so termed), conceptualised by the said clause, would become applicable.

52. The applicability of this clause, therefore, is dependent on the candidate/student concerned *extending leave*, sought by her/him, *beyond* the period of 24 days, if in the first year, 30 days if in the second year and 36 days if in the third year. Interpreted in its plain and common-sense meaning, this clause would admit application only where a candidate avails of leave within the stipulated period of 24 days in the first year, 30 days in the second year or 36 days in the third year, and proceeds to extend such leave. In such an eventuality, the clause ordains that the period for which the leave is extended, beyond the period of 24, or 30, or 36, days, depending on the year in which the leave is availed, would be treated as Extra Ordinary Leave, and would result in extension, of the registration period, by postponement of the examination by one session.

53. In the present case, the petitioner never having sought any *extension* of the leave granted to her, at any point of time, and the leave sanctioned to the petitioner never, in fact, having been extended at any point of time, the extension clause, as contained in the Memorandum dated 4th December, 2015, *ex facie* would not apply.

Is the "extension clause" at all applicable in the case of availment of maternity leave?

54. The answer to this poser would become apparent if one were to consider the consequence which would ensue, were the extension clause to be applied to candidates who availed maternity leave during the currency of their DM course – such as the petitioner.

55. Maternity leave, by its very definition, can never be of 24, or 30, or 36 days' duration. Assuming, therefore, that the extension clauses were, as the AIIMS would prefer, to be interpreted as applying even to *availment* of leave in excess of the periods stipulated therein, any, and every, student, who availed maternity leave during the currency of her DM course, would be hit by it. One would, therefore, be reading, into the Memorandum dated 4th December, 2015, *an additional clause*, to the effect that, if the petitioner were to avail maternity leave, her examination would be postponed by one session. If the Memorandum desired to so postulate, it could have done so in plain words, and, it not having chosen to so do, it becomes extremely questionable whether the extension clause, which does not expressly so state, could be extrapolated to such an extent.

56. The incongruity of the situation is underscored if one takes, into account, the reality that a candidate applies for a DM course only after having already obtained her MBBS and MD qualifications and that, therefore, in the case of women candidates who secure admission to the DM course, the chance of the candidate seeking maternity leave is

a live possibility, to which the framers of the Prospectus, or even the AIIMS itself, could not be regarded as having been blind. In my view, it would be unreasonable to interpret the clause as postponing the final examination of the course being undertaken by the candidate, in every case where the candidate sought maternity leave during the tenure of the course, especially where no such express stipulation is to be found therein.

57. Indeed, given our avowed constitutional goals, if a clause, stipulating that availment of maternity leave, by a DM candidate, would necessarily result in delay in awarding of the DM qualification to the candidate, by 6 months, were to be enforced, such enforcement might be perilously pregnable to challenge, as violating Article 42 of the Constitution of India. This aspect would be examined in greater detail hereinafter; however, even at this point, the court expresses its disinclination to accord, to the extension clause, any such interpretation, as would permit it to be operated to the prejudice of the petitioner, in a manner which would infract Part IV of the Constitution of India.

58. In my opinion, therefore, the extension clause, as contained in the Memorandum dated 4th December, 2015, could never have been intended to cover all cases of DM students who sought to avail maternity leave during the currency of their DM course.

59. In this context, it is worthwhile to note the submission, of Mr. Dubey, premised on the distinction between Extra Ordinary Leave

(hereinafter referred to as "EOL") and "maternity leave", as contained in the CCS (Leave) Rules. Mr. Dubey sought to contend that, as EOL and maternity leave were fundamentally distinct concepts, for which different, and distinct, dispensations were to be found in the CCS (Leave) Rules, maternity leave could never be regarded as EOL. Mr. Dubey, therefore, sought to submit that, even if the maternity leave availed were to be in excess of the period of 24, or 30, or 36, days, as stipulated in the extension clause, it could never be treated as EOL, EOL and maternity leave being, as already noted, different and distinct concepts. Proceeding from this premise, Mr. Dubey sought, however, to draw a conclusion which, in my opinion, cannot follow, viz., that, as maternity leave, sought and granted, could never be regarded as EOL, the question of postponement of the examination by one session could also not arise.

