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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
% *Judgment reserved on: 10.07.2024*
Judgment pronounced on: 22.07.2024

\+ **W.P.(C) 9270/2024 and CM APPL. 38033/2024 (Stay)**

COMMISSIONER OF POLICE AND ANR .....Petitioners

Through: Ms. Avnish Ahlawat, Standing Counsel (GNCTD) with Mr. N.K. Singh, Ms. Laavanya Kaushik, Ms. Aliza Alam and Mr. Mohnish Sehrawat, Advocates.

versus

RAVINA YADAV AND ANR .....Respondents

Through: Ms. Avshreya Pratap Singh Rudy, SPC with Ms. Usha Jamnal, Advocate for R-2.

CORAM:
HON'BLE MR. JUSTICE SURESH KUMAR KAIT
HON'BLE MR. JUSTICE GIRISH KATHPALIA

J U D G M E N T

GIRISH KATHPALIA, J. :

Ontogeny recapitulates Phylogeny - Ernst Haeckel

1. By way of this writ petition brought under Articles 226 and 227 of the Constitution of India, the petitioners have assailed order dated 30.10.2023 of the Principal Bench, Central Administrative Tribunal, Delhi, passed in O.A. No.1716/2019 filed by respondent no.1.

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1.1 On the basis of advance notice, respondent no.2 Union of India entered appearance through counsel and accepted notice. At request of both sides, we heard final arguments at the initial stage itself, without issuing notice to respondent no.1.

2. Briefly stated, circumstances relevant for present purposes are as follows. The respondent no.1 is employed with the petitioners (police authorities) as a Lady Constable since 03.07.2006. Prior to her joining service with the petitioners, she got married with one Satya Pal on 07.04.1998 and was blessed with two children. Unfortunately, marriage of respondent no.1 with Satya Pal could not succeed and was got dissolved by way of decree dated 16.12.2015 of divorce with mutual consent, whereby custody of children born from their wedlock was handed over to Satya Pal. After her divorce, respondent no.1 got married with Deepak on 11.12.2016 and from this second wedlock, respondent no.1 was blessed with a child on 08.06.2018, so she submitted an application before the petitioners, thereby seeking maternity leave with effect from 08.06.2018. The said maternity leave application of respondent no.1 was forwarded by the petitioners vide communication dated 31.08.2018 to the Government of NCT of Delhi, seeking opinion. On being consulted by the petitioners, the Department of Personnel & Training (DoPT) rendered their opinion dated 12.03.2019 that according to Rule 43 of the CCS (Leave) Rules, 1972, entitlement of a female government servant to maternity leave for a period of 180 days is if she has less than two surviving children. Relying upon the said opinion, petitioners rejected the maternity leave application

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of respondent no.1 vide order dated 05.04.2019 and informed her accordingly. Feeling aggrieved with the decision, respondent no.1 preferred an Original Application, registered as O.A No.1716/2019 before the learned Tribunal, whereby she sought quashing of order dated 05.04.2019 along with directions to the petitioners to grant her maternity leave. After hearing both sides, by way of the impugned order dated 30.10.2023, the learned Tribunal allowed the Original Application, thereby setting aside order dated 05.04.2019 of petitioners and directing them to grant maternity leave to the respondent. Hence, the present petition.

3. During arguments, learned counsel for petitioners took us through the above records and contended that the impugned order is not sustainable in the eyes of law. She strongly contended that since respondent no.1 has two surviving children, in view of Rule 43 of CCS (Leave) Rules, 1972 she is not entitled to maternity leave now, it being her third child. However, the learned Tribunal fell in error by placing reliance on the judgment in the case of ***Ruksana vs State of Haryana***, W.P.(C) No. 4229/2011 as the same pertained to Rule 8.127 of the Punjab Civil Services Rules.

3.1 Learned counsel for respondent no.2 also supported the petition and contended that vide Rule 43 of CCS (Leave) Rules 1972, respondent no.1 is not entitled to maternity leave, it being a case of her third child. It was also argued that Rule 43 being a benevolent provision, maternity leave cannot be granted where the government servant has more than two

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surviving children, as the principle is based on public policy and family planning goal of the Central Government.

4. As mentioned above, finding no merit in the challenge, we opted not to issue notice of the petition to respondent no.1 so as to avoid on her the burden of litigation expenses.

5. Thence, the issue before us is as to whether a lady government servant, who has two surviving children is or is not entitled to maternity leave in case of third or subsequent child. The only resistance from the side of petitioners to grant of maternity leave to respondent no.1 is based on Rule 43 of CCS (Leave) Rules, 1972, despite the factual position even according to petitioners' own pleadings being that both her children born from her wedlock with her first husband Satya Pal are in custody of the latter by virtue of the terms of their mutual consent divorce.

6. To begin with, we find this issue to be *qua* rights of not just respondent no.1 but rights of her third child as well.

7. The matter has to be examined with the lens of constitutional morality in the light of the Directive Principles of State Policy, enshrined in Part IV of the Constitution of India.

7.1 Article 39 of the Constitution mandates that the State shall, in particular direct its policy towards securing that the citizens, men and women equally have the right to adequate means of livelihood; that the

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ownership and control of the material resources are so distributed as best to subserve the common good; that the operation of the economic system does not result in concentration of wealth and means of production to the common detriment; that there is equal pay for equal work for both men and women; that the health and strength of workers, men and women and the tender age of children are not abused and the citizens are not forced by economic necessity to enter avocations unsuited to their age or strength; and that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and childhood and youth are protected against exploitation and against moral and material abandonment.

7.2 Article 41 of the Constitution mandates the State to make within the limits of its economic capacity and development, effective provisions for securing right to work, education, and public assistance in cases of unemployment, old age, sickness and disablement.

7.3 Article 42 of the Constitution mandates that the State shall make provisions for securing just and humane conditions of work and for maternity relief.

7.4 Article 43 of the Constitution mandates that the State shall endeavour to secure to all workers work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities by way of suitable legislation or economic organization or otherwise.

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8. The concept of maternity leave, flowing from above quoted constitutional pronouncements is a matter of not just fair play and social justice, but also a constitutional guarantee to women of this country towards fulfillment whereof, the State is duty bound to act. It is in this direction that Parliament enacted the Maternity Benefit Act, 1961 (hereinafter referred to as "the Act"), thereby consolidating the maternity protection which was earlier being provided under different State and Central enactments, embodying considerable diversity relating to the qualifying conditions, period and rate of benefits etc., to reduce which, a separate central legislation was required.

