Dama Seshadri Naidu, J.

W.P.(C)No.20680 of 2014 H

Dated this the 6th day of January, 2015

JUDGMENT

Introduction:

Jean-Louis de Lolme's popular assertion that English parliament can do everything but make a woman a man, and man a woman, may have illustrated the putative omnipotence of British Parliament, but science has gaily mocked at it, in course of time. Once IBM's Chairman predicted, wrongly though, that there would be a world market for may be five computers. Science never ceases to surprise us: it always outwits us, out-paces us; and makes us either change or become irrelevant. Law is no exception: the West is grappling with the same sex marriages; and most of the law enforcement agencies have been facing issues like virtual world vandalism, identity theft, and torrent copy right violations, to name a few. Now, we have to add to that, the split motherhood.

2. For Robert Brown all love begins and ends with motherhood, by which a woman plays the God. Glorious it is as the gift of nature, being both

sacrosanct and sacrificial, though; now again, science has forced us to alter our perspective of motherhood. It is no longer one indivisible instinct of mother to bear and bring up a child. With advancement of reproductive science, now, on occasions, the bearer of the seed is a mere vessel, a nursery to sprout, and the sapling is soon transported to some other soil to grow on. Now, it is Law's turn to appreciate the dichotomy of divine duty, the split motherhood.

Facts:

3. Briefly stated, having joined just about a year ago, the petitioner is a Deputy General Manager working in the first respondent Board, a Government of Kerala undertaking. After remaining childless for over twenty years, the petitioner, along with her husband, had recently entered into an arrangement with a fertility clinic in Hyderabad, Telengana State, to have a baby through surrogate procedure. In fact, a baby was born on 18.06.2014 through a host mother, and handed over to the petitioner, the genetic mother.

4. With a view to looking after the new born baby, the petitioner is said to have submitted Exhibit P1 application for leave with effect from 19.06.2014 'as applicable for child birth in the normal process'. The first respondent, however, through Exhibit P2 letter dated 10.07.2014, informed

the petitioner that the Staff Rules and Regulations do not permit any leave to the employees on maternity ground other than the maternity leave envisaged under 'normal circumstances'.

5. It appears that the first respondent has further informed the petitioner through Exhibit P3 letter dated 16.07.2014 that the petitioner could avail herself of loss of pay leave on medical ground. Under those circumstances, being aggrieved by the refusal of the first respondent to grant leave for the petitioner to look after her baby born through surrogacy process, the petitioner has filed the present writ petition.

Rival Contentions:

Petitioner's:

6. Dr.Thushara James, the learned counsel for the petitioner, has initially explained all the nuances of this emerging branch of maternity. She has submitted that in that particular arrangement the petitioner had, the surrogate mother only underwent the gestational process, without much of emotional quotient, as the petitioner and her husband remained the genetic parents. Thus, as per the arrangement, as soon as the surrogate mother had been delivered of the baby, it had to be handed over to the petitioner, and it was done. Now, a toddler of days could not be left to the care of others.

7. The learned counsel has drawn my attention to the treatment of the issue of surrogacy and the rights and obligations arising there from in international arena. According to her, in the USA different states have adopted different approaches, whereas in a country like Israel, it is state controlled. The learned counsel has also stressed that, though it sounds pejorative, now for many developed countries, India has become a destination for what is called 'Fertility Tourism'.

8. In the process of justifying the claim of the petitioner for maternity leave, the learned counsel for the petitioner has underlined all the statutory developments in the field of Assisted Reproductive Technology (ART) across the world, with a specific reference to India. She has submitted that India has already come with a draft Bill, namely, The Assisted Reproductive Technologies (Regulation) Bill, 2010, Chapter VII of which deals with the rights and duties of parents, donors, surrogates and children. The learned counsel has taken the Court through certain aspects of the recommendations made by the Indian Council for Medical Research (ICMR), as well as the 228th report of the Law Commission of India.

9. The learned counsel for the petitioner has submitted that maternity either through biological process or through surrogacy is one and

the same, and that for all intents and purposes the commissioning parents are the natural parents, with same set of rights and obligations. According to her, motherhood does not end with delivery of a baby, but continues, with more vigour, through the process of child rearing, which is an equally difficult task. To stress the accepted practice of surrogacy from the days time immemorial, the learned counsel has made a Biblical reference to Genesis 16:2 of the New Testament (King James Version): “And Sarai said unto Abram, Behold now, the LORD hath restrained me from bearing: I pray thee, go in unto my maid; it may be that I may obtain children by her. And Abram hearkened to the voice of Sarai.”

10. As to the international treaty obligations, the learned counsel has referred to Article 25(2) of the Universal Declaration of Human Rights, 1948, Articles 4, 10(1), 10(2) and 10(3) of the International Convention on Civil & Political Rights, 1966, Articles 17 and 33 of the Beijing Declaration and Platform for Action - Fourth World Conference on Women, 1995, Articles 1, 3, 6 and 18(2) of the Convention on the Rights of the Child, apart from Articles 2, 5(b), 11(2)(a), 12(2) and 16 of the Convention on the Elimination of all Forms of Discrimination against Women, 1979. With reference to the above, she contends that, to most of the international

treaties, India is a signatory and that it is obligatory for the country to honour those commitments, without taking shelter under statute law. The learned counsel contends that right of women to fertility or to have children is an integral part of her empowerment. In that regard, she has drawn my attention to certain aspects pertaining to women and child protection in Millennium Development Goals, 2000, adopted at the UN Millennium Summit, 2000, as well as to Articles 1, 2(1), 3, 4(4) and 6(7), and the preamble of Maternity Protection Convention, 2000.

