IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 02.02.2022	Delivered on 25.03.2022

CORAM:

THE HONOURABLE MR.**JUSTICE V.PARTHIBAN**

W.P. No.22075 of 2021

K.Umadevi ... Petitioner

Vs

1 The Government of Tamil Nadu,
Rep. by its Chief Secretary to Government
Fort St George, Chennai- 600 009.

2 The Principal Secretary to Government
Human Resources Management Department
(Earlier Known as Personnel and
Administrative Reforms Department)
Fort St.George, Chennai 9

3 The Chief Educational Officer
School Educational Department
Dharmapuri District- 636 701.

4 The Headmaster
Government Higher Secondary School
P.Gollapatti, Pennagaram Taluk
Dharmapuri District- 636 809. ... Respondents

Writ Petition filed under Article 226 of the Constitution of India praying for a Writ of Certiorarified Mandamus calling for the records of the 3rd Respondent culminating in his impugned proceedings bearing Na.Ka.No.3763/E1/2021 dated ...08.2021 (Signed on 28-08-2021) quash the same and direct the Respondents to sanction Maternity Leave for the petitioner for the period from 11.10.2021 till 10.10.2022 with full pay and all attendant befits.

For Petitioner ... Mr.Arun Anbumani

For Respondents ... Mr.V.Arun,
Additional Advocate General,
assisted by
Mr.Abishek Moorthy,
Government Advocate

O R D E R

The case of the petitioner is that she was working as an English Teacher in Government Higher Secondary School, P.Gollapatti, Dharmapuri District. Before joining the Government service, the petitioner was already married to one A.Suresh in 2006. From the said wedlock, two children were born in 2007 and 2011 respectively. Subsequently, due to estrangement between them, they fell out of each other and finally they were legally separated in the year 2017. The two children born from the said wedlock are in the custody of the petitioner's former husband.

2. On 12.09.2018, the petitioner got married to one Mr.M.Rajkumar. Due to conceivement from the second wedlock, the petitioner applied for grant of maternity leave to the authorities concerned for the period between 17.08.2021 and 13.05.2022 (nine months) towards pre-and-post-natal care. When she applied for grant of maternity leave, she was under the *bona fide* impression that earlier, when the two children were born from the first wedlock, she

was not in Government service and that for the first time, she was availing the maternity leave benefit. She entered into the Government service only in December 2012, and that too from the second marriage, she was expecting a child, and in that circumstances there would not be any issue of grant of maternity leave to her. Her apprehension was due to the fact that in terms of the public policy adopted by the Government of India followed by the State Government prescribing two child norm, the benefit being sought for the third child, her request might not be favourably considered. However, in the peculiar facts and circumstances of the case, as stated above, she had submitted a request for the above said period.

3. The third respondent vide his proceedings dated 28.08.2021, rejected the request of the petitioner, quoting Fundamental Rule 101(a), applicable to State Government servants stating eligibility for grant of maternity leave is available only to women employees having only two surviving children and there is no provision for grant of maternity leave for the third child on account of her remarriage.

4. The petitioner being aggrieved by the rejection of her request for grant of maternity leave is before this Court.

5. Mr.Arun Anbumani, learned counsel for the petitioner has reiterated the facts briefly. The learned counsel initially contended that as far as the Government service is concerned, the petitioner was giving birth for the first time, as the earlier two children were born from the first wedlock, prior to her entering into the Government service in 2012. Therefore, the claim of the petitioner ought to have been construed as a first child as far as the Government service is concerned for extending the benefit of the maternity leave to her.

6. The learned counsel alternatively would submit that the reliance placed by the authority on Fundamental Rule 101(a) is incorrect and cannot be countenanced in law, as the provisions of the Maternity Benefit Act, 1961 (for short, the M.B. Act, 1961) which was enacted in pursuance of the constitutional guarantee enshrined in Article 42 does not impose any such condition for availing the maternity benefit. According to the learned counsel, restriction of two child norm for grant of maternity benefit to women Government servants came to be introduced only in 1993 vide G.O.Ms.No.237, Personnel and Administrative Reforms, dated 29.06.1993, following the larger public policy adopted by the Central Government towards population control. However, an executive order cannot override a

statutory provision, that too a Central legislation, more particularly when the M.B. Act, 1961 was a constitutional requirement in furtherance of Article 42 of the Constitution, demonstrating India's commitment to the convention of the International Labour Organization in the year 1952.

7. While broadly outlining the challenge as above, the learned counsel would then proceed to refer to a few decisions of the Hon'ble Supreme Court and High Courts on the subject-matter. According to the learned counsel, the decisions that are to be referred to, clearly support his contention that the Government cannot have recourse to the Fundamental Rule 101(a) for the purpose of denying the maternity benefit to the petitioner.

8. The learned counsel would refer to the following decisions:

(A) Municipal Corporation of Delhi vs. Female Workers (Muster Roll) and Another (2003(3) SCC 224).

(i) In the above decision, the Hon'ble Supreme Court has elaborately dealt with the provisions of the M.B. Act, 1961 and Articles 39, 42 and 43 of the Constitution of India. The Apex Court has also adopted the doctrine of social justice on the basis of the Universal Declaration of Human Rights, 1948 and also placing reliance upon

convention on the elimination of all forms of discrimination against women. The Supreme Court's ruling is quite significant development on the march of law in regard to socio-economic development of women and prevention of exploitation.

(ii) According to the learned counsel, while referring to the provisions of the M.B. Act, 1961, the Supreme Court has observed in paragraph 27 as under:

> *"27. The provisions of the Act which have been set out above would indicate that they are wholly in consonance with the Directive Principles of State Policy, as set out in Article 39 and in other Articles, specially Article. A woman employee, at the time of advanced pregnancy cannot be compelled to undertake hard labour as it would be detrimental to her health and also to the health of the foetus. It is for this reason that it is provided in the Act that she would be entitled to maternity leave for certain periods prior to and after delivery. We have scanned the different provisions of the Act, but we do not find anything contained in the Act which entitles only regular women employees to the benefit of maternity leave and not to those who are engaged on casual basis or on muster roll on daily wage basis."*

(iii) Thereafter, the Supreme Court, examined the contentions of the parties in paragraphs 32 to 34 and 36 and 37 and finally concluded

in paragraph 38. The relevant paragraphs are extracted hereunder:

"32. Learned counsel for the Corporation contended that since the provi-sions 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 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."

33. 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.

34. 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.

35 ...

36. Taking into consideration the enunciation of law as settled by this Court as also the High Courts in various decisions referred to above, the activity of the Delhi Municipal Corporation by which construction work is undertaken or roads are laid or repaired or trenches are dug would fall within the definition of "industry". The workmen or, for that matter, those employed on muster roll for carrying on these activities would, therefore, be "workmen" and the dispute between them and the Corporation would have to be tackled as an industrial dispute in the light of various statutory provisions of the Industrial Law, one of which is the Maternity Benefit Act, 1961. This is the domestic scenario. Internationally, the scenario is not different.

37. Delhi is the capital of India. No other City or Corporation would be more conscious than the City of Delhi that India is a signatory to various International covenants and treaties. The Universal Declaration of Human Rights, adopted by the United Nations on 10th of December, 1948, set in motion the universal thinking that human rights are supreme and ought to be preserved at all costs. This was followed by a series of Conventions. On 18th of December, 1979, the United Nations adopted the "Convention on the Elimination of all forms of

discrimination against women". Article 11 of this Convention provides 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 retirement, 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.

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 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.

3. Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary." [Emphasis supplied]

38. These principles which are contained in Article 11, reproduced above, have to be read into the contract of service between Municipal Corporation of Delhi and the women employees (muster roll); and so read these employees immediately become entitled to all the benefits conceived under the Maternity Benefit Act, 1961. We conclude our discussion by providing that the direction issued by the Industrial Tribunal shall be complied with by the Municipal Corporation of Delhi by approaching the State Government as also the Central Government for issuing necessary Notification under the Proviso to Sub-section (1) of Section 2 of the Maternity Benefit Act, 1961, if it has not already been issued. In the meantime, the benefits under the Act shall be provided to the women (muster roll) employees of the Corporation who have been working with them on daily wages."

(B)N.Mohammed Mohideen and anr. vs. Deputy Commissioner of Labour (Inspection) Chennai, [(2008) 5 MLJ 6]

(i) The learned counsel first referred to the *ratio decidendi* as culled out in the judgment as under:

"Special care and assistance for motherhood is one of the basic human rights contained in the Universal Declaration of Human Rights. Provisions for maternity protection is one of the programmes which is being furthered by the ILO on a worldwide basis. In India it is one of the directive principles of State policy contained in the Constitution under Article 42 of the Constitution that State should make provisions for securing just

and humane conditions of work and for maternity relief".

