CHAPTER TWELVE

PREGNANCY, MATERNITY AND CHILD CARE LEAVE, AND EMPLOYMENT

This chapter concerns equality and non-discrimination in employment in the context of pregnancy and child care. The Indian Constitution guarantees women a right to work,[1] as well as equality of opportunity in relation to public employment.[2] It prohibits the State from discriminating against any citizen on the grounds of sex, including in matters relating to public employment.[3] The constitutional guarantee of equality has been interpreted to prohibit pregnancy-based discrimination.[4] Further, Articles 39(e), 42 and 45 provide that the State should direct its policies towards securing the health of workers, ensuring just and humane conditions of work including maternity relief, and providing for early childhood care and education for children below six years.

In consonance with the Directive Principles of State Policy, Parliament has enacted the Maternity Benefits Act 1961 (MB Act 1961) to regulate women's employment during pregnancy, as well as maternity benefits.[5] *Inter alia*, this law secures a woman's right to pregnancy and maternity leave, protects her wages during that time, and requires the employer to provide onsite child care facilities and nursing breaks to female employees.

In addition to the MB Act 1961, rules relating to the pregnancy of employees are governed by the Central Civil Services (Leave) Rules for employees of the Central Government, State Civil Services Rules for employees of the various state civil services, the specific service rules of other public employers and corporations, and employment contracts of various employers.

Despite this constitutional and legislative framework, women often face discriminatory treatment on grounds of pregnancy or childbirth and have approached the courts seeking redressal on issues of:

- Pregnancy Discrimination
- Maternity and Child Care Leave
- Loss of Seniority

Pregnancy Discrimination

In ***Air India v. Nergesh Meerza***,[6] air hostesses working for Air India and Indian Airlines challenged the constitutionality of employment regulations that provided for employment termination on first pregnancy. The Supreme Court struck down this regulatory requirement as being arbitrary and unreasonable, and thus in violation of Article 14 of the Indian Constitution. Instead, the Court endorsed an amendment that in effect would require retirement of airhostesses with two living children on their third pregnancy and noted that such amendment would be in the interest of women's health and the national family planning program. Recently, in ***Navtej Johar v. Union of India***,[7] Chandrachud J. in his concurring opinion, questioned the correctness of this decision. *Inter alia*, he criticized the Court's approach of placing the entire burden of family planning and upbringing of children on women as a violation of their constitutional guarantee against non-discrimination on grounds of sex under Article 15 since it reinforces stereotypical gender norms.

Along similar lines, the Kerala High Court in ***Neetu Bala v. Union of India***,[8] held that denial of employment to women solely on grounds of pregnancy was arbitrary and illegal and thus violative of Articles 14, 16 and 42 of the Indian Constitution. It further stated that such discrimination would amount to negation of India's obligations under the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), International Labour Organization's Maternity Protection Convention and the Universal Declaration of Human Rights (UDHR). In this case, the petitioner had challenged the State's decision to deny her appointment to the Short Service Commission only on account of her pregnancy. Likewise, in ***S. Amudha v. Chairman, Neyveli Lignite Corporation***,[9] the Madras High Court invalidated employment regulations that termed women with pregnancy of more than four months as "temporarily unfit" for employment, regardless of the nature of work to be performed by them. Citing this rule, the respondent had sought to defer the appointment of the petitioner in this case, till after childbirth. The Court held that such a restriction violates Articles 14 and 21 of the Indian Constitution.

In ***Neera Mathur v. Life Insurance Corporation of India***,[10] a female employee was dismissed from service on account of her failure to correctly declare her last date of menstruation and the existence of her pregnancy on her employment declaration form at the time of joining the service. She approached the Supreme Court on the grounds that her right to equality guaranteed under Article 14 of the Indian Constitution had been violated by the arbitrary order of discharge. The Supreme Court set aside the discharge order stating that the declaration required in the form was embarrassing, humiliating and a violation of the employee's modesty and self-respect. The Court recommended deletion of such requirements from the declaration form and indicated that attempts to evade provision of maternity benefits to a female candidate by not hiring her if she is pregnant would be open to a constitutional challenge.

Maternity and Child Care Leave

In ***Municipal Corporation of Delhi v. Female Workers (Muster Roll)***,[11] female employees who had been working for years as daily wage employees with the Municipal Corporation of Delhi were denied maternity leave because they were classified as temporary workers. The Supreme Court struck down this practice. Relying on fundamental rights enshrined in Articles 14 and 15, the Directive Principles of State Policy reflected in Articles 39, 42 and 43 of the Indian Constitution and India's international law obligations under Article 11 of Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Court held that regardless of the nature of their duties, their avocation and the place where they work, all female workers must be provided the facilities to which they are entitled under the MB Act 1961. It also stated that India's obligations under Article 11 of CEDAW should be read into the employment contract between the Corporation and the Muster Roll workers.

Similarly, the Delhi High Court in ***Seema Gupta v. Guru Nanak Institute Management***,[12] held that provisions providing for maternity benefits under the employment and service regulations should be construed in the light of Articles 15, 41 and 42 of the Indian Constitution and the obligations under UDHR and CEDAW. It stated that the case of an employee seeking extension of her maternity leave in line with employment regulations is not to be construed as a traditional case of enforcement of contract of service but an exercise of her fundamental rights.

Recognizing that workplaces often do not pay adequate attention to family care giving responsibilities, and that in a patriarchal society such a working environment serves "overwhelmingly to suit men", the Kerala High Court in ***Mini K.T. v. Life Insurance Corporation of India***[13] held that any action taken against a woman employee for her absence from duty on account of such familial obligations would be an affront to her status, dignity and self-respect protected under Article 21, and guarantees of equality and non-discrimination in matters of employment under Articles 14 to 16 of the Indian Constitution.