11. Having copiously quoted from international covenants, the learned counsel has contended that when the municipal law is silent, the international covenants and treaties can be made applicable. In this regard, the learned counsel has relied on Lotus Case, 1927 (**France v. Turkey**) decided by the Permanent Court of International Justice (PCIJ) and **Vishaka v. State of Rajasthan1.**

12. Referring to Sections 3(b), 5, 27 and 28 of the Maternity Benefit Act, 1961, the learned counsel would contend that the very Act does not maintain any distinction between maternity by way of natural process and by way of ART. According to her, denying the petitioner the maternity benefit

1 (1997) 6 SCC 241

is an instance of invidious discrimination affecting her fundamental right as a woman. In that regard, the learned counsel has drawn my attention to Articles 21 and 42 of the Constitution of India.

13. The learned counsel for the petitioner has contended that with the changing times, statutes should be broadly interpreted to keep pace with the march of time. In that regard, the learned counsel has relied on **Laxmi Video Theatres v. State of Haryana2**.

14. The learned counsel has drawn my attention to a decision of the Hon'ble Madras High Court **Kalaiselvi v. Chennai Port Trust3** to underline the need and necessity of providing the maternity benefits to the genetic mother as well. She has referred to Rule 18(1)(b) of the All India Service (Leave) Rules, 1955, to underline the factum that the Union Government permits even paternity leave.

15. Finally, the learned counsel has submitted that Rule 52 of Kerala Livestock Development Board Limited Staff Rules & Regulations, 1993, provides for Extraordinary Leave and that the petitioner ought to have

2 (1993) 3 SCC 715
3 2013 (2) KLT 567

been sanctioned the said extraordinary leave without any loss of pay.

16. Thus, summing up her submissions, the learned counsel for the petitioner has urged this Court to allow the writ petition, with a direction to the first respondent to provide all maternity benefits to the petitioner, as if she had undergone the process of pregnancy and had been delivered of a baby.

Respondent's:

17. Smt.Sumathi Dhandapani, the learned Senior Counsel for the respondent Board, has strenuously opposed the claims and contentions of the petitioner. She has submitted that, though the petitioner, holding a key post, has not completed her probation, she has gone on leave unauthorisedly with an excuse that she has to take care of a newborn baby. The learned Senior Counsel has further submitted that in the face of its own Regulations having statutory force, the respondent Board is not bound by the provisions of the Maternity Benefit Act.

18. In tune with the counter affidavit filed by the respondent Board, the learned Senior Counsel has contended that as per the Staff Rules and Regulations, a female employee is entitled to 180 days' maternity leave, but it cannot be provided on the grounds other than those specified under

Clauses 44 and 50 of the Regulations. According to her, Rule 50, which exclusively deals with maternity leave, does not provide for leave in the case of surrogacy.

19. Expatiating on her submissions, the learned Senior Counsel has contended that in the case of gestational surrogacy, the biological mother does not carry the pregnancy and give birth to the child. In the present instance, since the petitioner has undergone neither pregnancy nor delivery of child, she is not entitled to any maternity benefits, which include leave as well.

20. Adverting to the Associated Reproductive Technology (Regulation) Bill, the learned Senior Counsel has submitted that as it has not yet been made into law, no provision of the said Bill can be enforced. According to her, the very object of granting maternity leave is for the health and safety of the foetus, as well as the mother, during the advanced stages of pregnancy and for restoration of the mother's health post-delivery.

21. The learned Senior Counsel has also underlined the fact that despite what is said to be the disentitlement of the petitioner to have any maternity leave, the respondent Board has been considerate enough in granting 62 days of extraordinary leave to the petitioner. She has also further

contended that as the first respondent Board is a Government of Kerala undertaking, the provisions of the All India Services (Leave) Rules, 1955, have no application. In the same vein, the learned Senior Counsel repelled the contention of the petitioner as to the applicability of Article 42 of the Constitution of India.

22. Placing reliance on **Union of India v. C. Krishna Reddy4**, the learned Senior Counsel has submitted that a *mandamus* can be granted only when an authority refuses to discharge a statutory duty imposed upon him or her.

23. To underline the nuances of surrogacy, the learned Senior Counsel has placed reliance on **Baby Manji Yamada v. Union of India5**. On the issue of applicability of international covenants and conventions in the domestic sphere, the learned Senior Counsel has placed reliance on **Gramophone Co. of India Ltd. v. Birendra Bahadur Pandey6**.