60. The submission, as thus advanced by Mr. Dubey, is inherently flawed, proceeding, as it does, on the fallacious premise that the extension of the registration period, as postulated by the extension clause in the Memorandum dated 4th December, 2015, *was conditional upon* the extended leave period being treated as EOL. A reading of the extension clause discloses, however, that this is not so. The clause postulates that, if leave is extended in a year (beyond the periods stipulated in the earlier part of the clause), then *two* consequences follow. The first consequence is that the extended period is treated as EOL without pay. The second consequence is that the registration period of the candidate is extended by postponing the examination for one session. These consequences are independent of, and not

interdependent on, each other. As such, the issue of whether maternity leave is, or is not, different from EOL and, therefore, whether, if the extended period is attributable to maternity leave, and would be permissible to be treated as EOL without pay, cannot decide, or influence the decision on, the issue of whether the registration period of the candidate was liable to be extended by postponing the examination. The submission of Mr. Dubey that, as EOL and maternity leave were conceptually and statutorily distinct dispensations, the availment of maternity leave in excess of the periods stipulated in the extension clause could never result in extension of the registration period or postponement of the examination, therefore, has necessarily to be rejected.

61. Though the conclusion that Mr. Dubey seeks to draw from the jurisprudential distinction between EOL and maternity leave is, therefore, unfounded, the distinction itself is not without significance. Apples can never be equated with oranges, and Mr. Dubey is, therefore, correct in his initial premise that "extra" maternity leave could never be regarded – or treated – as EOL. The stipulation, in the extension clause, to the effect that the "extended" period of leave would be treated as EOL without pay, also, therefore, indicates that the clause was never meant to cover cases of availment of maternity leave.

<u>If the extension clause were to be interpreted in the manner canvassed by the AIIMS, would it be enforceable at law?</u>

62. The answer to this question has necessarily to be in the negative, for two reasons.

63. Firstly, as Mr. Dubey correctly points out, the Prospectus, on the basis thereof the candidates, including the petitioner, applied for enrolment in the DM course, did not contain any stipulation, to the effect that, if leave, in excess of 24 days, was taken in the first year of the course, it would result in postponement of the final examination to be undertaken by the candidate. Mr. Garg, appearing for the AIIMS, did seek to submit that there was, in fact, a pre-existing stipulation, applicable to Senior Residents, whereby, in the event of the candidate availing leave in excess of the period of 24 days in the first year (or, for that matter, the maximum periods of leave stipulated for the second or third years), the consequence would be postponement of the date of final examination to be undertaken by the candidate. Despite such an assertion, being made at the Bar, Mr. Garg was unable to produce any Regulation, clause or other stipulation, to that effect. The reliance, by Mr. Garg, on Clause 11 of the "Guidelines for Academic Course, Awards and Operations at AIIMS" (extracted in para 26 *supra*), on its plain terms, applies to Junior Residents, and not to Senior Residents. Pursuant to the opportunity granted, to him, for the said purpose, to produce an equivalent clause covering Senior Residents, Mr. Garg candidly confessed his inability to trace any such clause, and limited himself to relying on Agenda Item No AC/117/8, in the 117th Academic Meeting of the AIIMS, held on 20th November, 2018 (*supra*). As the italicised words, in the said Agenda Item (as extracted in para 29 hereinabove) disclose, the reference, to the

entitlement of Senior Residents to a maximum of 24 days leave in the first year, 30 days leave in the second year and 36 days leave in the third year of their Course, and the attending stipulation, to the effect that, in the event of extension of the leave beyond the said periods, the extended leave would be treated as EOL without pay and would also result in extension of the registration period, is only to be found in the "information", provided the Academic Council by the representative of the AIIMS. It is obvious that this "information" was incorrect, as the Clause, in the Guidelines, to which Mr. Garg referred, applies only to Junior Residents, and not to Senior Residents. Incorrect information, as conveyed by the AIIMS to the Academic Council, can hardly constitute a basis for the AIIMS to contest the case of the petitioner. That apart, the "approval", accorded by the Academic Council against the said Agenda Item, was for grant of *paternity leave*, and not maternity leave. Needless to say, the petitioner is, for reasons biological, least concerned with the availability of paternity leave. Neither, consequently, is this court – at least in the present case.

64. Interestingly, and essentially as an aside, a reading of the approval, granted by the Academic Council in the said Meeting, against Agenda Item No. AC/117/8, indicates that it proceeds on the premise of *availment*, by the concerned candidate, of paternity leave in excess of the total period of 90 days. The distinction between "availment" and "extension" of leave, apparently, never engaged the attention of the Academic Council. The correctness of the position, as placed before the Academic Council was, therefore, itself seriously

open to question. However, as this case does not concern itself with paternity leave, nothing further is required to be said thereon.

