



**HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR**



S.B. Civil Writ Petition No. 7853/2020

Smt. Chanda Keswani W/o Shri Bhupesh Datwani, aged about 44 Years, R/o A-233, Madhav Nagar Lane No. 2, Near Jhoolal Temple, Chosiyawas Road, Vaishali Nagar, Ajmer.

-----Petitioner

Versus

1. State of Rajasthan, Through the Principal Secretary, Higher Education, Government of Rajasthan, Main Building, Secretariat, Jaipur.
2. The Joint Director (HRD), Department of College Education, Rajasthan, Block-IV, Dr. S. Radhakrishnan Shiksha Sankul, Jawahar Lal Nehru Marg, Jaipur-302015.

-----Respondents

For Petitioner(s) : Mr.Rajesh Kapoor with
Mr.Harshad Kapoor
For Respondent(s) : Dr.V.B.Sharma, Addl.Adv.General.

HON'BLE MR. JUSTICE ANOOP KUMAR DHAND

Order

RESERVED ON : 31/10/2023
PRONOUNCED ON : 08/11/2023
REPORTABLE
BY THE COURT:

1. ***"Mother is she who can take place of all others, but whose place no one else can take."***
2. ***"The bond between mother and her child is special one. It remains unchanged by time or distance. It is the purest love-unconditional and true. It is understanding of any situation and forgiving any kind of mistakes...."***
3. Motherhood is the mother of all civilizations. Family as a social institution is considered as the backbone of the society. No



civilization could have passed without recognizing the power of mother and often figuratively projected her as Goddess. A child born to a family sees the world first through the eyes of his/her mother and develops his/her skills through the vision of the family.

4. The issues involved in this petition is "Whether any distinction can be made by the State Government to a natural mother, a biological mother and a mother who has begotten a child by surrogacy procedure? Whether a surrogate mother/commissioning mother can be deprived to get maternity leave? Whether denying maternity leave to surrogate mother amounts to violation of right to life under Article 21 of the Constitution of India and Whether the right to life includes the right to motherhood and also the right of every child to full development?" It is in this background, the issue involved in this petition is required to be considered.

5. The factual matrix of the case is that after following the process of surrogacy, the petitioner had begotten twins and she applied before the State authorities for getting maternity leave for taking care of the newly born babies. But the State refused to grant the same to the petitioner vide impugned order dated 23.06.2020 indicating therein that there is no provision under the Rajasthan Service Rules, 1951 (for short "the Rules of 1951") for grant of maternity leave to the mother, who got children through the process of surrogacy.



6. Feeling aggrieved by the impugned order dated 23.06.2020, the petitioner has approached this Court by way filing this petition under Article 226 of the Constitution of India with the following prayer:

- "1. Direct the respondents to grant/sanction maternity leave to the petitioner for 180 days commencing from 01.02.2020.
2. Direct the respondents to pay leave salary equal to pay drawn by the petitioner immediately before proceeding on maternity leave as per rule 103 of the RSR.
3. Direct the respondents to not to debit the maternity leave availed by the petitioner from her leave account and a separate entry in this regard shall be made in the service book of the petitioner.
4. Any other relief, which the Hon'ble court may deem fit in the favour of the humble petitioner, may also be given to the humble petitioner."

7. Learned counsel for the petitioner submits that the marriage of the petitioner was solemnized on 25.08.2007. Since the couple was not having any issue from the wedlock, hence the petitioner along with her husband decided to have children through the process of surrogacy. After availing that process, twins namely Chinmay Datwani and Charmy Datwani were born on 31.01.2020. Counsel submits that after birth of the children the petitioner applied for grant of maternity leave of 180 days for taking care of the children w.e.f. 01.02.2020. Counsel submits that the application was submitted by the petitioner before the authorities on 06.03.2020 but the respondents have rejected the application vide impugned order dated 23.06.2020 indicating therein that under Rajasthan Service Rules, 1958 there is no provision of granting maternity leave to the couple having children through surrogacy. Counsel submits that the Rules were enacted by the