(ii) According to the learned Judge of this Court, since there is no provision in the M.B. Act, 1961 fixing any ceiling on the number of deliveries of a female worker and also in terms of Articles 42 of the Constitution, every female worker covered by the Act is entitled to maternity benefits without any ceiling on the number of deliveries made by them. The succinct ruling of the learned Judge in paragraph 14 is extracted hereunder:

> *"14. There is no provision under the M.B. Act, 1961 fixing any ceiling on the number of deliveries made by a female worker. So long as Article 42 of the Constitution read with the provisions of the M.B. Act, 1961 is available, every female worker covered by the Act is entitled to claim maternity benefits without any ceiling on the number of deliveries made by them. That will be the correct interpretation which will be in tune with the judgment of the Supreme Court rendered in B. Shah's case (cited supra)."*

(C) J.Sharmila vs. Secretary to Government, Education Department, (2010 SCC Online Mad 5221)

(i) This Court's attention has been drawn to the facts as recorded in the decision in paragraphs 5 and 6, extracted herein below:

"5.The petitioner Block Resources Teacher Educator in Maths in Thoothukudi District had her second delivery during the period between 16.10.2006 to 11.01.2007. For the aforesaid period, she was not given maternity benefit stating that during the first labour, she had given birth to twins and therefore, by the present delivery, she had given birth to a third child and hence by the order of the Government in G.O.Ms.No.237, School Education Department, dated 29.6.1993 she will not be paid wages for her leave. The order communicating these views, dated 27.10.2009 is under challenge in this writ petition.

6.The petitioner though placed reliance upon an order passed in respect of one Mrs.Meri Joshpin Anjali, a Secondary Grade Teacher of St. Alocius Girls Higher Secondary School, who was given an exemption from Rule 5A read with 101(a) of Fundamental Rules and explanation 1 was relaxed in her favour by G.O.Ms.No.367, School Education Department, dated 8.10.1998, the respondent did not choose to grant any exemption. Therefore, the only question that would arise is whether the impugned order refusing to grant her maternity leave for the birth of her third child in the second delivery and to treat her leave to which she was eligible was legally justified?

(ii) The same learned Judge of this Court however did not restrict his consideration to the facts of that case alone, but has taken a call to go into the very legality of the Fundamental Rules and the explanation contained therein as observed by him in paragraphs 7 and

8. The said paragraphs are extracted as under:

> *"7.The matter could have been dealt with on technical ground, i.e.intention of the rule is only the grant of maternity leave for the second delivery and not really based upon two children norm. The petitioner had delivered during her first delivery twins and the second delivery was a single child. Therefore, maternity leave was confined only to the second delivery and not based on the third child norm. Therefore, the petitioner should have been granted maternity leave with full pay. If it is not construed in this way it may produce ridiculous result. To cite an example, if during the first delivery a woman Government servant delivers a single child and by the second delivery if she delivers twins or triplets, then should she be disqualified?*
>
> *8.Yet this court having regard to the legal issue involved, decided to go into the very legality of the Fundamental Rule and its explanation. Therefore, in this context, it is necessary to refer to the historical basis for maternity leave for the women employees as well as various enactments which were made in this regard."*

(iii) After referring to the history of the legislation regarding maternity benefits the learned Judge dealt with the M.B. Act, 1961 in paragraphs 12, 15, 18, 22 to 27, which are extracted as under:

> *"12. It was after 11 years after the Constitution was adopted, the Maternity Benefit Act, 1961 came to be enacted on 12.12.1961 to regulate the employment of women in certain*

establishments for certain periods before and after childbirth and to provide for maternity benefit and certain other benefits. Section 3(e) defines "establishment" to which the Act applies. After categorising certain list of industries, Section 3(e)(v) enables the Government to apply the provisions of the Act to other establishments also. Section 5 provides for right to payment of maternity benefit. Section 5(3) provides for 12 weeks payment.

....

....

15. The purpose for bringing this legislation after 11 years after the Constitutional guarantee was given in the form of Article 42 was because of Convention No.103 of International Labour Organisation, had guaranteed maternity protection with effect from 7.9.1955. Article 2 of Convention No.103 reads as follows:

> *"For the purpose of this Convention, the term "woman" means any female person, irrespective of age, nationality, race or creed, whether married or unmarried, and the term "child" means any child whether born of marriage or not."*

Article 4 reads as follows:

> *"1.While absent from work on maternity leave in accordance with the provisions of Article 3, the woman shall be entitled to receive cash and medical benefits." Recommendation No.95 reiterated the said convention.*

18. Therefore, when the thrust is for expanding the scope of maternity benefit, the State Government by clarification made by G.O.Ms.No.237, School Education Department, dated 29.6.1993 restricted the scope and introduced a two children norm for the grant of maternity leave with full pay. The question is how far it is legal and constitutional?

....

....

22.When a question came up for consideration before this court in respect of a woman employee, who sought for maternity leave with pay for her third delivery in terms of Beedi and Cigar Workers (Conditions of Employment) Act, 1966 in N.Mohammed Mohideen and another Vs. Deputy Commissioner of Labour (Inspection), Chennai and others reported in 2008 (3) LLN 362 in paragraph 14, this court had observed as follows:

> *"14.There is no provision under the M.B. Act, 1961 fixing any ceiling on the number of deliveries made by a female worker. So long as Art.42 of the Constitution read with the provisions of the M.B. Act, 1961 is available, every female worker covered by the Act is entitled to claim maternity benefits without any ceiling on the number of deliveries made by them. That will be the correct interpretation which will be in tune with the judgment of the Supreme Court rendered in B.Shah V. Labour Court, Coimbatore and others [1977 (2)*

L.L.N. 606] (vide supra)."

X.Laws can be made to restrict the benefits to achieve Family Planning :

23.The Supreme Court in more than one decision tried to justify the rule restricting the benefits beyond two child norm based on public policy and family planning as the goal of the State. In this regard, the following passage found in paragraph 101 in Air India Case (cited supra) may be usefully extracted below:

> *"101. For the reasons given above, we strike down the last portion of Regulation 46(i)(c) and hold that the provision "or on first pregnancy which-ever occurs earlier" is unconstitutional, void and is violative of Article 14 of the Constitution and will, therefore, stand deleted. It will, however, be open to the Corporation to make suitable amendments in the light of our observations and on the lines indicated by Mr Nariman in the form of draft proposals referred to earlier so as to soften the rigours of the provision and make it just and reasonable. For instance, the Rule could be suitably amended so as to terminate the services of an AH on third pregnancy provided two children are alive which would be both salutary and reasonable for two reasons. In the first place, the provision preventing third pregnancy with two existing children would be in the larger interest of the health of the AH concerned as also for the good*

upbringing of the children. Secondly, as indicated above while dealing with the Rule regarding prohibition of marriage within four years, same considerations would apply to a bar of third pregnancy where two children are already there because when the entire world is faced with the problem of population explosion it will not only be desirable but absolutely essential for every country to see that the family planning programme is not only whipped up but maintained at sufficient levels so as to meet the danger of over-population which, if not controlled, may lead to serious social and economic problems throughout the world."

(Emphasis added)

24.This observation came to be quoted with approval in Javed's case (cited supra). In paragraph 40 of the said judgment, it was observed as follows:

"40. The menace of growing population was judicially noticed and constitutional validity of legislative means to check the population was upheld in Air India v.Nergesh Meerza15. The Court found no fault with the rule which would terminate the services of air hostesses on the third pregnancy with two existing children, and held the rule both salutary and reasonable for two reasons:..."

XI.Executive instruction cannot replace substantive law :

25.As held in the Air India case (cited supra), the Supreme Court had suggested an amendment to the rule. In Javed's case,

the Supreme Court was only dealing with the disqualifying provisions found in the Haryana Panchayati Raj Act from contesting election. But in both judgments, the constitutional guarantee as well as non obstante clause found in the Maternity Benefit Act, 1961 were not considered. So long as the non obstante clause is found under Section 27, the constitutional obligation found under Article 42 as well as ILO norms set out above are to be the guiding factor, it is not open to the Government to deny maternity protection including paid leave as provided. By intruding an explanation to FR 101 by an executive instruction cannot be treated as substantial rule to deny the constitutional right of a woman Government servant as had happened in the present case.

26.Further, in Javed case (cited supra) itself when it was argued that in cases of birth of twins or triplets, whether the second delivery would be a disqualification, the Supreme Court did not answer the question in a straight way. But in paragraph 63 and 64 of the said judgment it was observed as follows:

> *"63. It was also submitted that the impugned disqualification would hit the women worst, inasmuch as in the Indian society they have no independence and they almost helplessly bear a third child if their husbands want them to do so. This contention need not detain us any longer. A male who compels his wife to bear a third child would disqualify not only his wife but himself as well. We do not think that with the awareness which is arising in Indian womenfolk, they are so*

helpless as to be compelled to bear a third child even though they do not wish to do so. At the end, suffice it to say that if the legislature chooses to carve out an exception in favour of females it is free to do so but merely because women are not excepted from the operation of the disqualification it does not render it unconstitutional.

64. Hypothetical examples were tried to be floated across the Bar by submitting that there may be cases where triplets are born or twins are born on the second pregnancy and consequently both of the parents would incur disqualification for reasons beyond their control or just by freak of divinity. Such are not normal cases and the validity of the law cannot be tested by applying it to abnormal situations. Exceptions do not make the rule nor render the rule irrelevant. One swallow does not make a summer; a single instance or indicator of something is not necessarily significant."