8.1 Section 5 of the Act confers on every woman, to whom the Act applies, a right for the payment of maternity benefit at the rate of average daily wage for the period of her actual absence immediately preceding the day of her delivery, the actual day of her delivery and any period immediately following that day; the said provision not just confers a right on a lady employee but also explicitly makes it a duty of the employer to ensure grant of such benefit.

8.2 Sub Section (4) added to Section 5 of the Act in the year 2017 extended the maternity benefits also to a lady who legally adopts a child below the age of three months and to a surrogacy commissioning mother as well.

8.3 The Act, laudably does not create any distinction between the

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regular and casual/contractual lady employees or in any other manner whatsoever.

9. Apart from the Act, various international covenants binding on the Government of India, for example, the Convention on the Elimination of all Forms of Discrimination against Women, adopted by community of nations on 18.12.1979 also lend support to such concepts. Article 11 of the said convention reads as under:

> *"Article 11(1) States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:*
> *(a) The right to work as an inalienable right of all human beings;*
> *(b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;*
> *(c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;*
> *(d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;*
> *(e) The right to social security, particularly in cases of retire-ment, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;*
> *(f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.*
> *11(2). In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:*
> *(a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;*
> *(b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;*
> *(c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through*

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promoting the establishment and development of a network of child-care facilities;
(d) To provide special protection to women during pregnancy in types of work proved to be harmful to them.

9.1 In this context, we may also refer to the United Nations Convention on Rights of Child (UNCRC), which, through its Preamble explicitly recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding, mandates through its Article 6 that the States, which are party to the Convention, shall recognize that every child has the inherent right to life and shall ensure, to the maximum extent possible, the survival and development of the child. Undoubtedly, India is a signatory to the UNCRC. There being no municipal law in conflict with the provisions of Article 6 of the UNCRC, we are obliged to act in a manner which ensures discharge of obligations under the same.

9.2 We are of the considered view that the principles enshrined in the above mentioned conventions and the overall scheme of the Act have to be the guiding light while interpreting the scope of Rule 43 of the CCS (Leave) Rules.

10. Rule 43 of the CCS(Leave) Rules, the solitary plank of petitioners' opposition to the claim of respondent no.1 to maternity leave stipulates thus:

*"**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

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date of its commencement.
(MOF Notification No. P-11012/1/77-E-IV(A) dated 21.11.1979)
("135 days substituted by 180 days" vide DOPT Notification No. 1101 2/1/2009-Estt.(L), dated 01.12.2009).
(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:
(DOPT Notification No. 13018/7/94-Estt (L), dated 31.03.1995)
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 year 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.
(MOF Notification No. 16(3).E.IV(A)/74 dated 20.12.1974)
(DOPT Notification no. 11012/1/85-Estt.(L) dated 06.06.1988)"

10.1 We also consider it apposite to take a brief look at few other CCS(Leave) Rules as follows in order to get a wholesome view:

*"**43-A. Paternity leave***
(1) A male Government servant (including an apprentice) with less than two surviving children, may be granted Paternity Leave by an authority competent to grant leave for a period of 15 days, during the confinement of his wife for childbirth, i.e., up to 15 days before, or up to six months from the date of delivery of the child.
(2) During such period of 15 days, he shall be paid leave salary equal to the pay drawn immediately before proceeding on leave.
(3) The paternity Leave may be combined with leave of any other kind.
(4) The paternity leave shall not be debited against the leave account.
(5) If Paternity Leave is not availed of within the period specified in

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sub-rule (1), such leave shall be treated as lapsed.
NOTE:- the Paternity Leave shall not normally be refused under any circumstances.

43-AA. Paternity Leave for Child Adoption
(1) A male Government servant (including an apprentice) with less than two surviving children, on accepting a child in pre-adoption foster care or on valid adoption of a child below the age of one year, may be granted Paternity Leave for a period of 15 days, within a period of six months, from the date of accepting the child in pre-adoption foster care or on valid adoption, as the case may be:
Provided that in a case where the pre-adoption foster care is not followed by valid adoption of the child, the Paternity Leave already availed shall be debited from any other kind of leave available to the credit of such male Government Servant.
(2) During such period of 15 days, he shall be paid leave salary equal to the pay drawn immediately before proceeding on leave.
(3) The Paternity Leave may be combined with leave of any other kind.
(4) The Paternity Leave shall not be debited against the leave account.
(5) If Paternity Leave is not availed of within the period specified in sub-rule (1), such leave shall be treated as lapsed.
NOTE 1.— The Paternity Leave shall not normally be refused under any circumstances.
NOTE 2.— "Child" for the purpose of this rule will include a child taken as ward by the Government servant, under the Guardians and Wards Act, 1890 or the personal law applicable to that Government servant, provided such a ward lives with the Government servant and is treated as a member of the family and provided such Government servant has, through a special will, conferred upon that ward the same status as that of a natural born child.
(DOPT Notification No. 13026/5/2011-Estt. (L), dated 04.04.2012)

43-B. Child Adoption Leave
(1) A female Government servant, with fewer than two surviving children, on accepting a child in pre-adoption foster care or on valid adoption of a child below the age of one year, may be granted child adoption leave, by an authority competent to grant leave, for a period of 180 days, immediately after accepting the child in pre-adoption foster care or on valid adoption, as the case may be:
Provided that in a case where the pre-adoption foster care is not followed by valid adoption of the child, the leave already availed shall be debited from any other kind of leave available to the credit of such female Government Servant.
(2) During the period of child adoption leave, she shall be paid leave salary equal to the pay drawn immediately before proceeding on

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leave.
(3) (a) Child adoption leave may be combined with leave of any other kind.
(b) In continuation of the child adoption leave granted under subrule (1), a female Government servant on valid adoption of a child may also be granted, if applied for, leave of the kind due and admissible (including leave not due and commuted leave not exceeding 60 days without production of medical certificate) for a period up to one year reduced by the age of the adopted child on the date of valid adoption, without taking into account child adoption leave.
Provided that this facility shall not be admissible in case she is already having two surviving children at the time of adoption.
(4) Child adoption leave shall not be debited against the leave account.
NOTE.— "Child" for the purpose of this rule will include a child taken as ward by the Government servant, under the Guardians and Wards Act, 1890 or the personal law applicable to that Government servant, provided such a ward lives with the Government servant and is treated as a member of the family and provided such Government servant has, through a special will, conferred upon that ward the same status as that of a natural born child.
(DOPT Notification No. 13026/5/2011-Estt. (L), dated04.04.2012)