Legislature in the year 1951 and at the relevant time there was no such procedure adopted by the parents but with passage of time & by development of medical science, the parents have an alternative method of having children through surrogacy, if they are not having issue from the wedlock. Counsel submits that under these circumstances, the petitioner is entitled to get maternity leave of 180 days for taking care of children born through surrogacy process. Counsel submits that though there is no such Rule under the Rules of 1958 and there exists no similar Rules in other States as well like Delhi but the Delhi High Court in the case of **Rama Pandey vs. Union of India & Ors. (WP (C) No.844/2014)** has interpreted the Rule regarding grant of maternity leave in the similar case where the children were born through surrogacy process. Counsel submits that in the case of **Rama Pandey** (surpa) the Delhi High Court has not only granted medical leaves to the surrogative mother but also granted him other service benefits. Counsel submits that the judgment passed by the Delhi High Court in the case of **Rama Pandey** (supra) has been subsequently followed by the Bombay High Court in the case of **Dr.Ms. Pooja Jignesh Doshi vs. The State of Maharashtra & Anr.** reported in **2019 SCC Online Bom. 1433** and **Mrs. Amisha Girish Ramchandani vs. The Divisional Manager (Personnel Branch) Mumbai CST and Ors.** reported in **2016 SCC Online Bom. 71**. Counsel submits that under these circumstances, appropriate directions be issued to the respondents to grant maternity leave to the petitioner and the consequential benefits be also awarded in favour of the petitioner.



8. Per contra, learned counsel for the State respondents opposed the arguments raised by the counsel for the petitioner and submitted that there is no provision under Rule 103 of the Rules of 1951 for granting maternity leave to the surrogate mother, hence the respondents have not caused any illegality in passing impugned order dated 23.06.2020. Counsel submits that in absence of any rule for grant of such maternity leave the petitioner is not entitled to get any indulgence from this Court, hence the petition is liable to be rejected.

9. Heard and considered the submissions made at Bar and perused the material available on the record.

10. The only difficulty before the respondents is that there is no provision under the Rules of 1951 for granting maternity leave to the mother who got the child through surrogacy process. Rule 103 of the Rules of 1951 deals with the provisions for grant of maternity leave, which reads as under:-

"103. Maternity Leave – Maternity leave may be granted to a female Government Servant with less than two surviving children upto a period of 135 days from the date of its commencement. However, if there is no surviving child even after availing it twice Maternity Leave may be granted on one more occasion. During such period she will be entitled to leave salary equal to pay drawn immediately before proceeding on leave. Such leave shall not be debited to the leave account but such entry should be made in the service book separately."

11. A perusal of the aforesaid Rule 103 of the Rules of 1951 indicates that 'maternity leave' may be granted to a female "Government Servant" for a period of 180 days twice. But the word 'maternity leave' is not defined under the Rules of 1951. It is worthy to note here that the provision of grant of maternity leave



was substituted vide Notification dated 06.12.2004 by the Department of Finance, Government of Rajasthan.

12. Prior to substitution of Rule 103 to the Rules of 1951, there was a provision of granting 'maternity benefits' under the Maternity Benefit Act, 1961 (for short 'the Act of 1961') to the women employed in certain establishment for certain period before and after child birth. As per Section 3(b) of the Act of 1961 "child" includes "a still-born child". But nowhere the words "mother and child" have been defined under the Rules of 1951 and the Act of 1961.

13. The meaning of the word "maternity leave" in common parlance is where a female employee is given a certain amount of time off, after birth of the baby to take care of her newborn and to develop the bond of love, care and affection with the new little one on arrival in the family. During this period the job of the employee is protected and such employee receives the pay and salary of the maternity leave time.

14. A female can become mother not only by giving birth to a child but also by adopting a child and now with the development of medical science, surrogacy is also an option for a female or couple to have their child. The provision relating to grant of maternity benefits is a beneficial provision, which is intended to achieve the social justice and therefore, it must be construed beneficially. The Hon'ble Supreme Court in the case of **B.Shah Vs. Presiding Officer, Labour Court, Coimbatore & Ors.** reported in **(1977) 4 SCC 384**, has held in para 18 as under:-



"18.It has also to be borne in mind in this connection that in interpreting provisions of beneficial pieces of legislation like the one in hand which is intended to achieve the object of doing social justice to women workers employed in the plantations and which squarely fall within the purview of Article 42 of the Constitution, the beneficent rule of construction which would enable the woman worker not only to subsist but also to make up her dissipated energy, nurse her child, preserve her efficiency as a worker and maintain the level of her previous efficiency and output has to be adopted by the Court."