(Emphasis added)

XII.What relief to which the petitioner is entitled to :

27.In the present case, it is suffice to state that if the intention of the State Government is to afford protection of the woman for her second delivery, then it should not be based upon the number of children she delivers during those two deliveries. The importance has to be seen only from the health point of the woman Government servant and not the number of children one delivers during each delivery. Hence this court is not inclined to

accept the reasons found in the impugned order based upon the so-called Explanation 1 to Rule 101(a) of the Fundamental Rules. The petitioner who had availed maternity leave for the period from 16.10.2006 to 11.1.2007 during her second pregnancy, is entitled to be paid full salary for that period.

28.In the light of the above, the writ petition will stand allowed. However, there will be no order as to costs. The respondents are directed to pay full salary to the petitioner for the maternity leave availed by her for the period from 16.10.2006 to 11.01.2007 within a period of 12 weeks from the date of receipt of copy of this order. Consequently, connected miscellaneous petition stands closed."

9. The learned counsel then proceeded to refer to an unreported decision of the Division Bench of Punjab and Haryana High Court as below.

(D) Ruksana vs. State of Haryana, (Civil Writ petition No.4229 of 2011) decided on 21.04.2011:

(i) In the said decision, an executive instruction was the subject-matter of challenge where like the present Fundamental Rule, it sought to restrict the grant of maternity benefit to women Government employees having two living children. In consideration of the challenge, the Division Bench extensively dealt with various decisions

of the Supreme Court and of High Courts. In its quest for comprehensive answers, the Court has first framed the following questions for its consideration:

> *"The rival submissions advanced by learned counsel for the parties lead us to formulate the following four questions for consideration:-*
>
> *i) Whether the classification of women employees, one having two children and another having more than two children is just and appropriate? Whether the Government can create such a distinction?*
>
> *ii) If the answer to the first question is in affirmative, whether Note 4 to Rule 8.127 is contrary to the provisions of the Act which do not lay down two child norm for grant of maternity benefits?*
>
> *iii) Whether the Executive Instructions dated 5.2.1993 (Annexure R2) infringe, supersede or override the Rules framed by the Government?*
>
> *iv) Whether having two children from the previous marriage will eclipse the right of a woman to obtain maternity benefit for the first child to be born from the second marriage?"*

(ii) Thereafter, the High Court has proceeded to answer each question as under:

> *"Question No.1*

A Division Bench of this Court in Parkasho Devi v. Uttar Haryana Bijli Vitran Nigam Limited and Others 2008(4) Service Cases Today 84 observed that the Act is not applicable to the Uttar Haryana Bijli Vitran Nigam Limited and upheld Rule 8.127 and observed as under:-

> *"6. After hearing the learned Counsel for the parties and going through the records of the case, we do not find any ground warranting interference by this Court in exercise of writ jurisdiction. Note 4 below Rule 8.127(1) of the Punjab Civil Services Rules (Vol. I Part I), as applicable to Haryana and adopted by the Nigam clearly lays down that maternity leave shall not be admissible to a female Government employee having more than two living children. In such cases leave of the kind due or extraordinary leave will be allowed".*

However, in Parkasho Devi's case (supra), the question of classification between a woman employee having more than two children or another woman employee having less than two children was not considered. In that case, vires of the Rules in context of the Act were also not considered. Furthermore, in Parkasho Devi's case (supra), a Division Bench of this Court had also not deliberated on the issue as to whether the classification of women employees, one having two children and another having more than two children is just and appropriate and whether the Government can create such a distinction. Classification between the women having two children or more was considered by the Hon'ble Apex Court in Javed and Others v.

State of Haryana and Others (2003)8 Supreme Court Cases 369. The vires of the provisions of Sections 175(1)(q) and 177(1) of the Haryana Panchayati Raj Act, 1994, were questioned before the Hon'ble Apex Court. By these provisions, persons having two living children were disqualified to hold the office of the Sarpanch or a Panch of the Gram Panchayat. Such a classification was assailed being ultra vires to the Constitution of India. It was canvassed that the provision is arbitrary and hence violative of Article 14 of the Constitution of India and is also discriminatory. In Javed's case (supra), it was held that even though Article 14 of the Constitution of India forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. Relying upon Budhan Choudhary and Others v. The State of Bihar 1955 AIR 191, it was held that to satisfy the Constitutional contest of permissibility, two conditions must be satisfied, namely (i) that the classification is founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and, (ii) that such a differentia has a rational relation to the object sought to be achieved by the Statute in question. The basis for classification may rest on conditions which may be geographical or according to objects or occupation or the like. In Javed's case (supra), the Hon'ble Apex Court noticed population scenario of the world and observed that increase in the population of the Country is one of the major hindrances in the pace of India's socio-economic progress. It marked the words of Bertand Russell, "Population explosion is more dangerous than Hydrogen Bomb" and upheld the provisions of the Haryana Panchayati Raj Act,

1994, saying State is competent to define its priority in enacting Policy or enacting legislation. Thus, classification between two sets of women employees having two children or more than two was held to be reasonable. In Javed's case (supra), the Hon'ble Apex Court relied upon Air India and Others v. Nergesh Meerza and Others (1981)4 Supreme Court Cases 335 and upheld the rule which would terminate the services of Air Hostesses on the third pregnancy with two existing children, and held the rule to be salutary and reasonable. It was observed as under:-

> *"101. For instance, the rule could be suitably amended so as to terminate the services of an AH on third pregnancy provided two children are alive which would be both salutary and reasonable for two reasons. In the first place, the provision preventing third pregnancy with two existing children would be in the larger interest of the health of the AH concerned as also for the good upbringing of the children. Secondly, as indicated above while dealing with the rule regarding prohibition of marriage within four years, same considerations would apply to a bar of third pregnancy where two children are already there because when the entire world is faced with the problem of population explosion it will not only be desirable but absolutely essential for every country to see that the family planning programme is not only whipped up but maintained at sufficient levels so as to meet the danger of over population which,*

if not controlled, may lead to serious social and economic problems throughout the world".

Therefore, in view of the law laid by the Hon'ble Apex Court, we are of the view that the State is well justified in making a distinction between the two sets of women employees, one having two living children and another having more than two living children. Such a classification being reasonable is having intelligible differentia to achieve the object of family planning.

Question No.2.

Having held that the family planning is a part of National Public Policy and the State to achieve this object can grant incentives and also put restrictions upon the benefits which have to flow to the employees. Our answer to the first question is in favour of the State. Now we have to examine as to whether the mechanism to achieve this objective is in place, in other words Note 4 to Rule 8.127 of the Punjab Civil Services Rules Volume I Part I is in conflict or is in consonance with the provisions of the Act.

Section 5 of the Act grants right of a woman to receive payment of maternity benefits. It prescribes that every woman shall be entitled to and her employer shall be liable for the payment of maternity benefit at the rate of the average daily wage for the period of her actual absence. The provisions of Section 5 of the Act says that the woman worker who expects a child is entitled to maternity benefit for a maximum period of 12 weeks which is split into two periods i.e. pre natal and post natal. The first one i.e. pre natal or ante natal period is limited

to the period of woman's actual absence extending up to six weeks immediately preceding and including the day on which her delivery occurs and second one which is post natal compulsory period consists of six weeks immediately following the day of delivery (B.Shah v. Presiding Officer, Labour Court, Coimbatore and Others (1977)4 Supreme Court Cases 334). The Act, as per Section 2, applies to all the establishments of the Government. In the reply filed by the State, application of the Act to the employees of the State has not been disputed. Rather it has been canvassed that under Section 28(2)(k) of the Act, the Government has powers to make Rules in respect of any other matter which is to be or may be prescribed. Section 27 of the Act specifically states that there is no fetter on the Rule making power of the organization so long as it is more beneficial to an employee than the one envisaged in the Act. However, all rules which are inconsistent with the provisions of the Act shall not eclipse the provisions of the Act. Section 27 of the Act reads as under:-

> *"27. Effect of laws and agreements inconsistent with this Act. (1) The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law or in the terms of any award, agreement or contract of service, whether made before or after the coming into force of this Act:*
>
> *Provided that where under any such award, agreement, contract of service or otherwise, a woman is entitled to benefits in respect of any*

matter which are more favourable to her than those to which she would be entitled under this Act, the woman shall continue to be entitled to the more favourable benefits in respect of that matter, notwithstanding that she is entitled to receive benefit in respect of other matters under this Act.

(2) Nothing contained in this Act shall be construed to preclude a woman from entering into an agreement with her employer for granting her rights or privileges in respect of any matter, which are more favourable to her than those to which she would be entitled under this Act."