43-C. Child Care Leave
(1) Subject to the provisions of this rule, a female Government servant and single male Government servant may be granted child care leave by an authority competent to grant leave for a maximum period of seven hundred and thirty days during entire service for taking care of two eldest surviving children, whether for rearing or for looking after any of their needs, such as education, sickness and the like.
(DOPT Notification No. 11020/01/2017-Estt. (L), dated 11.12.2018)
(2) For the purposes of sub-rule (1), "child" means—
(a) a child below the age of eighteen years: or
(b) an offspring of any age with a minimum disability of forty per cent as specified in the Government of India in Ministry of Social Justice and Empowerment's Notification No. 16-18/97-N 1.1, dated the 1st June, 2001.
(DOPT Notification No. 13018/6/2013- Estt. (L), dated 06.06.2018)
(3) Grant of child care leave to a female Government servant and a single male Government servant under sub-rule (1) shall be subject to the following conditions, namely:- (DOPT Notification No. 11020/01/2017-Estt. (L), dated 11.12.2018)
(i) it shall not be granted for more than three spells in a calendar year;
(ii) in case of a single female Government servant, the grant of leave in three spells in a calendar year shall be extended to six spells in a

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calendar year.
(iii) it shall not ordinarily be granted during the probation period except in case of certain extreme situations where the leave sanctioning authority is satisfied about the need of child care leave to the probationer, provided that the period for which such leave is sanctioned is minimal.
(iv) child care leave may not be granted for a period less than five days at a time.
(4) During the period of child care leave, a female Government servant and a single male Government servant shall be paid one hundred per cent of the salary for the first three hundred and sixty-five days, and at eighty per cent of the salary for the next three hundred and sixty-five days.
EXPLANATION.— Single Male Government servant' means — an unmarried or widower or divorcee Government servant.
(5) Child care leave may be combined with leave of any other kind.
(6) 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 not exceeding sixty days and Leave Not Due) up to a maximum of one year, if applied for, be granted in continuation with child care leave granted under sub-rule (1).
(7) Child care leave shall not be debited against the leave account."

10.2 It would be significant to notice the development of rule position, whereby the scope of such leave has been gradually expanding across the period from 1979 to 2018. What began with child birth oriented maternity leave, expanded to paternity leave and then to adoption oriented leave and finally to the child care leave, common thread across this expansion being "the child". Similar expansion of the scope is evident from child delivery (*substitution of sub-section(1) in 1989*) to adoption and finally, surrogacy (*insertion of sub-section (4) in 2017*) in Section 5 of the Act, which also shows "the child" to be the common continuing thread across those statutory developments.

11. The word "maternity" has not been defined in the CCS(Leave)

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Rules, so one has to refer to the dictionary meaning. According to Oxford English Dictionary, the word "maternity" means motherhood. According to the Shorter Oxford English Dictionary (5th Edition) "maternity" means (1) the quality or condition of being a mother; motherhood and (2) the qualities or conduct characteristic of a mother; motherliness. As per Black's Law Dictionary (8th Edition) the word "maternity" means the state or condition of being a mother, especially a biological one; motherhood. Broadly speaking, "maternity" in the present day scenario would mean the period during pregnancy and shortly after acquisition of motherhood through child birth or adoption or surrogacy.

12. The purpose of the maternity leave is to ensure that a working lady may overcome the state of motherhood honourably, peaceably and undeterred by the fear of being victimized for forced absence from work during pre and post natal period. Women, even otherwise constituting sizeable part of workforce in our society, must be treated with honour and dignity at places where they work to earn livelihood. Whatever be the nature of their job and the workplace, they must be provided all facilities to which they are entitled. Motherhood, being the most natural phenomena in the life of a woman and an indispensable requisite for continuation of human race, whatever is needed to facilitate birth of her child while she is in service, it is the bounden duty of the employer to be sensitive and responsive to the physical difficulties which she would face in performing her duties at the workplace while carrying a baby in her womb or while bringing up the child after birth.

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13. It is a matter of common knowledge that pregnancy brings about major physiological changes in the body as well as psychological changes in mind of the women, ranging from morning sickness to enlargement of abdomen, coupled with mood swings and bouts of depression. Pregnancy also restricts movement of the lady carrying the child as it progresses through the term. In case complications arise during the term, movement of the pregnant lady may get completely stalled. It is for these reasons that a pregnant lady is granted maternity leave in government as well as non-government establishments. The difficulties get aggrandized when the pregnant lady is in a nuclear family, where she has to take care of all basic needs of her husband and children. But understanding of maternity cannot be uni-dimensional, keeping in context only the pregnant lady. The child from womb to infancy is an integral part of the concept of maternity, insofar as immediately from the birth moment across the stages of infancy the child undergoes extensive physical, physiological and psychological development, which would have significant bearing on her adulthood.

14. Therefore, not just motherhood, it is also the childhood that requires special attention. The health issues of both - mother as well as the child are to be kept in consideration while providing maternity leave, aimed at protecting the dignity of motherhood by providing for full and healthy maintenance of the woman and her child. The maternity leave is intended to achieve the object of ensuring social justice to women and children. This kind of leave ensures creation of a bond of affection between the mother and the child. A child sees the world for the first time through the eyes of her mother and develops her cognitive skills through the vision of

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her family. In earlier centuries, predominantly, in agrarian society, the role of woman was limited to taking care of children, household and family. Social conditions of modern family underwent transformation due to education, industrialization and urbanization. As a result, the social and legal concept related to the society also got changed. Motherhood has become a contentious issue in the modern society, particularly, in economic frontier, as the competing market interests override notions of culture and social justice like gender equity. Identity of a women is often tangled within the patriarchal structure of a profit motivated enterprise which dare to see mothering or family responsibility remain subordinate to their interest. Complexity of working environment as above is designed by an architecture without adhering to rules of gender equity; often overwhelmingly to suit men.

15. Biologically speaking, in the words of Ernst Haeckel, ontogeny recapitulates phylogeny. This historical hypothesis, coined in 19th century suggests that the development of an organism from the stage of fertilization of ovum to birth of the child (ontogeny) expresses evolutionary history and all immediate forms of its ancestors (phylogeny). Although, across past few years, the hypothesis has been slightly modulated, for present purposes, suffice it to notice the biological significance of embryonic development during pregnancy.

