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

\+ W.P.(C) 3629/2022, CM APPL. 10751/2022 & CM APPL. 10752/2022

TRIGYANSH JAIN ..... Petitioner

Through: Ms. Shahrukh Alam, *Amicus Curiae* along with Mr. Shantanu and Mr. Nishant Kumar, Advocates.

versus

NORTH DELHI MUNICIPAL CORPORATION & ORS. ..... Respondents

Through: Mr. Akhil Mittal, Standing Counsel for North MCD along with Ms. Yashika Sharma, Ms. Manisha Rana, Mr. Hardik A., Advocates for R-1 & R-2.
(Mob. 9212504099)

Mr. Vikrant N. Goyal and Mr. Anirudh Shukla, Advocates for R-3 & R-4.

None for respondent no. 5.

Mr. Tushar Sannu, Standing Counsel for R-6 along with Mr. Suyansh Tripathi, Consultant Health and Nutrition, DCPCR.

CORAM:
HON'BLE MR. JUSTICE NAJMI WAZIRI
HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

O R D E R

% 17.05.2022

The hearing has been conducted through hybrid mode (physical and virtual hearing).

1. Ms. Shahrukh Alam, the learned *Amicus Curiae* has been heard for some time. She refers to her Preliminary Note apropos the issue raised

by the petitioner. She submits that, in the first instance, the way the issue has been framed by the petitioner, it seeks to limit the agency of the mother especially in view of the jurisprudence laid down in *Justice KS Puttuswamy vs. Union of India*, (2019 1 SCC 1), which also discussed *Roe vs. Wade*, (410 US 113 (1973)). She submits that the petitioner's unselfconscious claim on his mother's time as a fundamental right, may encroach upon the mother's right to privacy and agency. Her submissions are:

"*I. Locus of the Petitioner: what bearing does the child's claim on his mother's time, framed as a 'fundamental right', have on mother's own rights to privacy, work, etc.?*

A. The Petition frames 'maternity leave' as primarily a duty owed to the child, and a corresponding fundamental right that vests in the child, to maternal time and care. Significantly, the right to care and attention is claimed only with respect to the mother.

B. On the other hand, 'maternity leave' was conceived as a right with the woman at the centre of it: it sought to enable women to combine their reproductive and productive roles successfully, and to prevent unequal treatment at work due to their reproductive role. [ILO Policy Paper Annexure 1] However, 'maternity leave' is certainly not intended to shift the child rearing responsibilities as a duty to the women alone, during the period of her maternity leave, such that the time meant for her own recuperation translate into unpaid domestic work. [Women in India perform already perform a disproportionately high number of hours performing care work in the house 577% more than men. Interpreting it as a right vested in the one cared for, would have implications on women's choice agency].
Annexure 2 - Report on domestic responsibilities as unpaid labour.

C. The issue of the Petitioner's right to life, to the extent it is linked to his need to be cared for, must be considered as a joint responsibility of both his parents.

D. Gendered labour policy aims to protect working women during their pregnancy and recovery from child birth, by securing for them maternity leave. However, it is 'parental leave', a relatively long-term leave available to either or both parents, for the sole purpose of taking care of an infant, or of a young child, usually following the maternity or paternity leave period. Parental leave is not included in any ILO Convention. However, both Recommendation No. 191 (accompanying Convention No. 183 on maternity protection) and Recommendation No. 165 (accompanying the Workers with Family Responsibilities Convention, 1981, No. 156) contain provisions on parental leave. [ILO Policy Papers]

E. In this regard, Indian statutory provisions including the Central Civil Services (Leave) Rules, 1972, or The All India Services (Leave) Rules, 1955 only recognize 'parental leave' for the purpose of taking care of an infant or a child with respect to the mother. (Rules 43 (C) and 18 (D) respectively) thus contributing to the structural inequity in division of care giving work. Both these Rules also recognize 'paternity leave' for a period of 15 days to coincide with the term of confinement of the wife in childbirth. Pertinently, the Maternity Benefit Act, 1961 also does not provide for 'child care' leave, probably because it is the women who is at the centre of the social legislation, which attempts to balance her productive and reproductive roles at the workplace and at home, while foregrounding her emotional and physical health.