The Act nowhere restricts the benefit of payment of maternity benefits to birth of two children. In other words, the provisions of the Act entitle the woman employee to maternity benefits for the birth of third child too. We are conscious that by Note 4 to Rule 8.127 of the Punjab Civil Services Rules Volume I Part I, the State Government intended to achieve a laudable object but such an object cannot be given effect to till the establishments of the Government are amenable to the Act. Unless an amendment is carried out in the Act, the Government cannot restrict beneficial provisions of the Act to a woman employee for the birth of a third child. Such a restriction imposed under the Rules is contrary to Section 27 of the Act and cannot sustain in the eyes of law. In Vasu Dev and Others v. Union of India and Others (2006)12 Supreme Court Cases 753 wherein the validity of Section 3 of the East Punjab Urban Rent Restriction Act, 1949

was challenged, the Hon'ble Apex Court referred to a large number of decisions on subordinate legislation and held as under:-

> *"118. A statute can be amended, partially repealed or wholly repealed by the legislature only. The philosophy underlying a statute or the legislative policy, with the passage of time, may be altered but therefor only the legislature has the requisite power and not the executive. The delegated legislation must be exercised, it is trite, within the parameters of essential legislative policy. The question must be considered from another angle. Delegation of essential legislative function is impermissible. It is essential for the legislature to declare its legislative policy which can be gathered from the express words used in the statute or by necessary implication, having regard to the attending circumstances. It is impermissible for the legislature to abdicate its essential legislative functions. The legislature cannot delegate its power to repeal the law or modify its essential features..."*

To similar effect is the law laid in Employees' State Insurance Corporation v. HMT Limited and Another (2008)3 Supreme Court Cases 35 as their Lordships of the Hon'ble Apex Court held as under:-

> *"24. We agree with the said view as also for the additional reason that the subordinate*

legislation cannot override the principal legislative provisions..."

Thus, we are of the opinion that Note 4 to Rule 8.127 of the Punjab Civil Services Rules Volume I Part I is not in consonance with the provisions of the Act and this cannot be given effect to and the petitioner cannot be deprived of the maternity benefit for the birth of a third child.

Questions Nos.3 and 4

Since our answer to question No.2 is conclusively answered in favour of the petitioner and the petitioner is held entitled to the maternity leave under the provisions of the Act, thus, there is no need to answer rest of the two questions posed before us as it will not be fruitful to undertake issues which have become academic only.

To conclude, the answer to first question is in favour of the State. Classification made on the basis of a number of children is justifiable, however, question No.2 is answered in favour of the petitioner as the rules framed by the Government are not in conformity with the Act. Hence, till an amendment is carried in the Act, the rules framed by the State Government will not curtail the benefit which had accrued to the petitioner in view of the Act. Answers to questions No.3 and 4 are not necessary for the present controversy, hence, are left open to be answered in future as and when need arise."

(iii) The above ruling of the Division Bench of Punjab and

Haryana High Court would be a pointer to note that though the State cannot be faulted with for introducing family planning norms and imposing restrictions on the grant of maternity leave on Government employees, yet, unless the principal Act viz., the Maternity Benefit Act, 1961 was suitably amended, the restriction of two child norm under no circumstances can be applied and there can be no denial of the benefit on that account.

(E) T.Priyadharsini vs. Secretary to Government, (2016 SCC Online Mad 30096)

(i) The learned counsel would draw the attention of this Court to the facts recorded in paragraph 4 in the decision which reads as under:

> *"4. The petitioner in W.P.(MD) No.9274 of 2015, R.Gayathri, was appointed as Graduate Teacher, on 26.12.2011, and at present working at the third respondent School. This petitioner given birth to twin (girl) children, in the year 2010 and she got conceived again in the year 2015 and delivered a boy baby, on 06.04.2015. Therefore, she applied for maternity leave from 01.04.2015 onwards. The third respondent has forwarded the leave application to the second respondent, on 22.04.2015, for availing the maternity benefits invoking G.O.Ms.No.237, dated 29.06.1993, but the second respondent has informed the petitioner orally that, as already there are two girl children for the petitioner, she could not avail the benefit of the said*

Government Order and hence, she could not opt for maternity leave and instead, she should opt for medical leave."

(ii) In the above decision, yet another Judge of this Court has referred to the landmark judgment rendered by the Hon'ble Supreme Court in *Municipal Corporation of Delh*i (supra), and its profound observation in paragraph 16, which is reproduced herein below.

> *"16. The objects and reasons as set out in Government of India Gazette, Part II, Section 2, dated 6.12.1960 [p-817], provide as under :*
>
> *"This clause entitles a woman to receive maternity benefit at the rate of her average daily wage subject to a minimum of seventy-five naye paise per day for a maximum period of 12 weeks, including six weeks following the day of her delivery. The qualifying condition is employment for 240 days in the 12 months immediately preceding the expected date of delivery, but there is no such restriction as to entitlement in the case of an immigrant woman who is pregnant when she first arrives in Assam.""*

10. The learned Judge then proceeded to conclude as under in paragraphs 17 to 20.

Paragraphs 17 to 20 read as follows :

"17. In this background, this Court has to consider whether the two children norm discovered and adumberated by the Government in G.O.Ms.No.237, School Education Department, dated 29.06.1993, is valid.

17.1. Executive instructions cannot replace the substantive law. If the concern of the State Government is to afford protection to the women during/at or after delivery, then the rule cannot be based upon the number of children delivered in each delivery and it should be based on the delivery itself.

17.2. The interpretation of law cannot defeat the very purpose for which the law was enacted. Therefore, the orders passed by the respondents, declining maternity leave and ordering recovery of salary paid for the eligible maternity period, have to be set-aside.

18. Unless there is a law prohibiting / restricting the number of delivery in order to have indirect control over population, then the Government cannot decline maternity leave, fixing the number of children delivered in each delivery as the basis.

19. It is appropriate to quote the highlights of the Maternity Benefit (Amendment) Bill, 2016, as passed by Rajya Sabha, on 11th August 2016, which reads as under:-

<u>Highlights of the Bill:</u>

> *The Act provides maternity leave up to 12 weeks for all women. The Bill extends this period to 26 weeks. However, a woman with two or more children will be entitled to 12 weeks of maternity leave.*

An employer may permit a woman to work from home, if the nature of work assigned permits her to do so. This may be mutually agreed upon by the employer and the woman.

19.1. From the amendment proposed, it is evident that the law is marching towards upholding of rights of women in equal opportunities in employment sector and the increase in the period of maternity leave would reflect the concern for the proper growth and development of the child. When the legislation is progressive, the interpretation cannot be retrogressive.

19.2. When the employment opportunity is at global level, the interpretation of welfare laws should be towards attracting competent workforce towards India and not to repel them away from India.

20. For the foregoing reasons, the proceedings of the fourth respondent in O.Mu.No.1868/A5, dated 09.04.2015 and the consequent recovery proceedings of the sixth respondent, in Na.Ka.No.267/2015, dated 21.04.2015 are quashed and the writ petitions are allowed as prayed for. No costs."

(iii)The learned counsel, after drawing reference to the above decisions, would submit that the issue herein is no longer *res integra*, as the Courts have consistently held that a woman employee cannot be denied maternity benefits by applying two children norm. According to him, the rejection of the petitioner's request therefore cannot be

countenanced in law and liable to be interfered with.

11. On behalf of the respondents, Mr.Abishek Moorthy, learned Government Advocate appeared, and was led by Mr.V.Arun, learned Additional Advocate General. According to the learned Additional Advocate General, Article 42 empowers the State to bring in enactments towards grant of maternity relief. According to him, in line with the constitutional directives maternity benefits has been provided in the Fundamental Rules. Over the years, the period of maternity leave has been enhanced from time to time.

12. The learned Additional Advocate General would refer to the Fundamental Rule 101(a) in support of his contention. He then proceeded to refer to G.O.Ms.No.105, Personnel and Administrative Reforms (FR.III) Department, dated 07.11.2016 enhancing the maternity leave from 180 days (six months) to 270 days (nine months). He has also brought to the notice of this Court that subsequently, an amendment has been introduced in FR 101(a) enhancing the maternity leave to 270 days vide G.O.Ms.No.154, Personnel and Administrative Reforms (FR II) Department, dated 05.12.2017 infusing statutory force to G.O.Ms.No.105 dated 07.11.2016.

13. The attention of this Court has also been drawn to two other Government Orders in G.O.Ms.No.77, dated 20.06.2018 and G.O.Ms.No.91 dated 28.07.2020, of the Personnel and Administrative Reforms (FR-III) Department. In the first G.O.Ms.No.77 dated 20.06.2018, it was clarified that in case of a woman Government servant giving birth to twins in a delivery, maternity leave shall be granted to one more delivery. As far as the latter Government Order (G.O.Ms.No.91 dated 28.07.2020) is concerned, the learned Additional Advocate General has referred to the contents, in particular, the first proviso in the Order, which read thus:

> *"(i) A competent authority may grant maternity leave on full pay to permanent married women Government Servants and to non-permanent married women Government servants, who are appointed on regular capacity for a period not exceeding 270 days, which may spread over from the pre-confinement rest to post confinement recuperation at the option of the Government servant. Non-permanent married women Government servants, who are appointed on regular capacity and join duty after delivery shall also be granted maternity leave for the remaining period of 270 days after deducting the number of days from the date of delivery to the date of joining in Government service (both days inclusive) for the post confinement recuperation.*
>
> *(ii) Non-permanent married women Government servants, who are appointed under the emergency provisions of the*

relevant service rules should take for maternity purposes, the earned leave for which they may be eligible. If however, such a Government servant is not eligible for earned leave or if the leave to her credit is less than 270 days, maternity leave may be granted for a period not exceeding 270 days or for the period that falls short of 270 days, as the case may be. Non-permanent married women Government servants employed under the emergency provisions should have completed one year of continuous service including leave periods, if any, to become eligible for the grant of maternity leave:

Provided that the maternity leave referred in (i) or (ii) above shall be granted to a married woman Government servant with less than two surviving children:

Provided further that in the case of a woman Government servant with two surviving children born as twins in the first delivery, maternity leave shall be granted for one more delivery."