15.1 It is scientifically well established that the period of pregnancy and shortly thereafter is a very crucial period for not just health of the mother, but also for development of overall personality, the child would acquire and develop even across her adulthood. During the gestation period,

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mother and the foetus share many things. The mother's womb and placenta are replete with all the nutrients and warmth needed for the foetus. Just after birth, the infant needs the same warmth. It is the chest of the mother that provides the same warmth, offering an optimum body temperature and allowing the infant to consume energy, thereby controlling the infant's body temperature. The close touch between the mother and the child produces a sense of security in the infant, which gives them a surety that they are secure and in safe hands. The skin-to-skin touch assists in balancing blood sugar levels in the infant, thereby reducing the risk of hypoglycaemia.

15.2 The early infancy environment and changes have lasting effect on the development of brain in the child. Researchers across the world have observed that infants begin to bond with their mother from the moment of birth, and this social bond continues to provide regulatory emotional functions throughout adulthood. It is part of well documented research that children from deprived surroundings like orphanages have vastly different hormone levels as compared to their parent-raised peers. For instance, in Romania during 1980s, in target group aged 6 to 12 years, levels of the stress hormone Cortisol were found much higher in children who lived in orphanages for more than eight months as compared to those who were adopted at or before the age of four months.

15.3 Other researches show that children who experienced early deprivation of maternal touch had different levels of Oxytocin and Vasopressin (*hormones that have been linked to emotion and social*

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bonding), despite having spent an average of three years in a family home and this environmental change into a home does not seem to have completely overridden the effects of earlier neglect, according to medical researches published in the year 2005 in the proceedings of the National Academy of Sciences, University of Wisconsin. The Vasopressin and Oxytocin neuropeptide systems, which are critical in the establishment of social bonds and regulation of emotional behaviors are affected by early social experience.

15.4 The results of various experiments suggest a potential mechanism whose atypical function may explain the pervasive social and emotional difficulties observed in many children who have experienced aberrant care giving. The social attachments formed between human infant and her caregiver begin very early in postnatal life and play a critical role in child's survival and healthy adaptation. Typically, adults provide infants with a social environment that is fairly consistent. Caregivers learn how to recognize and respond to the infants' needs, thereby creating predictable contingencies in the environment; these regularities, in turn, make the infants' environment secure and conducive to further social learning. Multiple perceptual, sensory, cognitive, and effective systems must become synchronized so that a social bond can develop between an infant and caregiver; this bond is then reflected in the child's adaptive behavioral responses to the environment. {*Reference: Paper published by the team of Department of Psychology, University of Wisconsin, led by Alison B Wismer Fries (www.pnas.org/cgi/doi/10.1073/pnas.0504767102)*}.

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16. At this stage, it would be apposite to briefly traverse through some of the judicial pronouncements on the significance of maternity leave.

16.1 In the case of ***Mini K.T. vs Senior Divisional Manager*, *LIC, Divisional Office, Jeevan Prakash***, (2017) SCC OnLine Ker 41588, the Ernakulam Bench of the High Court of Kerala dealt with the issue of motherhood as follows:

> *"Motherhood is the mother of all civilization. Family as a social institution is considered as the backbone of the society. Family is the first model of political society (Rosseau on the Social Contract). When people settled down and started living as a commune, the family was the foundation of such commune, and women was the center of such family. No civilization passed without recognising the power of mother and often figuratively projected her as Goddess. (See our own glorious past, as described by Jasodhara Bagchi, a feminist writer in her book, "Interrogating motherhood"):*
>
>> *"The celebration of motherhood has happened in most cultures in the world, and Indian culture is no exception. The oldest available cultural artifacts in the pre-Aryan civilization in Mohenjo-daro and Harappa bear testimony to the mother cult. The principle of fertility represented by the embodiment of mother is the oldest testimony to the sense of continuity of the species. Not just birthing but the process of nurturance that makes it incumbent upon homo sapiens to recognize the value of the mother."*

16.2 In the case of ***Municipal Corporation of Delhi vs Female Workers***, (2000) 3 SCC 224, after detailed examination of the principles governing maternity leave, the Hon'ble Supreme Court held thus:

> *"**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 emphasised by this Court in*

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several decisions. In Messrs 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." A just social order can be achieved only when inequalities are obliterated and everyone is provided what is legally due. Women who constitute almost half of the segment of our society have to be honoured and treated with dignity at places where they work to earn their livelihood. Whatever be the nature of their duties, their avocation and the place where they work; they must be provided all the facilities to which they are entitled. To become a mother is the most natural phenomena in the life of a woman. Whatever is needed to facilitate the birth of child to a woman who is in service, the employer has to be considerate and sympathetic towards her and must realise the physical difficulties which a working woman would face in performing her duties at the work place while carrying a baby in the womb or while rearing up the child after birth. The Maternity Benefit Act, 1961 aims to provide all these facilities to a working woman in a dignified manner so that she may overcome the state of motherhood honourably, peaceably, undeterred by the fear of being victimised for forced absence during the pre or post-natal period. ***Next it was contended that the benefits contemplated by the Maternity Benefit Act, 1961 can be extended only to workwomen in an 'industry' and not to the muster roll women employees of the Municipal Corporation. This is too stale an argument to be heard.*** *Learned counsel also forgets that Municipal Corporation was treated to be an 'industry' and, therefore, a reference was made to the Industrial Tribunal, which answered the reference against the Corporation, and it is this matter which is being agitated before us."*

(emphasis supplied)

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16.3 In the case of ***Sushma Devi vs State of Himachal Pradesh***, 2021 SCC OnLine HP 416, a Division Bench of the Himachal Pradesh High Court dealt with the question as to whether a lady government servant employed on contract basis is entitled to avail maternity leave even in a case where she gets the child through surrogacy. The only objection of the government in that case was that maternity leave is admissible on adoption of a child vide Rule 43(1) of CCS (Leave) Rules 1972, but there is no clarity as regards admissibility of maternity leave to a lady government servant on surrogacy. After traversing through various judicial precedents, the High Court directed the government authorities to sanction/grant maternity leave.