Conclusions: The Petitioner's unselfconscious claim on his mother's time as a fundamental right may encroach upon the Mother's right to privacy as laid down in Justice KS Puttuswamy v. Union of India (2012a: para 72, 2012b: para

46, 2012c: para 38), while discussing Roe v Wade,

ii) Further, could the Petitioner raise a claim of differential treatment between siblings, if the mother herself were unable to give the same kind of time and attention for a variety of reasons?

iii) It is for this reason that gendered labour policy now seeks to distribute responsibilities between parents, employers and state. Facilities and feeding breaks are mandatory; 'work from home' options must also be considered (Section_5(5) of the Maternity Benefit Act, 1961 as amended in 2017). It is believed on that basis of accumulated data that 'workers seem to prefer better-paid leave for both women and men of shorter duration, followed by flexible working arrangements and provision of childcare services, rather than extended leave periods with little compensation (ILO Policy Brief)

II. Is petitioner's right to life under threat in any manner?

A. The Petitioner was born on 17.01.22 and is five months to the day today, 17.05.22. The World Health Organization recommends exclusive and continued breastfeeding for the first 180 days, i.e. the first 6 months. At the same time, the period of breastfeeding is not meant to be a period of seclusion for the mother, where she cannot resume her normal life. Law and policy have now sought to balance the two needs and make it possible for mothers to nurse at the workplace, provided that a clean and private environment is made available, with frequent nursing breaks. [Sections 11 and 11A of the Maternity Benefit Act, 1961 as amended in 2017]

B. Respondents must undertake to provide hygienic and private nursing spaces. Moreover, while the Act encourages nursing at the workplace, there is gap in terms of provision of crèches, which are only available to larger establishments. Where is a mother who works in an establishment of 15 persons, and who is nursing at the workplace, to deposit the

child in the interim?

III. What rights does the Petitioner's mother have in terms of her maternity leave/ benefits?

A. The Petitioner's mother has an undisputed right to 45 days of maternity leave under Section 4 of the Act, which gives her the right to not work for six weeks following the date of the delivery.

B. Section 5(5) of the Act, as amended in 2017, gives her the right to work from home.

IV. But would provisions of the Act apply in view of the OM of 20.12.17?

A. The Maternity Benefit Act. 1961 is a comprehensive piece of legislation, which includes within its ambit a wide variety of the Act read with Section 2(5) establishments [Section 2(b) of the Delhi Shops and Establishments Act. 1954: 'commercial establishment' means any premises wherein any trade, business or profession or any work in connection with, or incidental or 1S ancillary thereto is carried on and includes a society registered under the Societies Registration Act, 1860 (21 of 1860), and charitable or other trust, whether registered or not, which carries on any business, trade or profession or work in connection with, or incidental or ancillary thereto, journalistic and printing establishments, contractors and auditors establishments, quarries and mines not governed by the Mines Act, 1952 (35 of 1952), educational or other institutions run for private gain, and premises in which business of banking, insurance, stocks and shares, brokerage or produce exchange is carried on, but does not include a shop or a factory registered under the Factories Act, 1948 (43 of 1948), or theatres, cinemas, restaurants, eating houses, residential hotels, clubs or other places of public amusements or entertainment"]

B. The Hon'ble Supreme Court in Municipal Corporation of

Delhi v. Female Workers (Muster Roll) and Another [2003(3) SCC 224] answered this question in Paragraphs 32 and 38:

"32. Learned counsel for the Corporation contended that since the provisions of the Act have not been applied to the Corporation, such a direction could not have been issued by the Tribunal. This is a narrow way of looking at the problem, which essentially is human in nature and anyone acquainted with the working of the Constitution, which aims at providing social and economic justice to the citizens of this country, would outrightly reject the contention. The relevance and significance of the doctrine of social justice has, times out of number, been emphasized by this Court in several decisions. In Messes Crown Aluminium Works v. Their Workmen, [1958] SCR 651, this Court observed that the Constitution of India seeks to create a democratic, welfare State and secure social and economic justice to the citizens. In J.K. Cotton Spinning & Weaving Mills Co. Ltd. v. Badri Mali & Ors., [1964] 3 SCR 724, Gajendragadkar, J., (as His Lordship then was), speaking for the Court, said: "Indeed the concept of social justice has now become such an integral part of industrial law that it would be idle for any party to suggest that industrial adjudication can or should ignore the claims of social justice in dealing with industrial disputes. The concept of social justice is not narrow, one-sided, or pedantic, and is not confined to industrial adjudication alone. Its sweep is comprehensive. It is founded on the basis ideal of socio-economic equality and its aim is to assist the removal of socio-economic disparities and inequalities; nevertheless, in dealing with industrial matters, it does not adopt a doctrinaire approach and refuses to yield blindly to abstract notions, but adopts a realistic and pragmatic approach."

38. These principles which are contained in Article 11, reproduced above, have to be read into the contract of service between 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."

C. The Non-obstante clause in Section 27 of the Act precludes the enforcement of any other law, whose terms are less beneficial to the woman worker.

D. Rule 2(i) of the Central Civil Service (Leave) Rules itself specifies that the Rules shall not apply to persons "in respect of whom special provisions have been made by or under the provisions of the Constitution or any other law for the time being in force". Article 42 read with the Maternity Benefit Act,1961 make exactly such special provisions with respect to working mothers.