24. The learned Senior Counsel has contended that unless the statute permits, Courts would not be willing to grant relief merely on ethical or moral considerations. In that regard, she has placed reliance on **A. Arulin**

4 AIR 2004 SC 1194
5 (2008) 13 SCC 518
6 (1984) 2 SCC 534

Ajitha Rani v. Principal, Film and Television Institute of Tamil Nadu[7] and **Nasiruddin v. Sita Ram Agarwal**[8].

25. Finally, the learned Senior Counsel has placed reliance on **Z. v. A Government Department,** as reported in [2014] EUECJ C-363/12, to highlight that under similar circumstances European Court of Justice has refused to grant relief to a biological mother. Thus, summing up her submissions, the learned Senior Counsel has urged this Court to dismiss the writ petition as devoid of any merit.

26. Heard Dr.Thushara James, the learned counsel for the petitioner and Mrs.Sumathi Dhandapani, the learned Senior Counsel for the respondent Board, apart from perusing the record.

Issues:

i. Whether the petitioner is entitled to maternity leave, having had a child through the process of surrogacy, she herself being the genetic or biological mother?

ii. Whether, in the face of a particular legislative field having been occupied by an extant domestic enactment, the International Law

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7 AIR 2009 MADRAS 7
8 (2003) 2 SCC 577

conventions and treaty obligations can be enforced through Municipal Courts?

iii. Whether the dichotomy in maternity is admissible, so that pre-natal and post-natal periods can be viewed distinctly in relation to two different women?

Discussion:
In re: Issue No.1

27. The issues of surrogacy and the dichotomous motherhood have their birth pangs as nascent aspects of law; they seek to be reared in the cradle of common law, i.e., case law, in the absence of the comfort of the statute law.

28. The issue is simple: the petitioner, being the genetic mother commissioning a surrogate to bear *her* child, sought maternity leave as if she underwent the maternity, for her child rearing is as vital as child bearing.

29. An effort is made to decide the issue within the statutory scheme, if at all, governing the issue, without *ad hominem* considerations. Indeed, both the learned counsel have made extensive references to international covenants and treaties, as well as case law; all of them have been referred to while reproducing their submissions. For adjudicatory

purposes referring many of them may not be necessary, but they have faithfully been adverted to only to underline the diligent efforts made by both the learned counsel in assisting the Court on deciding an issue which is, more or less, *res integra*.

30. In *Baby Makers*, (Harper Collins India, 2014), a study on surrogacy in India, the author, Gita Aravamudan, poses a question thus: "Woman, womb, mother ... in our minds, the creation, sustenance and nurturing of life hinges on the blending of these words into synonymity. But does being a 'mother' necessarily include the whole gamut of actions like conceiving, carrying, bearing and rearing a child? She describes the disturbing scenario in the prologue as follows:

> "Today, babies can be ordered over email, created in Petri dishes from frozen genetic material, and grown in wombs that are considered to be nothing more than gestational vessels . Today, human eggs are traded like any other commodity and fertile women sell their eggs to sterile women for the creation of babies to whom they are not genetically related."

31. Even in the absence of statutory frame work, surrogacy in India is not illegal, thus the country becoming a favourite destination for international destitutes of children. Before referring to the specifics, it is appropriate to appreciate the essential terminology employed in this field.

Going by the glossary provided in 'Baby Makers' (Harper Collins), Gestational Surrogacy (GS) is a treatment process in which another woman, known as the gestational surrogate, undergoes the embryo transfer process and then carries the pregnancy to term. GS may be achieved with the intending mother's eggs or with eggs from a donor. Artificial Insemination Surrogacy (AIS) occurs when a surrogate mother becomes pregnant after being inseminated with sperm. After the birth, the surrogate mother relinquishes all parental rights and the child is given to the person(s) whose baby she carried. The Assisted Reproductive Technology (ART) comprises a group of therapies that manipulates the egg and/or sperm and/or early conception in order to establish a sustainable pregnancy. These procedures all stem from the basic IVF process.

32. In **Baby Manji Yamada v. Union of India9** the Hon'ble Supreme Court, apart from tracing the etymological roots of surrogacy, has delineated different types of surrogacy, such as traditional surrogacy (also known as the Straight method), gestational surrogacy (also known as the Host method), which is the case here, altruistic surrogacy, and commercial surrogacy.

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9 (2008) 13 SCC 518

33. As stated above, the petitioner and her husband, being childless for more than two decades, had a baby through gestational surrogacy and took custody of the baby on the very day of birth in terms of the surrogacy agreement. The petitioner, being an executive in the first respondent Board, has applied for maternity leave. The employees of the first respondent Board are governed by the provisions of the Kerala Livestock Development Board Limited Staff Rules & Regulations, 1993 ('the Staff Rules' for brevity). Chapter IV of the Staff Rules deals with Leave Rules, which mandate that leave cannot be claimed as a matter of right, and that under exigent circumstances, the leave sanctioning authority has the discretion to refuse, postpone, curtail or revoke leave of any description and/or to recall to duty any employee on leave. The kinds of leave that can be provided are: Casual Leave, Compensation Leave, Special Casual Leave, Earned Leave, Half Pay Leave, Maternity Leave, Special Disability Leave, Extra Ordinary Leave and Study Leave. Rule 50 provides for maternity leave as under:

> **“MATERNITY LEAVE:**
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> i. Maternity leave may be granted to a female employee, not covered by the ESI Act, up to 90 days from the date of commencement of leave.
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> ii. Maternity leave for a period not exceeding 42

days may be granted in case of miscarriage including medical termination of pregnancy.

iii. Application for Maternity leave should be supported by medical certificate from a Government Medical Officer or Medical Practitioner registered in Part- A/Class-A of the Register of Modern Medicines, Indigenous Medicines or Homoeopathic Medicines.

iv. *Maternity leave may be combined with leave of any kind other than casual leave and special casual leave. Leave applied for in continuation of the Maternity leave may be granted for the continued medical attention of the mother or child.* Application for the continuation of such leave should be supported by a medical certificate.

v. *Maternity leave under this rule shall not be allowed if the employee has three or more living children.*

vi. An employee on Maternity leave will be eligible to draw during the period of leave, the full pay and allowances at the rate she had been drawing prior to her proceeding on Maternity leave.

(emphasis added)

34. Rule 50 of the Staff Rules, as can be seen, clearly provides for leave up to ninety days from the date of commencement of maternity leave. Maternity benefit is admissible to insured women in the event of confinement or miscarriage etc., for twelve weeks and the rate of about hundred percent of the wages. It also specifies that maternity benefit is

admissible in the case of confinement and also in the case of miscarriage. This benefit is also admissible for sickness arising out of pregnancy/ miscarriage or confinement for a specified period, additionally. The rate of this benefit is equal to or a little more than the wages i.e. double the standard benefit rate. Maternity benefit continues to be payable even in the death of an insured woman during her delivery or immediately following the date of her delivery leaving behind a child , for the whole of that period and in case the child also dies, during the said period, until the death of the child.

35. Now, we may examine the statutory scheme of the Maternity Benefit Act, 1961 ('the Act' for brevity), which is both literally and figuratively the parent enactment. It is an Act to regulate the employment of women in certain establishments for certain periods before and after the child-birth and to provide maternity benefit and certain other benefits.

36. In terms of Section 2 of the Act, it applies, in the first instance, to every establishment being a factory, mine or plantation; to every shop or establishment within the meaning of any law for the time being in force in relation to shops and establishments in a State, in which ten or more persons are employed, or were employed, on any day of the preceding twelve months. In fact, by way of proviso, it is provided that the State Government

may, with the approval of the Central Government, after giving not less than two months' 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 also apply to any other establishment or class of establishments, industrial, commercial, agricultural or otherwise. There is no gainsaying the fact that the Staff Rules of the first respondent Board are applied within the statutory framework of the Act.

37. Section 3 of the Act, the lexical provision, defines "delivery" as the birth of a child, and "maternity benefit" as the payment referred to in sub-section (1) of Section 5. It also defines "miscarriage", which need not be referred to in the present context.

38. Section 4 of the Act prohibits employment of, or work by, women during certain periods of pregnancy. Section 5 declares the right of the employee to payment of maternity benefit at a specified rate, apart from specifying the maximum period of leave that can be granted. Sections 5A and 5B provide for the payment and of maternity benefit and its continuance in certain specified cases. Section 6, in turn, elaborates on Section 5 as to the manner of payment of the maternity benefit. Section 9 provides for the

leave on miscarriage; and Section 10, for leave during illness arising out of pregnancy, delivery, premature birth of child, or miscarriage.

39. It can be seen that the Act focuses on conception, gestation and delivery. It intends to protect the health of the pregnant woman and collaterally the *in-vitro* child. The leave is not for bringing up the child. If it were so, a leave of a few days and compensation of a few thousand rupees are woefully inadequate to serve the said purposes.

40. Section 11 deals with nursing breaks, and it is as follows:

> "11. Nursing Breaks: Every woman delivered of a child who returns to duty after such delivery shall, in addition to the interval for rest allowed to her, be allowed in the course of her daily work two breaks of the prescribed duration for nursing the child until the child attains the age of fifteen months."

41. During the post-natal period, we may observe, apart from having leave for the purpose of convalescing from the labour related health deficiencies, the mother can also have nursing breaks, which are of short duration. Any provision, analogous to Rule 3-A of Madras Port Trust (Leave) Regulations, 1987, as seen in **Kalaiselivi**, which is discussed more elaborately below, is not to be found either under the Act or the Staff Rules.

42. Indeed, there cannot be any discrimination regarding the genetic mother in extending the statutory benefits to the extent they are applicable,

as is evident from the discussion on issue No.3 below.

In re: Issue No.2:

International Law vis-à-vis Municipal Law:

43. If we examine Convention No.183 of International Labour Organisation, to which India is a signatory, by way of revision of the Maternity Protection Convention (Revised), 1952, the General Conference of the ILO issued guidelines in its 88th Session on 30th May, 2000. A perusal of those provisions amply establishes that maternity has been viewed holistically and more emphasis has been laid on pregnancy and child birth.