16.4 In the case of ***Dr. Mrs. Hema Vijay Menon vs State of Maharashtra***, AIR 2015 Bom 231, a Division Bench of the Bombay High Court observed thus:

> *"7. On hearing the learned counsel for the parties, it appears that the Joint Director of Higher Education, Nagpur, was not justified in refusing maternity leave to the petitioner. According to Oxford English Dictionary, maternity means - motherhood. Maternity means the period during pregnancy and shortly after the child's birth.* ***If Maternity means motherhood, it would not be proper to distinguish between a natural and biological mother and a mother who has begotten a child through surrogacy or has adopted a child from the date of his/her birth. The object of maternity leave is to protect the dignity of motherhood by providing for full and healthy maintenance of the woman and her child. Maternity leave is intended to achieve the object of ensuring social justice to women.*** *Motherhood and childhood both require special attention. Not only are the health issues of the mother and the child considered while providing for maternity leave but the leave is provided for creating a bond of affection between the two. It is said that being a mother is one of the most rewarding jobs on the earth and also one of the most challenging.* ***To distinguish between a mother who begets a child through surrogacy and a natural mother who gives birth to a child, would result in insulting womanhood and the intention of a woman***

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to bring up a child begotten through surrogacy, as her own. *A commissioning mother like the petitioner would have the same rights and obligations towards the child as the natural mother. Motherhood never ends on the birth of the child and a commissioning mother like the petitioner cannot be refused paid maternity leave. A woman cannot be discriminated, as far as maternity benefits are concerned, only on the ground that she has obtained the baby through surrogacy. Though the petitioner did not give birth to the child, the child was placed in the secured hands of the petitioner as soon as it was born.* ***A newly born child cannot be left at the mercy of others. A maternity leave to the commissioning mother like the petitioner would be necessary. A newly born child needs rearing and that is the most crucial period during which the child requires the care and attention of his mother. There is a tremendous amount of learning that takes place in the first year of the baby's life, the baby learns a lot too. Also, the bond of affection has to be developed.*** *A mother, as already stated hereinabove, would include a commissioning mother or a mother securing a child through surrogacy. Any other interpretation would result in frustrating the object of providing maternity leave to a mother, who has begotten the child."*

(emphasis supplied)

16.5 Another progressive judicial precedent we came across is in the case of ***Rama Pandey vs Union of India & Ors***, 2015 SCC OnLine 10484, where this court approved grant of maternity leave in cases where surrogacy route is adopted for motherhood and observed:

"11.3 Rule 43 implicitly recognises that there are two principal reasons why maternity leave is accorded. First, that with pregnancy, biological changes occur. Second, post childbirth "multiple burdens" follow. (See : C-366/99 Griesmar, [2001] ECR 1-9383)
11.4 Therefore, if one were to recognise even the latter reason the commissioning mother, to my mind, ought to be entitled to maternity leave.
11.5 It is clearly foreseeable that a commissioning mother needs to bond with the child and at times take over the role of a breast-feeding mother, immediately after the delivery of the child.
11.6 In sum, the commissioning mother would become the principal care giver upon the birth of child; notwithstanding the fact that child in a given situation is bottle-fed.
11.7 It follows thus, to my mind, that the commissioning mother's entitlement to maternity leave cannot be denied only on the ground that she did not bear the child. This is de hors the fact that a

commissioning mother may require to be at the bed side of the surrogate mother, in a given situation, even at the pre-natal stage; an aspect I have elaborated upon in the latter part of my judgment.
11.8 The circumstances obtaining in the present case, however, indicate that the genetic father made use of a donor egg, which then, was implanted in the surrogate mother.
11.9 The surrogate mother in this case had no genetic connection with the children she gave birth to. The surrogate mother however, carried the pregnancy to term.
12. Undoubtedly, the fact that the surrogate mother carried the pregnancy to full term, involved physiological changes to her body, which were not experienced by the commissioning mother but, from this, could one possibly conclude that her emotional involvement was any less if, not more, than the surrogate mother?
12.1 Therefore, while the submission advanced by Mr Rajappa that maternity leave is given to a female employee who is pregnant, to deal with biological changes, which come about with pregnancy, and to ensure the health and safety, both of the mother and the child, while it is in her womb, is correct; it is, I am afraid, an uni-dimensional argument, offered to explain the meaning of the term "maternity", as found incorporated in the extant rules."

16.6 In the case of ***Lakshmi Kant Pandey vs Union of India***, (1984) 2 SCC 244, the Hon'ble Supreme Court expanded the scope of the fundamental right to life, holding thus:

"6. It is obvious that in a civilized society the importance of child welfare cannot be over-emphasized, because the welfare of the entire community, its growth and development, depend on the health and well-being of its children. Children are a "supremely important national asset" and the future well-being of the nation depends on how its children grow and develop. The great poet Milton put it admirably when he said: "Child shows the man as morning shows the day" and the ***Study Team on Social Welfare said much to the same effect when it observed that "the physical and mental health of the nation is determined largely by the manner in which it is shaped in the early stages". The child is a soul with a being, a nature and capacities of its own, who must be helped to find them, to grow into their maturity, into fullness of physical and vital energy and the utmost breath, depth and height of its emotional, intellectual and spiritual being; otherwise there cannot be a healthy growth of the nation. Now obviously children need special protection because of their tender age and physique, mental immaturity and incapacity to look after themselves. That is why there is a growing realisation in***

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every part of the globe that children must be brought up in an atmosphere of love and affection and under the tender care and attention of parents so that they may be able to attain full emotional, intellectual and spiritual stability and maturity and acquire self-confidence and self-respect and a balanced view of life with full appreciation and realisation of the role which they have to play in the nation building process without which the nation cannot develop and attain real prosperity because a large segment of the society would then be left out of the developmental process. *In India this consciousness is reflected in the provisions enacted in the Constitution. clause (3) of Article 15 enables the State to make special provisions inter alia for children and Article 24 provides that no child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment. Clauses (e) and (f) of Article 39 provide that the State shall direct its policy towards securing inter alia that the tender age of children is not abused, that citizens are not forced by economic necessity to enter avocations unsuited to their age and strength and that children are given facility to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment. These constitutional provisions reflect the great anxiety of the constitution makers to protect and safeguard the interest and welfare of children in the country. The Government of India has also in pursuance of these constitutional provisions evolved a National Policy for the Welfare of Children. This Policy starts with a goal-oriented preambulatory introduction:*