65. The pre-eminence of the Prospectus, in delineating the conditions subject which a person is admitted to a course, stands underscored by a Division Bench of this Court, speaking through the Chief Justice (as Hon'ble Dipak Misra, J., then was), in ***Varun Kumar Agarwal v. U.O.I., (2011) 179 DLT 24*** (interestingly, involving the AIIMS itself), in the following words:

> "**14.** Presently we shall refer to certain authorities in the field that have dealt with sanctity of a prospectus or brochure and the legal impact when it is changed in the midstream. In ***Dr. M. Vannilav. Tamil Nadu Public Services Commission, 2007 (3) CTC 69,*** a Division Bench of the High Court of Madras has opined thus:
>
> "19. The principle that the prospectus is binding on all persons concerned has been laid by the Supreme Court in ***Punjab Engineering College, Chandigarh v. Sanjay Gulati, (AIR 1983 SC 580 = 1983 (96) LW 172 S.N.).*** Following the same, a Division Bench of this Court has also observed in ***Rathnaswamy, Dr. A. v. Director of Medical Education (1986 WLR 207)*** that the rules and norms of the prospectus are to be strictly and solemnly adhered to. The same view is also taken by another Division Bench of this Court in ***Nithiyan P. and S.P. Prasanna v. State of Tamil Nadu (1994 WLR 624).*** The same principle is reiterated in the case of ***Dr. M. Ashiq Nihmathullah v. The Government of Tamil Nadu, 2005 WLR 697.*** It is clear that the prospectus is a piece of information and it is binding on the candidates as well as on the State including the machinery appointed by it for identifying the candidates for selection and admission."
>
> [Underlining is ours]

15. In ***Indu Gupta v. Director Sports, Punjab, AIR 1999 P&H 319 (FB),*** the Full Bench in paragraphs 9, 10 and 11 has expressed thus:

> "9. A Full Bench of this Court in the case of ***Raj Singh v. Maharshi Dayanand University, (1994) 4 Recent Services Judgments, 289*** disapproved the liberal construction of the terms and conditions of the brochure and specified the need for their strict adherence to avoid unnecessary prejudice to the candidate or the authority during the course of admission. The bench approved that the eligibility for admission to a course has to be seen according to the prospectus issued before the entrance test examination and that the admission has to be made on the basis of the instructions given in the prospectus having the force of law. While disapproving the law laid down by a Division Bench of this Court in the case of ***Madhvika Khurana (minor) v. M.D. University*** Civil Writ Petition No. 15367 of 1991, where contrary view had been taken, the Full Bench observed that the students seeking admission to the professional colleges are even otherwise matured enough and supposed to understand the full implication of filling the admission form and compliance with the instructions contained in the brochure.
>
> 10. Subsequently, another Full Bench of this Court in the case of ***Rahul Prabhakar v. Punjab Technical University, Jalandhar, 1997 (3) RSJ 475: (AIR 1998 Punj. & Har. 18)*** recapitulated the entire law on the subject. The Full Bench was considering the same brochure for the previous year of the Punjab Technical University. The Court held as under:-
>
> > "A Full Bench of this Court in ***Amardeep Singh Sahota v. State of Punjab, (1993) 4 Serv LR 673*** had to consider the scope and binding force of the provisions contained in the prospectus. The Bench took the view that the prospectus issued for

admission to a course, has the force of law and it was not open to alteration. In ***Raj Singh v. Maharshi Dayanand University, 1994 (4) R.S.J. 289*** another Full Bench of this Court took the view that a candidate will have to be taken to be bound by the information supplied in the admission form and cannot be allowed to take a stand that suits him at a given time. The Full Bench approved the view expressed in earlier Full Bench that eligibility for admission to a course has to be seen according to the prospectus issued before the Entrance Examination and that the admission has to be made on the basis of instructions given in the prospectus, having the force of law. Again Full Bench of this Court in ***Sachin Gaur v. Punjab University, 1996 (1) RSJ 1: (AIR 1996 Punj. & Har. 109)*** took the view that there has to be a cut off date provided for admission and the same cannot be changed afterwards. These views expressed by earlier Full Benches have been followed in CWP No. 6756 of 1996 by the three of us constituting another Full Bench. Thus, it is settled law that the provisions contained in the information brochure for the Common Entrance Test 1997 have the force of law and have to be strictly complied with. No modification can be made by the court in exercise of powers under Article 226 of the Constitution of India. Whenever a notification calling for applications, fixes date and time within which applications are to be received whether sent through post or by any other mode that time schedule has to be complied with in letter and spirit. If the application has not reached the coordinator or the competent authority as the case may be the same cannot be considered as having been filed in terms of the provisions contained in the prospectus or Information Brochure. Applications filed in violation of the terms of the brochure have only to be rejected."