44. Indeed, the Assisted Reproductive Technologies (Regulation) Bill, 2010, is still nebulous and has not attained a concrete shape of a statute to have any enforceability. The provisions, at best, remain the intention of the legislature without enforceability. A reference to that does not yield any result. At any rate, as a matter of apophasis, if we look at Chapter VII thereof, it yields nothing in the manner of maternity leave.

45. The Universal Declaration of Human Rights, 1948, *inter alia*, declares that motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection. In terms of the Convention on the Rights of Child,

Article 3 thereof mandates that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be the primary consideration. The nations are required to take all appropriate legislative and administrative measures. Article 6 focuses on the development of child.

46. The learned counsel for the petitioner has placed reliance on **Laxmi Video Theatres v. State of Haryana10** to stress the need of dynamic and progressive interpretation of statutes. In this case the question that fell for consideration was whether a video parlour wherein a pre-recorded cassette of a cinematograph film is exhibited through the medium of VCR/VCP falls within the ambit of the definition of 'cinematograph', as contained in the Cinematograph Act, 1952, etc. In that context, the Hon'ble Supreme Court has observed thus:

> "7. We are in agreement with this view. The definition of the expression 'cinematograph' contained in Section 2(*c*) of the Cinematograph Act, 1952 and Section 2(*a*) of the Act is an inclusive definition which includes any apparatus for representation of moving pictures or series of pictures. The said definition cannot be confined in its application to an apparatus for representation of moving

10 (1993) 3 SCC 715

> pictures or series of pictures which was known on the date of the enactment of the said provision. It must be given a meaning which takes into account the subsequent scientific developments in the field in accordance with principle of statutory construction laid down in *Senior Electric Inspector* v. *Laxmi Narayan Chopra*[5]. In that case it has been held —
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> "[I]n a modern progressive society it would be unreasonable to confine the intention of a Legislature to the meaning attributable to the word used at the time the law was made, for a modern Legislature making laws to govern a society which is fast moving must be presumed to be aware of an enlarged meaning the same concept might attract with the march of time and with the revolutionary changes brought about in social, economic, political and scientific and other fields of human activity. Indeed, unless a contrary intention appears, an interpretation should be given to the words used to take in new facts and situations, if the words are capable of comprehending them."

47. The learned counsel for the petitioner has contended that there is no bar on applying the international covenants or treaties in the domestic sphere, so long as there is no Municipal Law that expressly prohibits their application. In that regard, she has relied on **Lotus Case, 1927** (France v. Turkey) decided by the Permanent Court of International Justice (PCIJ).

48. In this celebrated case on International Law, the facts are that a collision occurred on the high seas between a French vessel and a Turkish vessel. Victims were Turkish nationals and the alleged offender was French. The question was whether Turkey could exercise its jurisdiction over the

French national under international law? Turkey, having arrested, tried and convicted a foreigner (a French national) for an offence which he is alleged to have committed outside her territory, claimed that it had been authorized to do so by reason of the absence of a prohibitive rule of international law. In that context, the plea of Turkey was that under international law everything which is not prohibited is permitted. In other words, the contention is that under international law every door is open unless it is closed by treaty or by established Custom. This plea was accepted by the Permanent Court of International Justice. I regret my inability to see any application of the ratio of the above case in the present factual matrix, here the adjudication is not inter-state to invoke the default principle of international law.

49. In **Vishaka v. State of Rajasthan11** the Hon'ble Supreme Court has held that any International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into the domestic legislation to enlarge the meaning and content thereof, so as to promote the object of the constitutional guarantee. The executive power of the Union is, therefore, available till the Parliament enacts legislation to

11 (1997) 6 SCC 241

expressly provide measures needed to curb the evil.

Monism and Dualism

50. Before considering the international covenants cited at the Bar by the learned counsel for the petitioner, it is pertinent to examine the concepts regarding the nation's treaty obligations *vis-à-vis* Municipal Law, with reference to the jurisprudential concepts of Monism and Dualism in the sphere of International Law. According to Parry & Grant's Encyclopaedic Dictionary of International Law (Oxford, 3rd Edn.), those concepts have been defined thus:

> "**Monism:** 'Monists believe that international and domestic law form one legal system and that international law is hierarchically superior. Provisions of international law would thus override conflicting provisions of domestic law': von Glahn and Taulbee, Law among Nations (8th ed.), 124. 'Since international law' can thus be seen as essentially part of the same legal order as municipal law, and as superior to it, it can be regarded as incorporated in municipal law, giving rise to no difficulty in principle in its application as international law within states:' I Oppenheim 54. Cf. **dualism.** Monism thus defined, very much in accordance with the views of Hans **Kelsen,** presents real theoretical and practical difficulties, not least in reconciling it with State sovereignty and the actual practice of States. Cassese, International Law (2nd ed.), 216 provides a modern assessment of monism: 'The Kelsenin monistic theory, and admirable theoretical construction was in advance of its time; in many respects it was utopian and did not reality of international