> *"The nation's children are a supremely important asset. Their nurture and solicitude are our responsibility. Children's programme should find a prominent part in our national plans for the development of human resources, so that our children grow up to become robust citizens, physically fit, mentally alert and morally healthy, endowed with the skills and motivations needed by society. Equal opportunities for development to all children during the period of growth should be our aim, for this would serve our larger purpose of reducing inequality and ensuring social justice."*

The National Policy sets out the measures which the Government of India proposes to adopt towards attainment of the objectives set out in the preambulatory introduction and they include measures designed to protect children against neglect, cruelty and exploitation and to strengthen family ties "so that full potentialities of growth of children are realised within the normal family neighbourhood and community environment". The National Policy also lays down priority in programme formation and it gives fairly high priority to maintenance,

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education and training of orphan and destitute children. There is also provision made in the National Policy for constitution of a National Children's Board and pursuant to this provision, the Government of India has constituted the National Children's Board with the Prime Minister as the chair-person. It is the function of the National Children's Board to provide a focus for planning and review and proper co-ordination of the multiplicity of services striving to meet the needs of children and to ensure at different levels continuous planning, review and co-ordination of all the essential services. The National Policy also stresses the vital role which the voluntary organisations have to play in the field of education, health, recreation and social welfare services for children and declares that it shall be the endeavour of State to encourage and strengthen such voluntary organisations." *(emphasis supplied)*

16.7 As so aptly observed by the Allahabad High Court in the case of ***Anshu Rani vs State of UP & Ors***, 2019 SCC OnLine 5170:

"23. Coming back to the question of dignity, those dignity has to be understood in the societal background. Indian cultural and traditional practices would go to show that motherhood is an essential part of family responsibility. International Human Rights Law thus protect dignity of woman and also family. The Constitution thus demand interpretation of its provisions in that background. ***Person-hood of a woman as mother is her acclaim of individuality essentially valued as liberty of her life. This was so designed by culture, tradition and civilisation. Mother's role in taking care of the child has been considered as an honour; she enjoyed such status because of her position in respect of the child. If on any reason she could not attend her workplace due to her duties towards child (compelling circumstances), the employer has to protect her person-hood as "mother". If not that, it will be an affront to her status and dignity.*** *No action is possible against a woman employee for her absence from duty on account of compelling circumstances for taking care of her child. No service Regulations can stand in the way of a woman for claiming protection of her fundamental right of dignity as a mother. Any action by an employer can be only regarded as a challenge against the dignity of a woman. Motherhood is not an excuse in employment but motherhood is a right which demands protection in given circumstances. What employer has to consider is whether her duty attached to mother prevented her from attending employment or not. As already adverted above, motherhood is an inherent dignity of woman, which cannot be compromised."*

(emphasis supplied)

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16.8 In the case of ***Chanda Keswani vs State of Rajasthan, through the Principal Secretary, Higher Education, Government of Rajasthan & Anr.***, 2023 SCC OnLine Raj 3274, the High Court of Rajasthan recapitulated various judicial precedents and observed:

> *"26. 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. 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****."*
>
> *(emphasis supplied)*

16.9 As observed by the Hon'ble Supreme Court in order dated 22.04.2024 in the case titled ***Shalini Dharmani vs The State of Himachal Pradesh***, SLP (c) No. 16864/2021:

> *"7.* ***The participation of women in the work force is not a matter of privilege, but a constitutional entitlement protected by Articles 14, 15***

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> ***and 21 of the Constitution****; besides Article 19(1)(g). The State as a model employer cannot be oblivious to the special concerns which arise in the case of women who are part of the work force. The provision of Child Care Leave to women subserves the significant constitutional object of ensuring that women are not deprived of their due participation as members of the work force. Otherwise, in the absence of a provision for the grant of Child Care Leave, a mother may well be constrained to leave the work force. This consideration applies a fortiori in the case of a mother who has a child with special needs. Such a case is exemplified in the case of the petitioner herself.* ***We are conscious of the fact that the petition does trench on certain aspects of policy. Equally, the policies of the State have to be consistent and must be synchronise with constitutional protections and safeguards.***"
>
> *(emphasis supplied)*

16.10 In the case of ***Deepika Singh vs Central Administrative Tribunal & Ors,*** 2022 SCC OnLine SC 1088, the Hon'ble Supreme Court dealt with the legal position pertaining to Rule 43 of the CCS (Leave) Rules in the circumstances quite similar to the present case as follows. The appellant therein was working on the post of Nursing Officer in the Post Graduate Institute of Medical Education and Research at Chandigarh since 25.11.2005. On 18.02.2014, the appellant got married with one Amir Singh, a widower who had two children from his previous marriage. At request of the appellant, names of those two children from previous marriage of her husband were taken on her service record. As regards her first biological child born on 04.06.2019, the appellant applied for maternity leave, but the same was denied on the ground that she had two surviving children and had earlier availed Child Care Leave for those two children. As such, the period of her absence from work was treated as earned leave, medical leave, half pay leave and extraordinary leave, period of the extraordinary leave not counted towards increments. The learned Central Administrative Tribunal, Chandigarh Bench, dismissed the

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Original Application of the appellant and the said order was upheld by the High Court in the writ petition. The Hon'ble Supreme Court after examining the rule position allowed the appeal, observing thus:

> *"15.* ***The provisions of Rule 43(1) must be imbued with a purposive construction****. In KH Nazar v. Mathew K Jacob, this Court noted that beneficial legislation must be given a liberal approach:*
>
> > *"11. Provisions of a beneficial legislation have to be construed with a purpose oriented approach. The Act should receive a liberal construction to promote its objects. Also, literal construction of the provisions of a beneficial legislation has to be avoided. It is the court's duty to discern the intention of the legislature in making the law. Once such an intention is ascertained, the statute should receive a purposeful or functional interpretation"*
> >
> > *12. In the words of O. Chinnappa Reddy, J., the principles of statutory construction of beneficial legislation are as follows : (Workmen case, SCC p. 76, para 4)*
> >
> > > *"4. The principles of statutory construction are well settled.* ***Words occurring in statutes of liberal import such as 'social welfare legislation and human rights' legislation are not to be put in Procrustean beds or shrunk to Lilliputian dimensions. In construing these legislations the imposture of literal construction must be avoided and the prodigality of its misapplication must be recognised and reduced. Judges ought to be more concerned with the "colour", the "content" and the "context" of such statutes*** *(we have borrowed the words from Lord Wilberforce's opinion in Prenn v. Simmonds [Prenn v. Simmonds, [1971] 1 WLR 1381 : (1971) 3 All ER 237 (HL)]). In the same opinion Lord Wilberforce pointed out that law is not to be left behind in some island of literal interpretation but is to enquire beyond the language, unisolated from the matrix of facts in which they are set; the law is not to be interpreted purely on internal linguistic considerations. In one of the cases cited before us, that is, Surendra Kumar Verma v. Central Govt. Industrial Tribunal-cum-Labour Court, we had occasion to say : (Surendra Kumar Verma case, SCC p. 447, para 6)*
> > >
> > > *'6. … Semantic luxuries are misplaced in the interpretation of "bread and butter" statutes. Welfare statutes must, of necessity, receive a broad interpretation. Where legislation is designed to give relief against certain kinds of mischief, the court is not*