11. The cumulative effect of the above well enunciated principles of law, is that the terms and conditions of the brochure where they used preemptory language cannot be held to be merely declaratory. They have to be and must necessarily to be treated as mandatory. Their compliance would be essential otherwise the basic principle of fairness in such highly competitive entrance examinations would stand frustrated. Vesting of discretion in an individual in such matters, to waive or dilute the stipulated conditions of the brochure would per se introduce the element of discrimination, arbitrariness and unfairness. Such unrestricted discretion in contravention to the terms of the brochure would decimate the very intent behind the terms and conditions of the brochure, more particularly, where the cut off date itself has been provided in the brochure. The brochure has the force of law. Submission of applications complete in all respects is a sine qua non to the valid acceptance and consideration of an application for allotment of seats in accordance with the terms prescribed in the brochure.

[Emphasis added]

16. We have referred to the aforesaid decisions only to highlight that the conditions stipulated in the prospectus are guidelines for all concerned and everyone is required to follow the same in letter and spirit and not act in transgression. The hopes and aspirations of the students, who came within the zone of merit, cannot be scuttled by changing the prospectus by way of introducing a corrigendum. A change in the conditions of the prospectus can be conceived of and allowed if such power is specifically reserved while making the prospectus public as in that case, no one can think of having a right. In that event, the same could be capable of change. In the case at hand, in the absence of a power reserved in the prospectus, in our considered opinion, the same could not have been altered by way of corrigendum. It is interesting to note that by issuing a corrigendum, the scenario of results changed because further results were published and more candidates were called. This,

> according to us, is nothing but an accommodation. The AIIMS may have been conferred the privilege of institutional preference, but that would not enable AIIMS to change the prospectus in the manner it has been done. Thus, the action of the AIIMS on this score is vitiated and despite the laboured attempt by the learned counsel for the AIIMS, we cannot give the stamp of approval to the action of the institution."

66. That, in the matter of admission to an educational institution, the terms and conditions of the prospectus by the institution of the candidate, no departure therefrom is permissible may, therefore, be justifiably regarded as a position, in law, that is no longer *res integra*.

67. Mr. Dubey points out that the Prospectus, governing the DM course, in the various super specialities in which the said course was administered by the AIIMS, did not contain any clause permitting postponement of the examination of the candidate, on the candidate availing leave in excess of the periods stipulated for each year of the course. A reading of the Prospectus reveals that this is, indeed, so. The consequence, inevitably, would be that the AIIMS would be foreclosed from postponing the final examination of the petitioner, solely on the ground of her having availed maternity leave. The extension clause, in the letter dated 4th December, 2015, on which Mr. Garg places reliance, may not be susceptible to such an interpretation; even if it were, it could not be so enforced, in the absence of any such stipulation finding place in the Prospectus, on the basis whereof applications were invited, by candidates, for the DM course which, in view of the law laid down in the judgments relied upon, by this Court,

in ***Varun Kumar Agarwal (supra),*** as well as in the said decision itself, was inviolable and sacrosanct.

68. The second reason, for the non-enforceability of the extension clause in the manner in which the AIIMS would seek to enforce it, is relatable to Article 42 of the Constitution of India, on which, too, Mr. Dubey rightly relies. "Maternity relief" is a sanctified constitutional goal, fossilized, as it were, in Article 42, which requires the State to provide "for just and humane conditions of work *and maternity relief*." Mr. Dubey is, therefore, correct in his submission, that extending the aforementioned clause, in the letter, dated 4th December, 2015, to cover cases where maternity leave is sought by the candidate, would fall foul of Article 42 of the Constitution of India, and can, therefore, never be permitted. The AIIMS has all the trappings of a public authority – indeed, of "State" – and is, therefore, bound by the principles and precepts enshrined in Parts III and IV of the Constitution of India. It would be impermissible, therefore, for the AIIMS to include, in the order of appointment, a clause which effectively penalises a student, who avails maternity leave, for having done so, by extending the period of the course to be undertaken by the student by any length of time. Such an interpretation, if accorded, would render the said Clause violative of Article 42 of the Constitution of India and, even for that reason, unenforceable.