14. The issuance of the above Government Order was necessitated in order to cover non-permanent married women Government employees appointed in regular capacity. According to the learned Additional Advocate General, that it has been the consistent policy of the State Government since 1993 to restrict the grant of maternity benefits only to the employees with less than two surviving children. The above GO as a matter of fact seeks to amend the FR, its

legal implication and validity will be discussed in the run up to the conclusion herein.

15. Although the learned counsel Additional Advocate General relied on the proviso as contained in the latter G.O. pointedly, this Court is unable to countenance the reference made therein, as the same primarily appears to be related to extension of the maternity benefits to non-permanent married women Government Servants as per abstract of the GO, which reads as hereunder:

ABSTRACT

Fundamental rules – Maternity Leave under Fundamental Rule 101(a) – Extending Maternity Leave benefits to non-permanent married Women Government Servants appointed in a regular capacity – Amendment to Fundamental Rules – orders – issued.

16. The learned Additional Advocate General before concluding his submissions has also referred to following two decisions:

(i) Judgment of the Madras High Court in the case of ***Union of India vs. M.Asiya Begum, dated 27.02.2020 (W.A.No.4343 of 2019).***

(ii) Judgment of the High Court of Kerala in the case of ***Nima vs. Union of India,***

reported in 2020 SCC OnLine Ker 16520;

17. The first decision was rendered by a First Division Bench of this Court while considering a claim of a member of the Central Industrial Security Force, who was governed by the Central Civil Services (Leave) Rules, 1972. While dealing with the statutory rule of the Central Government, the Division Bench has held that the order of the learned Judge granting maternity benefits on the basis of appreciation of the rules relating to the State Government servants is erroneous and overturned the verdict of the learned Single Judge. The ruling of the Division Bench was entirely premised on the facts of that case and it did not make any statement of law on the subject as binding effect on this Court.

18. As far as the decision of the Kerala High Court is concerned, the learned Additional Advocate General would rely on paragraphs 17 to 22 of the order, which are extracted hereunder:

> *"17. In the judgment of the Madras High Court in W.P.No.13555 of 2009, a learned Single Judge considered the claim of a Government employee, who had already two surviving children, for Maternity Leave with benefits. As per a Government Order issued on 27.06.1997, Maternity*

Leave was admissible to only a woman employee with less than 2 surviving children. In that case also, the employee had given birth to twins in the first delivery as in the present case. After analysing the history behind the enactment of 1961 Act in tune with the provisions contained in Article 42 of the Constitution of India, the Maternity (Protection) Convention, 1952 adopted by the General Council of the International Labour Organisation(ILO), it was observed that Convention 103 of the ILO had guaranteed maternity protection with effect from 07.09.1955. Referring to the report on National Plan of Action and its recommendations and National Perspective Plan for women for the year 1988-2000 of the Department of Women and Child development recommending extension of maternity benefit to unorganised sectors, the learned Single Judge found that the State Government had at the same time restricted the benefits, as per its order dated 29.06.1993, introducing two children norm for grant of the maternity benefit. Referring to the judgments of the Apex Court in Nergesh Meerza's case (supra) and in Javed's case (supra), the learned Single Judge held that in none of these cases the nonobstante clause contained in Section 27 of the Maternity Benefit Act was considered and that in the light of that clause it was not open to the State

Government to deny the maternity benefit protection and such protection cannot be denied by issuing an executive order. It was finally concluded that the intention of the State Government was to protect the women for her second delivery and that cannot depend upon the number of children one delivers in each delivery and it was held that petitioner therein was entitled to paid Maternity Leave.

18. In the judgment dated 19.10.2016 of the Madurai Bench of Madras High Court in W.P.(MD) No. 9227 of 2015 another learned Single Judge considered a similar question and held that unless there is a law prohibiting/ restricting the number of delivery in order to have indirect control over population, then the Government cannot decline Maternity Leave fixing the number of children delivered in each delivery.

19. However a Division Bench of the Madras High Court in the judgment dated 27.02.2020 in W.A. No.4343/2019, considered a case where Maternity Leave was denied to a CISF personnel governed by Rule 43 of CCS(leave) Rules, on the ground that she had more than 2 children. There also she was having twin children in the first delivery. The judgment of the learned Single Judge was reversed observing that the same was rendered without taking note of the relevant rules. It was

held that the admissibility of the benefit would be limited if one has more than two children and it does not depend on number of deliveries.

20. In the present case, the FACT has only adopted the provisions contained in Subsection 3 of Section 5 of the Maternity Benefit Act, 1961. The petitioner is already granted leave for a period of 12 weeks. It cannot be said that the number of deliveries can only be the factor to determine the eligibility for maternity benefit. The Central Government has found that the benefit of Section 5 i.e., the provisions for paid Maternity Leave need be extended only to those who do not have two children. Petitioner's claim that she is entitled to 26 weeks' paid leave towards her second delivery, cannot be accepted when the Government of India has enacted the law to see that the labourers are protected and at the same time the population explosion is also kept under check, which will also be a measure towards protection of the health of the women labourers. At any rate, there is no prohibition with respect to the number of children an employee can have. The restriction is in granting 26 weeks' Maternity Leave. The woman employee is given 12 weeks' paid leave irrespective of the number of children. By way of amendment effected in 2015, the 12 weeks' Maternity Leave has been enhanced to 26 weeks' leave. It cannot be also said

that there is no purpose in limiting the number of surviving children irrespective of the number of deliveries to make one eligible for grant of Maternity Leave. The Government have been granting incentives to those, who did not have more than two children. Maternity Leave is not admissible at all for the third child for a mother working in a Central Government establishment and governed by CCS(leave) Rules. It cannot be said that just because petitioner has given birth only twice, she should be given the maternity benefit for her second delivery, to the third child also, when Government found it necessary to restrict the benefits only to those having children less than two.

21. Either the Universal Declaration of Human Rights under the United Nations, or the Maternity Benefit Act, 1961 or any of the prevailing legislation, insist that maternity benefit to the extent of 26 weeks' paid leave should be given to an employee/worker even in a case where there are two children.

22. It is true that the benefit is intended to the mother and children. There is no provision that the 26 weeks' paid leave shall be granted to any woman employee whenever she gives birth to a child. When a benefit is granted on certain conditions, it is necessary for the respective respondents to see that the conditions are fulfilled

before granting the benefit. The provisions contained in Section 5(3) of the Maternity Benefit Act, 1961 has been introduced in the interest of the public at large, while ensuring the benefit to the mother and child in cases where the number of children is less than two. Therefore there is nothing wrong in denying paid leave to petitioner for the entire period of leave requested by her in her application."

19. That was a case where the High Court was dealing with the restriction on the period of maternity leave, in terms of Section 5(3) of the M.B. Act, 1961 in respect of woman employee having two, or more than two, surviving children. The maximum maternity benefit of 26 weeks applicable as per sub-clause (3) of Section 5 is restricted to twelve weeks instead, for those women employees. The Kerala High Court in the above case has held that the restriction to the period of maternity leave and denying the maximum period of maternity leave is between two classes is legally permissible and cannot be faulted with. The decision is therefore is of no value addition to the stiff resistance put up against the claim of the petitioner by the respondents herein.

20. The learned Additional Advocate General would submit that in any event, the Fundamental Rules are applicable to the State

Government employees and the rejection by the authority is in terms of the Rules and therefore, the same is in order and not liable to be interfered with.

21. By way of reply, Mr.Arun Anbumani, the learned counsel for the petitioner would submit that in 2017, an amendment has been brought to the M.B. Act, 1961, a woman having two or more surviving children is also entitled to maternity benefit, though the period is lesser. But the fact of the matter is, as far as the conferment of benefit is concerned, there is no cap on the number of children. Therefore, the Central Act would continue to apply regardless of the existence of the Fundamental Rules.

22. This Court has considered the submission of the learned counsel for the petitioner and the learned Additional Advocate General for the respondents, perused the materials placed on record and the case laws cited.

23. The issue herein having great significance touching upon the motherhood, calls for a comprehensive ruling on the subject, leaving no scope for any uncertainty in the matter. Although two learned Judges of this Court have held in favour of similar claims directing

grant of maternity benefit, not applying the two child norm, nonetheless to further improve upon and elucidate the legal position, this Court is inclined to examine the issue from a multi-dimensional perspective.

24. The first aspect of consideration is the scope and restriction that stem from the application of Rule 101(a) of the Fundamental Rules governing the Tamil Nadu Government Servants. The petitioner herein being a Government school teacher is directly governed by the above rule position. Rule 101(a) and the statutory instructions issued thereunder in para 1 is reproduced herein below.