> relations. However, for all its inconsistencies and practical pitfalls, it had a significant ideological impact. It brought new emphasis to the role of international law a s controlling factor of State conduct.' For a brief account of the history of monistic though, see O' Connell, International Law (1965),Vol.1,38-41.
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> **Dualism:** The theory according to which 'international law and the internal law of states are totally separate legal systems. Being separate systems international law would not as such form part of the internal law of a state: to the extent that in particular instances rules of international law may apply within a state they do so [by] virtue of their adoption by the internal law of the state, and apply as part of that internal law and not as international law. Such a view avoids any question of the supremacy of the one system over the other since they share no common field of application: each is supreme in its own sphere': I Opeenheim 53.
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> (emphasis original)

51. Jurisprudentially India is Dualistic, but Article 51(c) exhorts the nation to respect the international covenants. On the other hand, Article 253 speaks of Parliament's power to give effect to International conventions. Contradistinguished, the USA is Monistic in terms of Article VI of the American Constitution. When we consider the value of the International Covenants in Municipal Courts, it is to be observed that it has no direct binding effect on the Municipal Law of the State, the reason being that treaties are made by the executive as per Article 53, but the laws are made by the legislature. In other words, in the absence of any constitutional

provision like Article VI of the American Constitution, insistence on the automatic engrafting of International Law to Internal Law falls foul of the doctrine of separation of powers.

52. At any rate, while interpreting any constitutional provision, in terms of Article 367(1), it is required to be interpreted like a statute, liberally, rather than with 'the austerity of tabulated legalism'. In fact, over the time, the Hon'ble Supreme Court has observed that the interpretation of the internal law shall be imbued with the spirit of international law covenant, when the domestic law is uncertain or ambiguous; when the common law is uncertain or incomplete; when there is an occasion to exercise discretion by the Courts; when the matters of public policy are before the Courts; when the Convention is part of community law; and when, lawfulness of the exercise of administrative discretion is being considered.

53. In **Gramophone Co. of India Ltd. v. Birendra Bahadur Pandey12**, under Copy Right Act, 1957, the expression 'Import' has fallen for interpretation. The question required to be decided was whether copy righted material in transit *via* India could be termed as 'import' falling within the mischief of the municipal law. The Hon'ble Supreme Court has

12 (1984) 2 SCC 534

examined two questions: first, whether international law is, of its own force, drawn into the law of the land without the aid of municipal statute, and second, whether, so drawn, it overrides municipal law in case of conflict and held as follows:

> "5. There can be no question that nations must march with the international community and the municipal law must respect rules of international law even as nations respect international opinion. The comity of nations requires that rules of international law may be accommodated in the municipal law even without express legislative sanction provided they do not run into conflict with Acts of Parliament. But when they do run into such conflict, the sovereignty and the integrity of the Republic and the supremacy of the constituted legislatures in making the laws may not be subjected to external rules except to the extent legitimately accepted by the constituted legislatures themselves. The doctrine of incorporation also recognises the position that the rules of international law are incorporated into national law and considered to be part of the national law, unless they are in conflict with an Act of Parliament. Comity of nations or no, municipal law must prevail in case of conflict. National courts cannot say yes if Parliament has said no to a principle of international law. National courts will endorse international law but not if it conflicts with national law. National courts being organs of the national State and not organs of international law must perforce apply national law if international law conflicts with it. But the courts are under an obligation within legitimate limits, to so interpret the municipal statute as to avoid confrontation with the comity of nations or the well established principles of international law. But if conflict is inevitable, the latter must yield."

54. In **Selvi v. State of Karnataka13**, a three-Judge Bench of the Hon'ble Supreme Court has observed in paragraph 373 thereof that even though India is a signatory to a particular Convention, so long as it has not been ratified by Parliament in the manner provided under Article 253 of the Constitution and so long as we do not have a national legislation, which has provisions analogous to those of the Convention, its automatic enforcement does not arise. It is, however, further held that the Convention has significant persuasive value since it represents an evolving international consensus on the nature and specific contents of human rights norms.

55. In **W.B. v. Kesoram Industries Ltd.14** at page 401, a Constitution Bench of the Hon'ble Supreme Court has held thus:

> "It is true that the doctrine of "monism" as prevailing in the European countries does not prevail in India. The doctrine of "dualism" is applicable. But, where the municipal law does not limit the extent of the statute, even if India is not a signatory to the relevant international treaty or covenant, the Supreme Court in a large number of cases interpreted the statutes keeping in view the same."

56. In the face a particular legislative field having been occupied by an extant domestic enactment, the International Law conventions and treaty obligations cannot be enforced through Municipal Courts, though they have

13 (2010) 7 SCC 263
14 (2004) 10 SCC 201

considerable persuasive value in interpreting the Municipal Law.

In Re: Issue No.3:

57. The gravamen of the submissions of the learned counsel for the petitioner is that motherhood is an integral and inherent part of womanhood and that with advanced reproduction techniques, one cannot cling on to the traditional meaning of maternity. She also contends that there ought not to be any discrimination on account of woman getting a child through surrogacy, for all practical purposes, that woman shall be treated as the natural biological mother with all the rights flowing from the acceptance of the said factum, unhindered. All the international covenants and the domestic declarations only go to establish that there ought not be any discrimination based on the method of maternity, or in other words, merely on the ground that the mother did not actually bear the child in her womb. This being the underlining theme, this Court is prepared to accept, at least polemically, the entire proposition of law as projected by the learned counsel for the petitioner, as it were, and is further prepared to examine what should follow in such an eventuality.