69. The ability of woman to create, nurture, and sustain, life, is celestially unique, and, even in the most conservative and puritanical of cultures, commands reverence and respect. The protection and

preservation of this ability is central to the most basic human rights which govern existence, and any dispensation, customary or in statute, which derogates therefrom, is constitutional anathema. Adverse consequences can never be allowed to visit any woman, *solely* by virtue of the fact that she availed maternity leave, perhaps in excess of the maximum leave admissible – provided, of course, the maternity leave was necessary and required for health of mother and child. In the present case, especially, as I have already held that the "extension clause", in the Memorandum dated 4th December, 2015, is not susceptible of any such interpretation, the decision, of the AIIMS, to postpone the final examination of the petitioner, *solely* for the reason that the maternity leave availed by her exceeded the periods of 24/30/36 days, stipulated in the said clause, cannot, consequently, sustain, and has necessarily to be set aside.

The question of delay/laches

70. Delay and laches, it is trite, are not inevitably fatal to a writ petition, Article 226 of the Constitution of India not being hedged in by any period of limitation. Even on facts, I am of the opinion that the petitioner, in the present case, cannot be non-suited on the ground of delay and laches. Delay in approaching this Court, by the petitioner, cannot be computed from the 4th December, 2015, i.e. the date of the Memorandum admitting her to the course, for the simple reason that, on that date, no cause of action had occurred, as would compel the petitioner to invoke the jurisdiction of this Court. That apart, the "extension clause", contained in the said Memorandum, was, as has

already been observed by me hereinabove, ambiguous at best, so that it cannot be said that the petitioner ought, by the said clause, to have been forwarn of the consequences, were she to become pregnant during the currency of her DM course. The cause of action, if any, arose on 18th April, 2016, when the AIIMS included, in the letter granting maternity leave to the petitioner, the stipulation that her final examination would stand postponed to May 2019. The fact that the petitioner availed maternity leave, as granted by the said letter, can hardly be held against her as, given the situation in which she was placed, she could not very well be expected to adopt a militant stance and refuse to avail maternity leave. The petitioner has approached this Court, invoking its jurisdiction under Article 226 of the Constitution of India, on 17th August, 2018 i.e. within about two years of the issuance of the said letter. I am of the opinion that, in these circumstances, it cannot be said that the petitioner is guilty of any such unconscionable delay as would disentitle her to maintain the writ petition.

71. The submission, of Mr. Garg, that the writ petition deserves to be dismissed on the ground of delay and laches, is, therefore, rejected.

A cautionary caveat

72. Before parting ways with this litigation, I deem it appropriate to enter an important cautionary caveat. I have limited my consideration, and decision, to the issue of whether, by virtue of the fact that the maternity leave availed by the petitioner exceeded the periods

stipulated in the extension clause contained in the Memorandum dated 4th December, 2015, or, for that matter, in Clause 7 of the Prospectus, insofar as it dealt with the terms and conditions applicable to DM candidates, the final examination of the DM course undertaken by the petitioner could be postponed by one session, from December, 2018 to May, 2019. The question, in my view, has necessarily to be answered in the negative, and in favour of the petitioner, and I have so held above.

73. The prayer in the writ petition is not, however, to quash the said stipulation, or to hold that the final examination of the petitioner could not be postponed by reason of her having availed maternity leave, but to issue a mandamus to the AIIMS to allow the petitioner to undertake the DM examination in December, 2018. The facts on record do not enable me to issue any such unqualified and absolute mandamus. All that can be held is, therefore, that the petitioner's right to undertake the final DM examination in December, 2018, would not be defeated by reason of the maternity leave availed by her, or the duration thereof. Her right to participate in the said examination would, however, necessarily be subject to the petitioner fulfilling all other requirements or pre-conditions required to be fulfilled to enable her to do so.

74. While entering this caveat, I may add that the AIIMS is not expected to use it as a means to deny the petitioner the right to undertake the examination in December 2018, if, but for the maternity leave availed by her, she fulfils all necessary requirements in that

regard. In case there is no other impediment in the petitioner's way, her right to undertake the final DM examination in December, 2018, would, it is clarified, stand confirmed. In that event, the grant of the DM qualification would abide by the result of the final examination undertaken by the petitioner, in December, 2018, pursuant to the interim order, dated 30th November, 2018, passed by this Court in these proceedings.

Conclusion

75. The writ petition stands allowed, to the above extent and in the above terms.

76. There shall be no order as to costs.

C. HARI SHANKAR, J

FEBRUARY 01, 2019
HJ