> *"1. A competent authority may grant maternity leave on full pay to permanent married women Government servants for a period not exceeding 90 days which may spread over from the preconfinement rest to post confinement recuperation at the option of the Government servant . The maternity leave will not be admissible to married women Government servants with more than three children. Non-permanent, married women Government servants, whether appointed in a regular capacity or under the emergency provisions of the relevant service rules should take for maternity purposes, the earned leave for which they may be eligible. If however, such a Government servant is not eligible for earned leave or if the leave to her credit is less than 90 days, maternity*

leave may be granted for a period not exceeding 90 days or for the period that falls short of 90 days, as the case may be. Non-permanent married women Government servants employed under the emergency provisions should have completed one year of continuous service including leave periods, if any, to become eligible for the grant of maternity leave:

(180 days – substituted vide G.O.Ms.No.138 P & AR (FR-IV) Department, dated 19.11.2013, with effect from 16.05.2011 to 6.11.2016)

Provided that on and from the 29th June 1993, maternity leave shall be granted to a woman Government servant with less than two surviving children.

(G.O. Ms. No. 173, P & AR Department, dated 27th June 1997 with effect from 29th June 1993)

Provided further that, in the case of a woman government servant with two surviving children born as twins in the first delivery, maternity leave shall be granted for one more delivery.

(Added vide G.O.Ms.No.149, P & AR Department, dated 31.10.2018 with effect from 20.06.2018) .

25. The above instructions restrict the admissibility of the maternity leave benefit to married women government servants, having more than three children. The three child norm for entitlement of the maternity leave as prescribed in the instruction remained as such unaltered or not amended at least up to December, 2019, the last

corrected date and issued by the Government of Tamil Nadu. On behalf of the government, it has not been demonstrated that the instructions have undergone any amendment so far, adopting two child norm. In this regard, a feeble attempt has been made by the learned Additional Advocate General by referring to G.O.Ms.No.91 dated 28.07.2020, but he failed to categorically demonstrate whether amendment to the rule in this regard had taken place at all.

26. Be that as it may, it is intriguing that in 1997 an order was issued in G.O.Ms.No.173 P & AR Department dated 27th June 1997, further restricting the maternity leave benefits, applying two child norms. The GO was stated to come into force with effect from 29th June 1993. The rejection of the petitioner's claim for the maternity leave was presumably on the basis of the above said GO though the rejection letter dated 28.08.2021 mentioned the Fundamental Rule 101(a). The GO was a sequel to the policy decision taken by the Central Government to promote small family norms in the country. Originally G.O.Ms.No.237 P & AR Department dated 29.06.1993 was issued by the State Government introducing two child norm, instead of the earlier three child ceiling. As a matter of fact, in the GO, it was stated that necessary amendment to the fundamental rules will be issued separately. But what is shown before the Court is issuance of

the G.O.Ms.No.173 P&AR Department dated 27.06.1997, with effect from 29 the June 1993, presumably, the date of the original G.O.Ms.No.237 which was issued as a follow-up to the public policy adopted by the Central Government, introducing two child norm.

27. On behalf of the respondents, no material has been produced to the effect that the relevant Fundamental Rules has been amended, pursuant to the issuance of the aforementioned GOs. In the absence of any authoritative submissions forthcoming from the respondents, despite the fact that the Government was represented by the learned Additional Advocate General, this Court has to take it that the statutory instructions has not been amended till date in terms of G.O.Ms.No.237 dated 29.06.1993 and G.O.Ms.No.173 dated 27.06.1997. The restriction of two child norm could be traced only to the above said GO.

28. One other important fact needed to be taken into consideration in this regard is the enhancement of maternity leave to 270 days vide G.O.Ms.No.154 P & AR (F.R.II) dated 05.12.2017 with effect from 07.11.2016. The enhancement has been officially notified in the Gazette and corresponding amendment to the F.R. had taken place. But as far as the G.O.Ms.Nos.237 dated 29.06.1993 or

G.O.Ms.No.173 dated 27.06.1997, no amendment seemed to have been introduced in the FR. Therefore, the question raised herein is about the tenability of applying the two child norm without any amendment to the relevant FR.

29. In the above factual backdrop, this Court would embark upon analysing the relevant observations, ruling of the Courts with reference to the applicable statutory provisions and the constitutional scheme governing the field. This Court would at the outset therefore refer to the observation of the two learned Judges of this Court in those reported decisions heralding a wholesome judicial trend in the subject-matter, as under:

***J.Sharmila* (2010 SCC Online Mad 5221)**

> *"25. As held in the Air India case (cited supra), the Supreme Court had suggested an amendment to the rule. In Javed's case, the Supreme Court was only dealing with the disqualifying provisions found in the Haryana Panchayati Raj Act from contesting election. But in both judgments, the constitutional guarantee as well as non obstante clause found in the Maternity Benefit Act, 1961 were not considered. So long as the non obstante clause is found under Section 27, the constitutional obligation found under Article 42 as well as ILO norms set out above are to be the guiding factor, it is not open to the Government to deny maternity protection including paid leave as*

provided. By intruding an explanation to FR 101 by an executive instruction cannot be treated as substantial rule to deny the constitutional right of a woman Government servant as had happened in the present case."

T.Priyadharsini (2016 SCC Online Mad 30096)

"17. In this background, this Court has to consider whether the two children norm discovered and adumberated by the Government in G.O.Ms.No.237, School Education Department, dated 29.06.1993, is valid.

17.1. Executive instructions cannot replace the substantive law. If the concern of the State Government is to afford protection to the women during/at or after delivery, then the rule cannot be based upon the number of children delivered in each delivery and it should be based on the delivery itself.

17.2. The interpretation of law cannot defeat the very purpose for which the law was enacted. Therefore, the orders passed by the respondents, declining maternity leave and ordering recovery of salary paid for the eligible maternity period, have to be set-aside.

18. Unless there is a law prohibiting / restricting the number of delivery in order to have indirect control over population, then the Government cannot decline maternity leave, fixing the number of children delivered in each delivery as the basis."

30. From the above observations of the learned Judges, it is clear that two child norm introduced vide G.O.Ms.No.173 dated 27th

June 1997, is a mere executive instruction, which obviously cannot supplant any further restriction in the rule, without proper amendment to the rule. Therefore, the Court has to come to an inexorable conclusion that the basis of the rejection of the petitioner's request cannot be countenanced, as the same is without any authority of law. This Court, however, is also conscious of the fact that public policy towards achieving small family norm is to benefit the country at large, as over-population is eating into the dwindling vitals of the country. But at the same time, when a restriction is imposed on the constitutional and fundamental rights of women, no matter how valid such restriction may be, it should go through proper legal channel before it attains sanctity for its universal application. In this case, as rightly observed by the learned Judges in the above extracted paragraphs in their decisions, the rejection of the petitioner's request on the basis of the executive order does not pass the test of judicial scrutiny.

31. Be that as it may, the second aspect of consideration of this Court is that, subjects relating to population control, family planning and maternity benefits fall within the Concurrent List (List III) (Entries 20-A and 24) to Schedule VII of the Constitution. While so, in the absence of any restriction in the Central Act viz., M.B. Act, 1961, is it

open to the State Government to apply two child norm in the shared legislative field and enforce the same? The answer could be fathomed out in the following discussion. In the shared legislative field any inconsistency between the laws made by Parliament and the State Legislature, law made by Parliament will prevail. To the extent of repugnancy, the State law would be void in terms of Part XI (Chapter I) of the Constitution, particularly with reference to Article 254. Whether there is consistency or repugnancy as between Central and State Acts, it is imperative to first refer to the relevant provision of the Central enactment M.B. Act, 1961.

Section 5 read thus :

> **5. Right to payment of maternity benefits**. --
> (1) Subject to the provisions of this Act, every woman shall be entitled to, and her employer shall be liable for, the payment of maternity benefit at the rate of the average daily wage for the period of her actual absence immediately preceding and including the day of her delivery and for the six weeks immediately following that day.
> *Explanation.* – For the purpose of this sub-section, the average daily wage means the average of the woman's wages payable to her for the days on which she has worked during the period of three calendar months immediately preceding the date from which she absents herself on account of maternity, (the minimum rate of

wage fixed or revised under the Minimum Wages Act, 1948 (11 of 1948), or ten rupees, whichever is the highest).

(2) No woman shall be entitled to maternity benefit unless she has actually worked in an establishment of the employer from whom she claims maternity benefit for a period of not less than one hundred and sixty days in the twelve months immediately preceding the date of her expected delivery:

Provided that the qualifying period of one hundred and sixty days aforesaid shall not apply to a woman who has immigrated into the State of Assam and was pregnant at the time of the immigration.

Explanation: For the purpose of calculating under this sub-section the days on which a woman has actually worked in the establishment, the days for which she has been laid-off during the period of twelve months immediately preceding the date of her expected delivery shall be taken into account.

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

[Provided that the maximum period for which any woman shall be entitled to maternity benefit shall be [twenty-six weeks of which not more thaneight weeks] shall precede the date of her expected delivery:]

[Provided further that] where a woman dies during this period, the maternity benefit shall be payable only for the days up to and including the day of her death:

[Provided also that] where a woman, having been delivered of a child, dies during her delivery or during the period immediately following the date of her delivery, for which she is entitled for the maternity benefit, leaving behind in either case the child, the employer shall be liable for the maternity benefit for that entire period but if the child also dies during the said period, then, for the days up to and including the date of the death of the child].