58. Sufficient discussion has already been made on the issue of the impact of international law in the domestic sphere. Now, the proposition is

that a genetic mother is required to be placed on the same pedestal as the natural, biological mother is placed, or as Oprah Winfrey has said, “Biology is the least of what makes someone a mother”. Indeed, from Darwin's 'On Origin of Species' to Richard Dawkin's ‘The Selfish Gene’, the Cardinal Principle of Evolution is observed to be that every senescent being craves to perpetuate its progeny, we the humans being no exception. In this case, as a matter of legal fiction, if the petitioner is to be treated as the woman who has undergone the pregnancy and has been delivered of the baby, what rights accrue to her?

59. Taking this legal fiction a little further, we have to inevitably confront the dichotomy of the maternity - pre and post natal. Admittedly, the petitioner has not undergone any pre-natal phase, which in fact was undergone by the surrogate mother, whose rights are not in issue before this Court. From day one, after the delivery, the petitioner is required to be treated as the mother with a newborn baby. Thus, without discriminating, it can be held that the petitioner is entitled to all the benefits that accrue to an employee after the delivery, as have been provided under the Act or the Staff Rules. Nothing more; nothing less, for the petitioner cannot compel the employer to place her on a higher pedestal than a natural mother could have

been placed, after undergoing the pregnancy.

Kalaiselvi:

60. It is pertinent to refer to **Kalaiselvi** (supra), a decision rendered by the High Court of Madras. In this case, which was made the sheet-anchor for the arguments of the learned counsel for the petitioner, Rule 3-A of Madras Port Trust (Leave) Regulations, 1987 has fallen for consideration. This Rule deals with leave to female employees on her adopting a child. The question sought to be addressed was whether a woman employee working in the respondent Port Trust was entitled to avail herself of maternity leave, to be precise 'child-care leave' even in case where she got a child through an arrangement of surrogacy. A learned Single Judge of the Hon'ble High Court of Madras likened the obtaining of a child through surrogacy to adoption and held that the benefit of Rule 3-A ought to be extended to the said employee as well. Referring to All India Services (Leave) Rules, 1955, it is observed that the Central Government has recognised even paternity leave to be granted.

61. In my considered view, the High Court of Madras has justly interpreted Rule 3-A expansively to take into the fold of adoption even the child obtained through surrogacy. Thus, the court has declared that a female

employee on her getting a child through surrogacy, instead of adoption, be granted leave of the kind and admissible (including commuted leave without production of medical certificate for a period not exceeding 60 days and leave not due) up to one year subject to the conditions provided in the Rule itself.

62. I am afraid, there is no analogous provision in the Staff Rules governing the petitioner; as such, notwithstanding the valiant efforts of the learned counsel for the petitioner, I am unable to persuade myself to hold that **Kalaiselvi** (supra) has any relevance in the present factual and legal matrix. True, the All India Services (Leave) Rules, 1955, provide for paternity leave under Rule 18 thereof, but they do not have any application to the respondent Board. It is the extant Rule or Regulation that can be enforced, but this Court cannot legislate in the name of either interpretation or application of law occupying some other filed as a matter of parity involving analogous situations.

63. In **A.Arulin Ajitha Rani v. Principal, Film and Television Institute of Tamil Nadu15**, a student of the institute could not secure minimum attendance of 80% owing to her pregnancy. The question that fell

15 AIR 2009 MADRAS 7

for consideration was whether the denial of benefit of maternity leave offends the provisions of the Convention on the Elimination of all Forms of Discrimination against Women and also Maternity Benefit Act. Holding that Educational Institutions stand on a different footing from Companies, the learned Division Bench of the High Court of Madras has held that it is essentially a policy matter left to the wisdom of legislature.

64. In **Nasiruddin v. Sita Ram Agarwal16**, the issue is the application of Section 5 of Limitation Act to condone the delay in depositing rent by the tenant in terms of the direction of a Court under Control of Rent and Eviction proceedings. Their Lordships have held that in a case where the statutory provision is plain and unambiguous, the court shall not interpret the same in a different manner, only because of harsh consequences arising there from.

65. In **Union of India v. C. Krishna Reddy17**, the issue is concerning the norms for giving reward for information passed on to the custom authorities. It is held that the Court cannot ask the authorities to travel beyond the guidelines on any issue and provide relief therefor. In that

16 (2003) 2 SCC 577
17 (2003) 12 SCC 627

context, relying on earlier pronouncements, it is observed thus:

> "13. It is well settled by a catena of decisions of this Court that a writ of mandamus can be granted only in a case where there is a statutory duty imposed upon the officer concerned and there is a failure on the part of that officer to discharge the statutory obligation. The chief function of the writ is to compel performance of public duties prescribed by statute and to keep subordinate tribunals and officers exercising public functions within the limit of their jurisdiction. Therefore, in order that a mandamus may issue to compel the authorities to do something, it must be shown that there is a statute which imposes a legal duty and the aggrieved party has a legal right under the statute to enforce its performance."