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

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

17. Maternity means the period during pregnancy and shortly after the child's birth. If maternity means motherhood, it would not be proper to distinguish between a natural and biological mother and a mother who has begotten a child through surrogacy. The object of maternity leave is to protect the dignity of motherhood by providing for full and healthy maintenance of the woman and her child. Maternity leave is intended to achieve the object of ensuring social justice to women as the motherhood and childhood both require special attention. Not only are the health issues of the mother and the child considered while providing for maternity leave but the leave is provided for creating a bond of affection between the two.



18. Surrogacy is a blessing for infertile couples. A woman carrying a baby in her womb for others by transfer of embryo or gametes created using the intended parents is called surrogacy. It has been proclaimed in India from ancient times and it was known by the terms 'Niyoya Dharma'. The ancient history of our country indicates that several great heroes were born through surrogacy. Surrogacy has been recognized by the Government now, that is why the Surrogacy (Regulation) Act, 2021 (for short 'the Act of 2021') has been enacted which deals with the provisions of regularization of surrogacy and surrogacy procedures. Hence, surrogacy is an option for couples to have a child for whom it is not possible to carry a baby at their own. Now, one can have a child through surrogacy process and the same is recognized under the law.

19. Similarly, as per the provisions of the Assisted Reproductive Technology (Regulations) Act, 2021, an infertile married couple who approaches an Assisted Reproductive Technology Clinic or an Assistant Reproductive Technology Bank for the purpose of bearing a child through surrogacy, is referred to as a 'commissioning couple'. Likewise, a commissioning mother would be the mother, who seeks to obtain a child through a rented womb of a surrogate mother. However, the commissioning mother remains the biological mother of the child and retains all rights in respect of the child.

20. Once the surrogacy has been recognized by the Legislature, by enacting the Act of 2021 and a female can now become mother through the procedure of surrogacy, then she cannot be denied



the benefit of maternity leave, after birth of the child through surrogacy process. In the last decade, much law have developed on the issue in question by several High Courts, across the nation, while interpreting the term 'maternity leave' contained under Rule 43 of the Central Civil Services (Leave) Rules, 1973 (for short 'the CCS (Leave) Rules, 1973'). The Rule 43 of the CCS (Leave) Rules, 1973 is paramateria to Rule 103 of the Rules of 1951. Rule 43 of the CCS (Leave) Rules, 1973 is reproduced as under:-

"43. Maternity Leave:

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

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

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

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

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

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

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

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



21. Interpreting the provisions of maternity leave and its entitlement to surrogacy and commissioning mother, several High Courts have held that commissioning mother (biological mother) is entitled for grant of maternity leave and this issue is no more *res integra*. In the case of **Devshree Bandhey Vs. Chhattisgarh State Power Holding Co.Ltd. & Ors. [W.P.(S) No.101/2017]** decided on 20.02.2017, the High Court of Chhattisgarh has held as under in paragraphs 24 & 25:-

"24. Maternity means the period during pregnancy and shortly after the child's birth. If maternity means motherhood, it would not be proper to distinguish between a natural and biological mother and a mother who has begotten a child through surrogacy. The object of maternity leave is to protect the dignity of motherhood by providing for full and healthy maintenance of the woman and her child. Maternity leave is intended to achieve the object of ensuring social justice to women. Motherhood and childhood both require special attention. Not only are the health issues of the mother and the child considered while providing for maternity leave but the leave is provided for creating a bond of affection between the two.

25. Right to life under of the Constitution of India includes the right to motherhood and also the right of every child to full development."

22. The above view taken in the case of **Devshree Bandhey** (supra) has been again followed and reiterated by the Chhatisgarh High Court in the case of **Smt.Sadhana Agrawal Vs. State of Chhatisgarh** reported in **2017 SCC Online Chh. 19**.

23. Similarly, in the case of **Rama Pandey Vs. Union of India & Ors. [W.P.(C) No.844/2014]** decided on **17.07.2015**, the Delhi High Court has held in paragraph 24 as under:-

"24. In view of the discussion above, the conclusion that I have reached is as follows :-



(i). A female employee, who is the commissioning mother, would be entitled to apply for maternity leave under sub-rule (1) of Rule 43.

(ii). The competent authority based on material placed before it would decide on the timing and the period for which maternity leave ought to be granted to a commissioning mother who adopts the surrogacy route.