32. The above provision which deal with the grant of maternity benefit does not impose *per se*, two child norm. It only differentiates the period of maternity benefit available to women employee with two surviving children and women having two or more than two surviving children. Despite several amendments, introduced in the year 2017 in the Act, as far as Section 5 is concerned, a restriction has been brought about by inserting a proviso under sub-clause (3) as to the entitlement of the period of maternity leave. A woman employee having less than two surviving children is entitled to the maximum period of benefit i.e. twenty six weeks and for a woman employee having two or more than two surviving children, the benefit is restricted to twelve weeks. However, no ceiling on the number of children has been imposed towards entitlement of the maternity leave per se. Even assuming on an hypothetical consideration that the relevant GOs aforementioned herein have a statutory force, to be read

as integral part of FR 101(a) and thus enforceable, the restriction of two child norm stipulated in the rule has to be declared as repugnant to the Central legislation (M.B. Act, 1961) and therefore, the same to be held, void, in terms of Article 254 of the Constitution.

33. Further, one other aspect is very crucial for consideration of this Court is Section 27 of the M.B. Act. Section 27 contains the non-obstante clause which is reproduced hereunder:

> **"27. Effect of laws and agreements inconsistent with this Act. --**
>
> (1) The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law or in the terms of any award, agreement or contract of service, whether made before or after the coming into force of this Act: Provided that where under any such award, agreement, contract of service or otherwise, a woman is entitled to benefits in respect of any matter which are more favourable to her than those to which she would be entitled under this Act, the woman shall continue to be entitled to the more favourable benefits in respect of that matter, notwithstanding that she is entitled to receive benefit in respect of other matters under this Act.
>
> (2) Nothing contained in this Act shall be construed to preclude a woman from entering into an agreement with her employer for granting her rights or privileges in

respect of any matter, which are more favourable to her than those to which she would be entitled under this Act."

34. Thus the provisions of the M.B. Act, 1961 has an overriding effect on any other law inconsistent therewith.

35. The learned Judge of this Court in ***J.Sharmila (2010 SCC Online Mad 5221)*** has also dealt with the application of Section 27 and Article 42, as well as International Labour Organization norms in the decision, particularly in paragraph 25 extracted supra. Unless or until the maternity benefits are in alignment with the scheme of M.B. Act, 1961, or such benefits are more favourable to women Government servants, neither the fundamental rules nor any government orders or instructions can be said to be enforceable. In terms of Article 51(c) of the Directive Principles, the State shall endeavour to foster respect for international law and treaty obligations in the dealings to organize people with one another.

36. The Parliament is invested with the power to make any law towards the implementation of any treaty, agreement or convention with any other country or countries or any decision made at any international conference or any other body in terms of Article 253 of

the Constitution. The learned Judge in the above decision has referred to the birth of the M.B. Act, 1961, in pursuance of the constitutional guarantee enshrined in Article 42 and also the Centre's commitment to the maternity protection in terms of convention of International Labour Organization held on 07.09.1955. The learned Judge has observed in paragraphs 12 to 18 thus:

> *"12.It was after 11 years after the Constitution was adopted, the Maternity Benefit Act, 1961 came to be enacted on 12.12.1961 to regulate the employment of women in certain establishments for certain periods before and after childbirth and to provide for maternity benefit and certain other benefits. Section 3(e) defines "establishment" to which the Act applies. After categorising certain list of industries, Section 3(e)(v) enables the Government to apply the provisions of the Act to other establishments also. Section 5 provides for right to payment of maternity benefit. Section 5(3) provides for 12 weeks payment.*
>
> *V.Object of the new Law :*
>
> *13.The Supreme Court while construing the provisions of the Act in B.Shah Vs. Labour Court and others reported in 1977 (35) FLR 414 = 1977 (4) SCC 384, interpreted the*

object which is found in paragraphs 18 and 19 which are as follows:

"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.

19. The interpretation placed by us on the phraseology of sub-sections (1) and (3) of Section 5 of the Act appears to us to be in conformity not only with the legislative intendment but also with paras 1 and 2 of Article 4 of Convention 103 concerning Maternity Protection Convention (Revised), 1952 adopted by the General Conference of the International Labour Organisation which are extracted below for facility of reference:

Article 4:

1. While absent from work on maternity leave in accordance with the provisions of

Article 3, the woman shall be entitled to receive cash and medical benefits.

2. The rates of cash benefit shall be fixed by national laws or regulations so as to ensure benefit sufficient for the full and healthy maintenance of herself and her child in accordance with a suitable standard of living."

14.The Act also provides for non obstante clause under Section 27, which reads as follows:

"27.Effect of laws and agreements inconsistent with this Act.- (1)The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law or in the terms of any award, agreement or contract of service, whether made before or after the coming into force of this Act : Provided that where any such award, agreement, contract of service or otherwise, a woman is entitled to benefits in respect of any matter which are more favourable to her than those to which she would be entitled under this Act, the woman shall continue to be entitled to the more favourable benefit in respect of that matter, notwithstanding that she is entitled to receive benefits in respect of other matters under this Act.

(2)Nothing contained in this Act shall be construed to preclude a woman from entering into an agreement with her employer for granting her rights or privileges in respect of any matter which are more favourable to her than those to which she would be entitled under this Act."

VI.Law based on International obligation :

15.The purpose for bringing this legislation after 11 years after the Constitutional guarantee was given in the form of Article 42 was because of Convention No.103 of International Labour Organisation, had guaranteed maternity protection with effect from 7.9.1955. Article 2 of Convention No.103 reads as follows:

"For the purpose of this Convention, the term "woman" means any female person, irrespective of age, nationality, race or creed, whether married or unmarried, and the term "child" means any child whether born of marriage or not." Article 4 reads as follows:

"1.While absent from work on maternity leave in accordance with the provisions of Article 3, the woman shall be entitled to receive cash and medical benefits." Recommendation No.95 reiterated the said convention.

16.Thereafter, a Commission, which was appointed during the International Women's Decade, submitted its report on National Plan of Action, 1976 identifying the areas of health, family planning, nutrition, education, employment, social welfare for formulating and implementing the action programme for women and called for action plans to improve the conditions of women in India.

17.Subsequent to the said report, a National Perspective Plan for Women for the year 1988-2000 A.D. was prepared by the Department of Women and Child Development through the Core Group set up by the Ministry of Human Resource Development. It published its report in the year 1988 and its recommendations with reference to maternity benefits. The Core Group recommended that the Maternity Benefit Act should be examined and wherever there is possibility extend it to unorganised and agricultural sectors.

VII.State Government applies brakes :

18.Therefore, when the thrust is for expanding the scope of maternity benefit, the State Government by clarification made by G.O.Ms.No.237, School Education Department, dated 29.6.1993 restricted the scope and

introduced a two children norm for the grant of maternity leave with full pay. The question is how far it is legal and constitutional?"

37. The same learned Judge in his earlier decision on the subject-matter ***N.Mohammed Mohideen [(2008) 5 MLJ 6]*** has precisely and pointedly has condensed the legal position aphoristically in paragraph 14 extracted supra. The learned Judge of this Court has rightly held that there is no provision in the M.B. Act, 1961 fixing any ceiling on the number of deliveries. The learned Judge further held that so long as Article 42 of the Constitution read with the provisions of the M.B. Act, 1961, is available, every female worker covered by the Act is entitled to claim maternity benefit without any ceiling on the number of deliveries made by them.

38. Apart from the decisions of the learned single Judge of this Court referred to above, a Division Bench decision has been cited on behalf of the petitioner rendered by the Punjab and Haryana High Court in the case of ***Ruksana.*** The High Court clarified the legal position clearly, leaving no scope for any disputation on the legal position. The Division Bench was primarily dealing with the question as to whether a woman employee can avail of the maternity leave when she already has two surviving children before joining the Government

service. The present facts of the case are exactly identical as that of the said case. The Division Bench after adverting to various decisions which has been referred supra, has finally held that the M.B. Act, 1961 nowhere restricts the benefit of maternity benefits only to two children. The Division Bench held that the note, introduced to the rule of Punjab Civil Services, was in conflict with the provisions of the M.B. Act, 1961 and ultimately held that the Act would have overriding effect. Although the High Court has held that the family planning is a part of the national public policy and the State has the right to place restrictions upon the benefits, yet in the absence of any amendment to the Act, such restriction is without the authority of law.

39. The learned Additional Advocate General has referred to the following government orders in support of the objections against grant of relief to the petitioner:

(i) G.O.Ms.No.51 dated 16.05.2011

(ii) G.O.Ms.No.105 dated 07.11.2016

(iii) G.O.Ms.No.154 dated 05.12.2017

(iv) G.O.Ms.No.77 dated 20.06.2018

(v) G.O.Ms.No.91 dated 28.07.2020.

40. The scope and application of the above mentioned GOs are

detailed hereunder.

41. The first G.O.Ms.No.51 dated 16.05.2011 was in relation to enhancing the maternity leave from 90 days to 180 days, reiterating the policy of the Government that the benefit is applicable to Government women employees with less than two surviving children. The second G.O.Ms.No.105 dated 07.11.2016 further enhanced the maternity leave from six months (180 days) to nine months (270 days). The third G.O.Ms.No.154 dated 05.12.2017 was a consequential order amending the rule (FR 101(a)) raising the maternity leave to 270 days. The fourth G.O.Ms.No.77 dated 20.06.2018 is sanctioning of the maternity benefit to a woman Government servant who has already given birth to twins in the first delivery. The last G.O.Ms.No.91 dated 28.07.2020 is in respect of extending the maternity leave benefits to non-permanent married women Government servants appointed on regular capacity and under emergency provisions. The said GO is stated to have brought in the amendment to Rule 101(a) by including the above two categories of women servants for conferment of the benefits. In that context, proviso has been inserted, incorporating the two child norm in the rule (F.R.101(a)).