66. The learned Senior Counsel for the respondent Board has drawn my attention to a decision, rendered by the Court of Justice of European Union, involving maternity leave to a mother who, as a genetic parent, obtained a baby through surrogacy. **Z. v. A Government Department,** as reported in [2014] EUECJ C-363/12, the issue was with regard to the Social policy of equal treatment of male and female workers as contained in the Directive 2006/54/EC of United Nations Convention on the Rights of Persons with Disabilities. Ms.Z, a commissioning mother, a post-primary school teacher in Ireland, who has had a baby through a surrogacy arrangement, has been refused paid leave equivalent to maternity leave or adoptive leave. Seeking what is termed as equal treatment in employment

and occupation by way of prohibition of any discrimination on the ground of disability, the commissioning mother questioned her employer's refusal to provide her paid leave.

67. In November 2010, Ms.Z brought an action against the Government Department before the Equality Tribunal that the Government Department had failed to reasonably accommodate her as a person with disability, and that the Government Department had refused to provide her with paid leave equivalent to maternity or adoptive leave, although she had undergone *in-vitro* fertilisation treatment. In those circumstances, the Equality Tribunal decided to stay the proceedings and to refer the matter to the Court of Justice for a preliminary ruling on whether there is discrimination on the ground of sex where a woman – whose genetic child has been born through a surrogacy arrangement, and who is responsible for the care of her genetic child from birth – is refused paid leave from employment equivalent to maternity leave and/or adoptive leave?

68. Article 16 of that directive, headed 'Paternity and Adoption Leave', states:

> "This Directive is without prejudice to the right of Member States to recognise distinct rights to paternity and/or adoption leave. Those Member States which

> recognise such rights shall take the necessary measures to protect working men and women against dismissal due to exercising those rights and ensure that, at the end of such leave, they are entitled to return to their jobs or to equivalent posts on terms and conditions which are no less favourable to them, and to benefit from any improvement in working conditions to which they would have been entitled during their absence."

69. The Court of Justice of EU considered whether there is any invidious discrimination in providing the maternity leave to one gender and denying it to the other. The Justices have held that under identical circumstances once a commissioning father is not entitled to any maternity or adoptive leave, a woman, too, cannot claim it. The reasoning goes thus:

> "[A] commissioning father who has had a baby through a surrogacy arrangement is treated in the same way as a commissioning mother in a comparable situation, in that he is not entitled to paid leave equivalent to maternity leave either. It follows from this that the refusal of Ms. Z's request is not based on a reason that applies exclusively to workers of one sex.
>
> …
>
> As regards the indirect discrimination referred to in Article 2(1)(b) of Directive 2006/54, it must be noted that there is nothing in the file in the case to establish that the refusal to grant the leave at issue puts female workers at a particular disadvantage compared with male workers."

70. It has eventually held that Article 16, read in conjunction with recital 27 in the preamble to Directive 2006/54, makes it clear that the directive preserves the freedom of the Member States to grant or not to grant

adoption leave, and that the conditions for the implementation of such leave, other than dismissal and return to work, are outside the scope of that directive. Thus, the ratio of the EU Court boils down to this: it is the domestic law that should govern the issue.

71. In the absence of any leave provided for bringing up a child, this Court cannot direct the first respondent Board to provide any leave to the petitioner for that purpose. In fact, the respondent Board has been considerate enough to allow the petitioner to go on extraordinary leave for a specified period.

72. The relief sought by the petitioner reads thus:

> "To direct the first respondent to grant leave to the petitioner on equal footing in terms of Rule 50 of the Staff Rules and Regulations applicable to the staff and officers of the first respondent which benefit was granted to employees who got child[ren] under normal circumstances."

73. I do not see any difficulty in acceding to the above prayer, provided the dichotomy is applied and only the benefit, namely, the leave that can be given post-delivery, is extended. Admittedly, the petitioner did not physically bear the child; as such, she cannot insist on having any leave for convalescing and regaining her health. For child rearing, no specific provision is made *a la* Rule 3-A of Madras Port Trust (Leave) Regulations,

1987. Resultantly, the only option left for the petitioner is to avail herself of leave under other heads, as has been specified under Rule 44 of the Staff Rules. In fact, it has already been noted that the petitioner has been given extraordinary leave, as a special case.

74. Thus, to conclude, this Court declares that there ought not to be any discrimination of a woman as far as the maternity benefits are concerned only on the ground that she has obtained the baby through surrogacy. It is further made clear that, keeping in view the dichotomy of maternity or motherhood, the petitioner is entitled to all the benefits an employee could have on post-delivery, *sans* the leave involving the health of the mother after the delivery. In other words, the child specific statutory benefits, if any, can, and ought to, be extended to the petitioner.

75. It is only apt to end this exposition on motherhood with the words of Margaret Sanger, the American Birth Control Activist and Nurse, who said: "When motherhood becomes the fruit of a deep yearning, not the result of ignorance or accident, its children will become the foundation of a new race."

With the above observations, the writ petition stands disposed of.

No order as to costs.

Dama Seshadri Naidu, Judge

tkv