(iii). The scrutiny would be keener and detailed, when leave is sought by a female employee, who is the commissioning mother, at the pre-natal stage. In case maternity leave is declined at the pre-natal stage, the competent authority would pass a reasoned order having regard to the material, if any, placed before it, by the female employee, who seeks to avail maternity leave. In a situation where both the commissioning mother and the surrogate mother are employees, who are otherwise eligible for leave (one on the ground that she is a commissioning mother and the other on the ground that she is the pregnant women), a suitable adjustment would be made by the competent authority.

(iv). In so far as grant of leave qua post-natal period is concerned, the competent authority would ordinarily grant such leave except where there are substantial reasons for declining a request made in that behalf. In this case as well, the competent authority will pass a reasoned order."

24. Similarly, in the case of **Dr.Mrs.Hema Vijay Menon Vs. State of Maharashtra & Ors. [W.P. No.3288/2015]** decided on **22.07.2015**, the Bombay High Court at Nagpur has held in paragraph 8 as under:-

"8. As rightly pointed out on behalf of the petitioner, there is nothing in Rule 74 of the Maharashtra Civil Services (Leave) Rules, 1961, which would disentitle a woman, who has attained motherhood through the surrogacy procedure to maternity leave.

Rule 74 provides for maternity leave to a female government employee. We do not find anything in Rule 74 which disentitles the petitioner to maternity leave, like any other female government servant, only because she has attained motherhood through the route of surrogacy procedure. It is worthwhile to note that by the Government Resolution dated 28.07.1995, maternity leave is not only provided to a natural mother but is also provided to an adoptive mother,



who adopts a child on its birth. The only reason for refusing maternity leave to the petitioner is that there is nothing in the Government Resolution, dated 28.07.1995 for providing maternity leave to the mother who begets the child through surrogacy. If the Government Resolution, dated 28.07.1995 provides maternity leave to an adoptive mother, it is difficult to gauge why maternity leave should be refused to the mother, who secures the child through surrogacy. In our view, there cannot be any distinction whatsoever between an adoptive mother that adopts a child and a mother that begets a child through a surrogate mother, after implanting an embryo in the womb of the surrogate mother. In our view, the case of the mother who begets a child through surrogacy procedure, by implanting an embryo created by using either the eggs or sperm of the intended parents in the womb of the surrogate mother, would stand on a better footing than the case of an adoptive mother. At least, there cannot be any distinction between the two. Right to life under Article 21 of the Constitution of India includes the right to motherhood and also the right of every child to full development. If the government can provide maternity leave to an adoptive mother, it is difficult to digest the refusal on the part of the Government to provide maternity leave to a mother who begets a child through the surrogacy procedure. We do not find any propriety in the action on the part of the Joint Director of Higher Education, Nagpur, of rejecting the claim of the petitioner for maternity leave. The action of the respondent Nos. 1 to 3 is clearly arbitrary, discriminatory and violative of the provisions of Articles 14 and 21 of the Constitution of India. It is useful to refer to the unreported judgment of the Delhi High Court in the case of Rama Pande Vs. Union of India, and relied on by the learned counsel for the petitioner, in this regard."

25. Following the judgment of Delhi High Court in the case of **Rama Pandey** (supra) and the judgment of Bombay High Court in the case of **Dr.Mrs.Hema Vijay Menon** (supra), the Division Bench of the Bombay High Court has held in the case of **Dr.Pooja Jignesh Doshi** (supra), as under

"1. Unable to bear a second child and forming the opinion that a sibling was needed for Master Saurav, a son born to the Petitioner; with consent of her husband the Petitioner chose the route of surrogacy.



The surrogate mother gave birth to a baby girl on 5 November 2012.

2. But prior to it, with reference to the expected date of delivery, the Petitioner sought maternity leave to take care of the surrogate child. The same has been denied to the Petitioner on the ground that the Leave Rules and the policy governing the Rules do not permit maternity leave for a surrogate child.

3. The issue is no longer res-integra. In the decision dated 22 July 2015 in Writ Petition No.3288 of 2015 Dr.Mrs.Hema Vijay Menon vs. State of Maharashtra, a Division Bench of this Court relying upon a decision of the Delhi High Court dated 17 July 2015 in the case of Rama Pande vs. Union of India, held that even in case of birth by surrogacy the parents who have lent the ova and the sperm would be entitled to avail leave. The mother being entitled to maternity leave and the father paternity leave.