E. The impugned OM is a mere executive order and has not been gazetted. The legality of state Fundamental Rules, which were at variance with the Maternity Benefit Act, 1961 was considered by the learned single judge in J. Sharmila v. Secretary to Government, Education (2010 SCC Online Mad 5221):

"25. As held in the Air India case (cited supra), the Supreme Court had suggested an amendment to the rule. In Javed's case, the Supreme Court was only dealing with the disqualifying provisions found in the Haryana Panchayati Raj Act from contesting election. But in both judgments, the constitutional guarantee as well as non obstante clause found in the Maternity Benefit Act, 1961 were not considered. So long as the non obstante clause is found under Section 27, the

constitutional obligation found under Article 42 as well as ILO norms set out above are to be the guiding factor, it is not open to the Government to deny maternity protection including paid leave as provided. By intruding an explanation to FR 101 by an executive instruction cannot be treated as substantial rule to deny the constitutional right of a woman Government servant as had happened in the present case.

[Also see Ruksana v. State of Haryana (DB, Civil Writ Petition No. 4229 of 2011, decided on 21.04.11; T.Priyadarshini (2016 SCC Online Mad 30096)]

F. The learned Single Judge in Uma Devi (WP 22075/2021; decided on 22.03.22; SJ) also reiterated that "when the Central Act (M.B. Act, 1961) is stated to be in furtherance of the Directive Principles of State Policy as contained in the Constitution of India, any executive orders, circulars or subordinate legislation or even the State law which is not in consonance with the Central enactment will have to be read down to give constitutional thrust and purpose in terms of the Central enactment".

G. At the same time, a Division Bench of the Madras High Court has ruled that in cases where the Central Civil Service (Leave) Rules hold sway; they shall remain applicable over the provisions of the Act. (Union of India v. M. Asiya Begun: WA 4343 OF 2019; decided on 27.02.20)

V. Can the OM of 20.06.1988 introducing through an executive order the impugned amendments into the Rules of 1972 be said to have been incorporated into the Rules by due amendment?

A. The impugned OM is a mere executive instruction, which obviously cannot supplant any further restriction in the rule, without proper amendment to the rule. The correct position as to whether the two child norm prescribed in the impugned OM of 20.06.1988 has been actually incorporated in the

Rules by due amendment or not has not been clarified. [See Uma Devi, Supra.]

Conclusion: In the event, the original Rule 43(1), which does not make distinctions based on the number of children, would hold the field."

2. An e-copy of the written submission has been supplied to the learned counsel for the parties. They seek time to obtain instructions and/or amend the petition, as may be instructed.
3. The learned *Amicus Curiae* submits that the World Health Organization advises an adequate and hygienic space for child-care at work places. This need is essential in the initial six months of a child. The petitioner is a four months' young infant.
4. On a query put to the learned counsel for the North Delhi Municipal Corporation as to whether such facility exists at the mother's work place, the answer is in affirmative. However, he seeks time to obtain instructions apropos its hygienic condition and whether it is in use and to file photographs of the same, supported by an affidavit.
5. Ms. Shahrukh Alam also draws the court's attention to adequate facilities being made available the world over to working mothers in public spaces, whether it be to a Parliamentarian or persons in the field of education or the corporate world. She says that in the last two years, working from home through the internet/video-conferencing, has become an acceptable mode of rendering services and this necessity-based innovation has become a part of people's lives and is here to stay. Therefore, on case to case basis, it could well be examined by the employer whether services could be rendered

through the internet/video-conferencing for the period for which the mother seeks maternity leave. In the present case, it would not be more than two more months as, according to the WHO recommendation, the mother should be with the child at least for initial six months to nurse the child.

6. The learned *Amicus Curiae* emphasizes that the rationale prompting the grant of maternity leave needs to be borne in mind, that this is not child rights' issue alone but has to be seen on a larger canvass apropos rights of working mothers.
7. Respondents may file the copy of the notification referred to in para 4 of the Office Memorandum dated 20.06.1988 issued by the Department of Personnel and Training (Annexure P-10 of the Writ Petition).
8. Counter-affidavits and rejoinder, if any, be filed in two weeks each, successively.
9. The learned Standing Counsel for North Delhi Municipal Corporation states, upon instructions, that the said respondent does not wish to file a reply. So be it.
10. The learned counsel for respondent nos. 3 and 4 seeks one more opportunity to file a reply and pay the costs in terms of the previous order. Let it be so done.
11. None appears for respondent no. 5. Mr. Kirtiman Singh, the learned CGSC is directed to accept notice on behalf of respondent no. 5 and file a reply.
12. Respondent no. 6 has filed a reply. Costs be paid in terms of the previous order.

13. List for further arguments on 14.07.2022.

NAJMI WAZIRI, J

SWARANA KANTA SHARMA, J

MAY 17, 2022/ RW