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to make inroads by making etymological excursions.'"

13. ***While interpreting a statute, the problem or mischief that the statute was designed to remedy should first be identified and then a construction that suppresses the problem and advances the remedy should be adopted****.*

16. In Badshah v. Urmila Badshah Godse, a two-judge Bench of this Court comprising AK Sikri and Ranjana Desai, JJ. ruled that courts must bridge the gap between law and society through the use of purposive interpretation, where applicable:

"13.3. Thirdly, in such cases, purposive interpretation needs to be given to the provisions of Section 125 CrPC. While dealing with the application of a destitute wife or hapless children or parents under this provision, the Court is dealing with the marginalised sections of the society. ***The purpose is to achieve "social justice" which is the constitutional vision, enshrined in the Preamble of the Constitution of India.*** *The Preamble to the Constitution of India clearly signals that we have chosen the democratic path under the rule of law to achieve the goal of securing for all its citizens, justice, liberty, equality and fraternity. It specifically highlights achieving their social justice. Therefore,* ***it becomes the bounden duty of the courts to advance the cause of the social justice.*** *While giving interpretation to a particular provision, the court is supposed to bridge the gap between the law and society.*

14. ***Of late, in this very direction, it is emphasised that the courts have to adopt different approaches in "social justice adjudication", which is also known as "social context adjudication" as mere "adversarial approach" may not be very appropriate.*** *There are number of social justice legislations giving special protection and benefits to vulnerable groups in the society. Prof. Madhava Menon describes it eloquently:* ***"It is, therefore, respectfully submitted that 'social context judging' is essentially the application of equality jurisprudence as evolved by Parliament and the Supreme Court in myriad situations presented before courts where unequal parties are pitted in adversarial proceedings and where courts are called upon to dispense equal justice. Apart from the social economic inequalities accentuating the disabilities of the poor in an unequal fight, the adversarial process itself operates to the disadvantage of the weaker party. In such a situation, the Judge has to be not only sensitive to the inequalities of parties involved but also positively inclined to the weaker party if the imbalance were not to***

> ***result in miscarriage of justice. This result is achieved by what we call social context judging or social justice adjudication."*** *[Keynote address on "Legal Education in Social Context" delivered at National Law University, Jodhpur on October 12, 2005, available on http://web.archive.org/web/20061210031743/http:/www.n lujodhp ur.ac.in/ceireports.htm [last visited on 25-12-2013]]*

> *...*

> *20.* ***The Act of 1961 was enacted to secure women's right to pregnancy and maternity leave and to afford women with as much flexibility as possible to live an autonomous life, both as a mother and as a worker, if they so desire.*** *In Municipal Corporation of Delhi v. Female Workers (Muster Roll), a two-judge Bench of this Court placed reliance on the obligations under Articles 14, 15, 39, 42 and 43 of the Constitution, and India's international obligations under the Universal Declaration of Human Rights and Article 11 of the Convention on the Elimination of All Forms of Discrimination Against Women to extend benefits under the Act of 1961 to workers engaged on a casual basis or on muster roll on daily wages by the Municipal Corporation of Delhi.* ***The Central Civil Services (Leave) Rules 1972, it is well to bear in mind, are also formulated to entrench and enhance the objects of Article 15 of the Constitution and other relevant constitutional rights and protections****.*
>
> *21.* ***Under Article 15(3) of the Constitution, the State is empowered to enact beneficial provisions for advancing the interests of women. The right to reproduction and child rearing has been recognized as an important facet of a person's right to privacy, dignity and bodily integrity under Article 21.11 Article 42 enjoins the State to make provisions for securing just and humane conditions of work and for maternity relief.***
>
> *...*
>
> *...*
>
> *24. The facts of the present case indicate that the spouse of the appellant had a prior marriage which had ended as a result of the death of his wife after which the appellant married him. The fact that the appellant's spouse had two biological children from his first marriage would not impinge upon the entitlement of the appellant to avail maternity leave for her sole biological child. The fact that she was granted child care leave in respect of the two biological children born to her spouse from an earlier marriage may be a matter on which a compassionate view was taken by the authorities at the relevant time.* ***Gendered roles assigned to women and societal expectations mean that women are always pressed upon to take a disproportionate burden of childcare work.*** *According to a 'time-use' survey conducted by the Organisation for Economic Co-operation*

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and Development (OECD), women in India currently spend upto 352 minutes per day on unpaid work, 577% more than the time spent by men. Time spent in unpaid work includes childcare. In this context, the support of care work through benefits such as maternity leave, paternity leave, or child care leave (availed by both parents) by the state and other employers is essential. Although certain provisions of the Rules of 1972 have enabled women to enter the paid workforce, women continue to bear the primary responsibility for childcare. The grant of child care leave to the appellant cannot be used to disentitle her to maternity leave under Rule 43 of the Rules of 1972.