43. The expression found in G.O.Ms.No.91 dated 28.07.2020 is

to the effect of extending maternity leave benefits to non-permanent married women Government servants for which suitable amendment has been introduced in the FR. In the references, strangely, neither G.O.Ms.No.237 P&AR Department dated 29.06.1993 nor G.O.Ms.No.173 P &AR Department, dated 27th June 1997, did find a place. The correct position as to whether the two child norm prescribed in the above said GO has been incorporated in the FR by due amendment or not has not been clarified. On behalf of the respondent, no amended rule has been produced before this Court. In any event, as concluded above, regardless of any amendment to the FR the legal position remain unaltered. First, the rule providing cap on the number of children for entitlement of maternity benefit is repugnant to the Central enactment (M.B. Act, 1961) and therefore the same is void. Second, two surviving children must mean a children in lawful custody of the mother on a purposive and harmonious reading of the provision.

44. The last aspect of consideration is thus whether the claim of the petitioner herein, even otherwise can be said to fall within the framework of the Fundamental Rule 101(a) read with the provisions of the M.B. Act, 1961 on a harmonious reading of both the enactments? The importance of maternity has been highlighted by none other than Maria Montessori, a physician turned educator who introduced child

friendly pedagogy in schools for the overall development of children. In whose name schools have been established all over the world with innovative method of teaching children. She has said about maternity as follows:-

> *"The respect and protection of woman and of maternity should be raised to the position of an inalienable social duty and should become one of the principles of human morality."*

45. According to the averments in the affidavit filed in support of the writ petition, divorce petition at the instance of the petitioner in FCHMOP No.153 of 2016 before the Family Court, Dharmapuri was allowed on 20.03.2017, dissolving the first marriage of the petitioner with one Mr.A.Suresh. The divorce granted by the Family Court has become final, as according to the petitioner, the appeal in C.M.A.No.1437 of 2017, filed before this Court by the husband had been withdrawn by him, subsequently. It is also averred in the affidavit that during the family court proceedings and also subsequent to the grant of divorce, the custody of the two children born from the first wedlock remained with the father.

46. The above facts being not controverted, point to the reality

that the petitioner is not having the custody of children born from the first wedlock, as on date. When the provisions of both the M.B. Act, 1961 and the Fundamental Rules speak about not more than two or three surviving children, as the case may be, the rule of construction ought to be oriented towards advancing the object, spirit and purpose of the Act/Rules. More particularly, with reference to the expression used in the provision of Section 5(3) of the M.B. Act, 1961 that maximum period of entitlement of maternity leave benefit for a woman having two or more than two surviving children must mean that the mother having children in her custody, literally and factually.

47. When Fundamental Rules or GOs provide maternity benefit and restrict such benefit to a woman Government servant with two surviving children only, such stipulation must receive meaningful, beneficial and liberal interpretation. In a case like the present one, the scheme of the Fundamental Rules on the aspect of providing the maternity benefit and the M.B. Act, 1961, must be harmoniously read conjunctively together to extend the benefit as far as possible and not to deny the same by obscure and hazy understanding of the spirit of the Act and the Rules. The semantic construct of the expression "having surviving children" must be taken to mean that the woman Government servant seeking the benefit must have custody of the

children. The thrust therefore must be towards grant of the benefit by liberal interpretation than to withhold the benefit on the pedantic construct of the provisions.

48. As a matter of fact, the Government itself has issued G.O.Ms.No.77 dated 20.06.2018 wherein the maternity benefit has been extended to second delivery, even if a woman Government servant had given birth to twins in the first delivery. The Government therefore recognized such extreme cases and the circumstances and this is one of the peculiar cases wherein as a fallout of divorce from the first marriage, the petitioner had to part with the custody of her two children born from the first wedlock. Therefore, in the entirety of the facts and circumstances of the case, it cannot be, today, said that the petitioner is having two surviving children at all. In these circumstances, a purposive and meaningful reading of the provisions and its implementation is a constitutional obligation cast upon the authorities, considering the peculiar and singular facts and the circumstances of the case. The Court therefore holds that the petitioner is deemed to have not having two surviving children, inviting disqualification for claiming the maternity benefit.

49. On behalf of the respondents, two decisions have been cited,

the relevant portions have already been extracted supra. As regards the reliance placed on the decision of the Division Bench of this Court rendered in ***M.Asiya Begum*** is concerned, as rightly contended by the learned counsel for the petitioner, it was a a case relating to application of Central Civil Services Leave Rules. The Division Bench adverting to the rule position therein, has held that the Government servant therein was not entitled for the grant of maternity benefit in respect of the third child. The Division Bench decision and the ruling ought to be confined only to the rules that governed the service conditions of the employee therein. Such ruling rendered on the framework of the Central Government rules cannot be stated to be applicable or binding on the claim of the petitioner herein, as admittedly, the petitioner herein is governed by a state statute. On the other hand, the ruling of the learned two Judges of this Court as aforementioned, has dealt with the same Fundamental Rules applicable to the State Government employees and held that the two children ceiling cannot be applied in their cases.

50. As far as the Kerala High Court judgment is concerned, that was a decision rendered on a different factual matrix and the consideration was also not germane to the present examination of this Court. As could be seen in paragraph 20 of the said judgment, which

has been extracted in the earlier part of the order, the consideration therein was, whether the woman employee concerned was entitled to 12 weeks or the maximum benefit of 26 weeks of maternity leave, in terms of Section 5(3) of the M.B. Act, 1961. The fact in that case was the employee had given birth to twins in her first delivery and for the next delivery, she sought maximum maternity benefit (26 weeks). In that context, the Court held that there was nothing wrong in placing restrictions on the benefits applicable to those having more than two children. The Court has eventually ruled that instead of the full period of 26 weeks of maternity leave, paid leave granted to the employee for a period of 12 weeks was in order. In the said circumstances, the decision of the Kerala High Court cannot be said to have any application on the controversy herein.

51. This Court has also extracted the relevant portions of the ruling of the Hon'ble Supreme Court and this Court wherein the country being a signatory to the convention relating to women empowerment and implementation of benefits relating to labour laws, is constitutionally bound to give effect to the commitments made to international conventions. The M.B. Act, 1961, was the result of the above commitment and it was also a constitutional imperative in tune with the Directive Principles of the State Policy as embedded in Articles

39 and 42 of the Constitution. When the Central Act (M.B. Act, 1961) is stated to be in furtherance of the Directive Principles of the State Policy as contained in the Constitution of India, any executive orders, circulars or subordinate legislation or even the State law which is not in consonance with the Central enactment will have to be read down to give a constitutional thrust and purpose in terms of the Central enactment. As long as the Central enactment has not placed any restrictions on the number of children for the purpose of availing maternity benefits, no other rule or regulations can put any fetters on such claim.

52. Lastly, the Court was informed that recently, the Government has issued G.O.Ms.No.84, Human Resources Management (FR-III) Department, dated 23.08.2021, further enhancing the maternity leave from 9 months (270 days) to 12 months (365 days). This Court is appreciative of the State Government's studied sensitivity towards the motherhood and its deep understanding of the importance of wholesome rearing and fostering of new born child. Maximizing the maternity benefit under the said GO is a reflection of sublime concern of the Government towards the well being of its women employees. The enhanced benefit under the said GO is protected in terms of Section 27(2) of the M.B. Act, 1961, even though, the Central Act is

lagging behind on this aspect.

53. For all the above said reasons, this Court finds that the rejection of the petitioner's claim for grant of maternity benefits cannot be countenanced in law and therefore, the impugned proceedings passed by the third respondent in Na.Ka.No.3763/E1/ 2021 dated 28.08.2021 is hereby set aside.

54. Consequently, the respondents are directed to sanction maternity leave to the petitioner for the period from 11.10.2021 till 10.10.2022 as admissible in terms of the latest G.O.Ms.No.84, Personnel and Administrative Reforms (FR.III) Department, dated 23.08.2021.

55. The respondents are directed to pass appropriate orders in this regard within a period of two weeks from the date of receipt of a copy of this order.

56. The writ petition is allowed. There will be no order as to costs. Consequently, W.M.P.No.23291 of 2021 is closed.

25.03.2022

Index: Yes/no
tar

To

1 The Chief Secretary to Government
Fort St George, Chennai- 600 009.

2 The Principal Secretary to Government
Human Resources Management Department
(Earlier Known as Personnel and
Administrative Reforms Department)
Fort St.George, Chennai 9

3 The Chief Educational Officer
School Educational Department
Dharmapuri District- 636 701.

4 The Headmaster
Government Higher Secondary School
P.Gollapatti, Pennagaram Taluk
Dharmapuri District- 636 809.

V.PARTHIBAN, J.

(tar)

P.D. Order in

W.P. No.22075 of 2021

25.03.2022