4. The decision of the Division Bench has attained finality and thus we declare that the Petitioner would be entitled to maternity leave for child born through surrogacy.

5. The Petitioner is held entitled to the relief sought for in terms of prayer clause [C]; being that the Earned Leave and Half-pay Leave availed of by her should be entered in the record as maternity leave for the purposes of the leave account and that the said leave availed by the Petitioner during various intervals be converted into maternity leave."

26. Recently, the similar issue of grant of maternity leave to the surrogate mother came before the High Court of Himachal Pradesh in the case **Sushma Devi Vs. State of Himachal Pradesh & Ors.** reported in **2021 SCC Online HP 416** and maternity leave was granted to the surrogate mother by making the following observations and directions, which are reproduced as under:-

"12. Article 42 of the Constitution of India reads as under:

"42. Provision for just and humane conditions of work and maternity relief:- The State shall make provision for securing just and humane conditions of work and for maternity relief."

13. It was long felt that the working women were unable to depute their time towards their children due



to exigencies of service. Hence, the concept of grant of child care leave was introduced to ensure the welfare of the child so as to enable the mother to avail child care leave whenever she feels that the child needs the care. This is in tune with the international covenants and treaties to which India is a signatory.

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

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

16. In view of the aforesaid discussion, we find merit in this petition and the same is accordingly allowed and the respondents are directed to sanction/grant maternity leave to the petitioner in terms of Rule 43(1) of the CCS (Leave) Rules, 1972. Pending application, if any, also stands disposed of."

27. Right to life under Article 21 of the Constitution of India includes the right to motherhood and also the right of every child to full development. If the Government can provide maternity leave to an adoptive mother, it would be wholly improper to refuse to provide maternity leave to a mother who begets a child through



the surrogacy procedure and as such, there cannot be any distinction between an adoptive mother who adopts a child and a mother who begets a child through surrogacy procedure after implanting an embryo created by using either the eggs or sperm of the intended parents in the womb of the surrogate mother.

28. Similarly, the Kerala High Court in the matter of **P. Geetha Vs. Kerala Livestock Development Board Ltd., Thiruvananthapuram** reported in **2015 SCC Online Ker 71** has held thus,

"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 that 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."

29. In view of the aforesaid legal analysis, it is *ipso facto* clear that no distinction can be made by the State Government to a natural mother, a biological mother and a mother who has begotten a child through surrogacy method. Because the right to life contained under Article 21 of the Constitution of India includes the right of motherhood and the right of the child to get love, bond of affection and full care and attention. Therefore, the action of the State-respondent is quite unjustified in denying maternity leave to the surrogate mother (the petitioner) for taking care of her twins born through surrogacy method. Making a difference between natural biological mother and surrogate/commissioning



mother would amount to insult of motherhood. A mother cannot be discriminated, as far as maternity leave is concerned, only because she begot the child through the process of surrogacy. Newly born babies through this process cannot be left at the mercy of others, as these infants need love, care, protection and attention of mother during the early crucial time after their birth i.e. infancy, as the bond of love and affection develops between the mother and children during this period after birth.

30. As a consequence thereof, the instant writ petition stands allowed and the impugned order dated 23.06.2020 is hereby quashed and set aside. The respondents are directed to sanction 180 days of maternity leave to the petitioner, as per the request made by her vide letter dated 23.02.2020 (Annex.2). The respondents are expected to do the needful within a period of three months from the date of receipt of certified copy of this order, with all consequential benefits to the petitioner.

31. Once, it has been held by the several High Courts of our Nation including this Court that there is no distinction between the natural, biological and surrogate or commissioning mothers and all of them have fundamental right to life and motherhood, contained under Article 21 of the Constitution of India and children born from the process of surrogacy have the right to life, care, protection, love, affection and development through their mother, then certainly such mothers have right to get maternity leave for above purpose. But the provisions are silent in this regard. Hence, this is high time for the Government to bring appropriate Legislation in this regard for grant of maternity leave to the



surrogate and commissioning mothers. This Court directs the Registry that copy of this order may be forwarded to the Ministry of Law and Justice, Union of India, New Delhi as well as to the Principal Secretary, Department of Law and Legal Affairs, Government of Rajasthan, Jaipur, for such action as, they may deem fit to take in this behalf.

32. All applications (pending, if any) stand disposed of and the parties are left free to bear their own costs.

(ANOOP KUMAR DHAND),J

Solanki DS, PS