25. ***Unless a purposive interpretation were to be adopted in the present case, the object and intent of the grant of maternity leave would simply be defeated. The grant of maternity leave under Rules of 1972 is intended to facilitate the continuance of women in the workplace. It is a harsh reality that but for such provisions, many women would be compelled by social circumstances to give up work on the birth of a child, if they are not granted leave and other facilitative measures. No employer can perceive child birth as detracting from the purpose of employment. Child birth has to be construed in the context of employment as a natural incident of life and hence, the provisions for maternity leave must be construed in that perspective****."*

(emphasis supplied)

17. The law on maternity leave has been progressively evolving as a part of not just right of the mother and child but also as a solemn duty of the State in not just India but across the world. We may also refer to a judgment of the Labour Court of South Africa in Durban, titled: ***MIA vs State Information Technology Agency (Pty) Ltd.***, (D312/2012) [2015] ZALCD 20 (dated 26.03.2015), which dealt with denial of maternity leave to a male employee on the ground that he was not a biological mother. It was held that the right to maternity leave as created in the Basic Conditions of Employment Act is an entitlement not linked solely to welfare and health of the child's mother but must of necessity be interpreted to and take into account the best interest of the child. Not to do so would be to ignore the Bill of Rights in the Constitution of the Republic

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of South Africa and the Children's Act. In all matters concerning the care, protection and well being of a child the standard that the child's best interest is of paramount importance must be applied. In the said case, as stipulated under the Surrogacy Agreement, the newly born child was immediately handed over to the commissioning parents and in the evidence, the applicant explained that for various reasons, he and his spouse had decided that he, the applicant would perform the role usually performed by the birth mother by taking immediate responsibility for the child and accordingly would apply for maternity leave. Given these circumstances, the court took a view that there is no reason why an employee in the position of the applicant should be held not entitled to maternity leave as granted to a biological mother. Of course, so long as same sex marriages are not recognized, the factual matrix of the said case would appear distinctive. But the significance of the said order is to underline the principle that the basic purpose of maternity leave is the welfare of the child, which has to be paramount, apart from health of the mother.

18. Falling back to the present case, it is nobody's case that respondent no.1 was not pregnant with third child at the time of seeking maternity leave. In other words, it is nobody's case that she is completely ineligible to be granted maternity leave. At the same time, it is also the pleaded case of petitioners only that in terms with their mutual consent divorce, custody of the two surviving children of respondent no.1 was handed over to her first husband Satya Pal, consequently now she has no child to bring up. Further, according to petitioners' own case, earlier two children were born

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to respondent no.1 prior to her joining service with the petitioners, so it is also nobody's case that she has already availed of maternity leave earlier twice. The core of the argument advanced on behalf of the State is that if a lady government servant has two surviving children, by virtue of Rule 43 of CCS(Leave) Rules, she cannot be granted maternity leave for the third and subsequent children. That calls upon us to test the applicability of parity or probe for intelligible differentia, if any between the two sets of pregnant lady government servants.

19. It would be crucial to remember that physiological and physical changes coupled with psychological turbulence that a pregnant woman undergoes remain the same, be it the first two occasions of pregnancy or third one or any further thereafter. Besides, on examining the issue from angle of child rights, we find that Rule 43 CCS(Leave) Rules creates an unreasonable distinction between rights of first two children born to a lady government servant and the third or the subsequent child, making the third and the subsequent child suffer deprivation of motherly care, which first two children had received. We are of *prima facie* view that classification of lady government servants on the basis of number of surviving children they have lacks intelligible differentia. However, we must add a rider that our this view is only *prima facie* view, because *vires* of Rule 43 were not challenged before us, and only in order to arrive at just and fair decision, we have examined the logic, if any behind Rule 43 of CCS(Leave) Rules.

20. Rule 43 of CCS(Leave) Rules remains completely silent *qua* certain absurd situations which may arise out of its implementation. If a lady

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government servant in her first pregnancy itself is blessed with triplets or quadruplets, would Rule 43 deny her maternity leave? If a lady government servant, having one surviving child is blessed with twins or triplets in the second pregnancy, would Rule 43 deny her maternity leave? One also wonders as to whether a lady government servant, opting to be a surrogate mother for noble reasons to help a childless close relative can be denied maternity leave under Rule 43 on the pretext that she already has two surviving children, ignoring that the surrogate child in her womb is of someone else. In such a situation, would it not be depriving her a right to health by expecting her to keep working. These unanswered questions are another pointer that makes us opine *prima facie* that Rule 43 CCS(Leave) Rules would fail the test of Article 14 of the Constitution of India. We have to be rationalist and situationist judges while dealing with such situations. The duty of the courts is to ascertain and give effect to the will of the Parliament, as expressed in legislations and in performance of that duty, the judges do not act as computers into which are fed the statutes and the rules for construction of statutes in order to cull out mathematically correct answers.

21. We have also deliberated upon the argument that Rule 43 of CCS (Leave) Rules was enacted in tune with the two child policy of the Government of India, aimed at population control, so must pass muster of Article 14 of the Constitution. Of course, the two child policy aimed at population control is a laudable policy. That being so, we certainly do not advocate to incentivise more than two children. But the steps to disincentivise more than three children must be addressed to the parents

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and not to the children. What is the fault of the third and subsequent child? They did not have any control over their birth. That being so, it would be atrocious to expect the third and the subsequent child to be deprived of motherly touch immediately post natal and during infancy because Rule 43 expects the mother of that child to report for official duties the very next day of delivery. That third and subsequent child being completely helpless, therefore, it is the duty of the court to step in.

22. In order to achieve success in population control, the government may take any appropriate innovative steps in order to dissuade the citizens from giving birth to more than two children. But once third child comes into existence even in womb, her rights cannot be trampled over.

23. Further, no statistical data has been placed before us to show as to out of total women population, how many are in government service and how many lady government servants give birth to more than two children, which would have led the government frame Rule 43 of the CCS (Leave) Rules. For population explosion, the government servants are not the only class to be held responsible. Nothing has been placed before us to show the steps taken by the government addressed to the citizens other than government servants for population control. To reiterate, it is not the question of incentivising the lady government servant with the third and the subsequent maternity leave; it is the question of protecting rights of the third and the subsequent child to mother's touch immediately post natal and during infancy period, which is most crucial for their overall development – physical as well as psychological.

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24. Besides, if object of Rule 43 of the CCS (Leave) Rules is population control, it remains unexplained as to why the maternity leave can be granted in case of child born through surrogacy. A childless couple always has an option to adopt, as in every society there are number of children who do not have parents and the *vice versa*.

25. To conclude, we find no reason to interfere with the humane and progressive view taken by the learned Tribunal, so the impugned order is upheld and the petition as well as the accompanying applications are dismissed, expecting that the government authorities would re-examine the sustainability of Rule 43 of the CCS(Leave) Rules.

GIRISH KATHPALIA
(JUDGE)

SURESH KUMAR KAIT
(JUDGE)

JULY 22, 2024/as/ry