With the advent of surrogacy, an issue that has come up repeatedly before courts is the entitlement of commissioning mothers to maternity leave. In ***K. Kalaiselvi v. Chennai Port Trust***,[14] the Madras High Court held that as is the case with an adoptive mother, even a woman employee who has a child through a surrogacy arrangement is entitled to maternity leave. The Bombay High Court reiterated this position in ***Hema Vijay Menon v. State of Maharashtra***.[15] This judgment also recognised the right to motherhood and right of every child to full development under Article 21 of the Indian Constitution. In ***P. Geetha v. Kerala Livestock Development Board Limited***,[16] the Kerala High Court clarified that a commissioning mother is entitled only to post-natal statutory benefits that accrue to an employee who herself delivers a child. On the other hand, the Delhi High Court in ***Rama Pandey v. Union of India***,[17] held that a commissioning mother is entitled to maternity leave not only in the post-natal period but also in the pre-natal period as she might be required to financially, emotionally and physically support the surrogate through her presence during her pregnancy. Noting that the applicable Central Civil Service (Leave) Rules did not define the term "maternity," the Court held that "maternity" is established once a pregnancy is conceived, even if in a womb other than that of the commissioning mother.

The Maternity Benefits (Amendment) Act, 2017 now clarifies this issue, by expressly providing 12 weeks of maternity leave to commissioning and adoptive mothers from the date on which the child is handed over to them.[18] A commissioning mother is defined in the Act as a woman whose own egg is used to create the embryo that is implanted in the surrogate.[19] Hence, for commissioning mothers who use donor eggs to create the embryo, the principles mentioned in the cases above may still apply, rather than the statutory protections under the Maternity Benefits (Amendment) Act, 2017. Likewise, for other types of benefits, relaxations or exemptions, etc., the distinctions made in these cases may be of relevance.

In ***T. Priyadharsini v. The Secretary to Government, Department of School Education, Government of Tamil Nadu***,[20] the Madras High Court was approached by two women government teachers, who had delivered twins in their first pregnancy, and were now being denied maternity leave for their second pregnancy on the ground that they already had two surviving children. The Court struck down the Government Orders based on which maternity leave was denied to the

petitioners on the ground that maternity leave could not be denied on the basis of executive fiat alone. In the absence of any legislative authorization to restrict maternity leave based on the number of children, the Court held that a woman is entitled maternity leave per delivery and not per child, since the intention behind providing maternity leave is to provide protection to women during/after delivery.[21]

Loss of Seniority

The issue of loss of seniority arose before the Delhi High Court in ***Bilju A.T. v. Union of India***,[22] where some officers of the Central Reserve Police Force could not take promotional courses on time because they were pregnant and therefore not considered medically fit for the training involved in the promotional course. However, they were not offered any other promotional courses for over two years after they were declared medically fit post their pregnancies. The Court held that such denial of the opportunity to take promotional courses immediately after becoming medically fit post-pregnancy, and consequent denial of promotion, was discriminatory under Articles 14, 15 and 16 of the Indian Constitution, and hence unconstitutional.

Along similar lines, in another case before the Delhi High Court, ***Inspector (Mahila) Ravina v. Union of India***,[23] the petitioner, an inspector with the Central Police Reserve Force, was due for promotion but could not complete a mandatory pre-promotional course as she was pregnant at the time when the course was offered. She completed the next course that was offered after her pregnancy was over and was accordingly promoted. However, she was denied restoration of seniority *vis-à-vis* her other colleagues who had completed the first pre-promotional course on the grounds that she had lost her seniority because of her "unwillingness" to attend the first pre-promotional course. The Court held that pregnancy does not amount to unwillingness to attend the course and that penalising a woman for her pregnancy and forcing her to choose between her career and child violated her rights to reproduction guaranteed under Article 21 of the Indian Constitution and her right to non-discrimination in public employment under Articles 14, 15 (1), 16 (1) and 16 (2) of the Indian Constitution.

Related Human Rights Standards and Jurisprudence

Below is a selection of human rights standards and jurisprudence relating to state obligations to ensure the rights of women and girls to protection from discrimination in the workplace, including direct and indirect discrimination related to reproductive health, pregnancy, childbirth, and maternity leave. Human rights mechanisms have outlined that states must work to eradicate structural discrimination based on stereotyped roles for women and men and should ensure women's right to equal wages, merit-based promotions free from discrimination, social security, and a healthy and safe working environment.

The Government of India has committed itself to comply with obligations under various international human rights treaties to protect sexual and reproductive health and rights. These include the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW), the International Covenant on Civil and Political Rights (ICCPR), and the Convention on the Rights of the Child (CRC).[24] Under international law all government organs and authorities, including the judiciary, are obligated to uphold the laws and standards outlined in these treaties.[25] The Supreme Court has held that in light of the obligation to "foster respect for international law" in Article 51 (c) of the Indian Constitution "[a]ny International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into [fundamental rights] to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee."[26]

INTERNATIONAL TREATY STANDARDS

TREATIES

- **CEDAW, Articles 1–5, 10–12, 13(1), 16(e)** (prohibiting discrimination against women, including by requiring states to eliminate stereotypes of the roles of men and women; noting that protections for maternity are not discriminatory and requiring states to "ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children"; guaranteeing women's rights to equal education, employment and promotion opportunities, to job security, vocational training, and benefits, to equal pay, paid leave and

social security, and to healthy and safe working conditions, including the safeguarding of the function of reproduction; requiring states to ensure the provision of maternity and family protections and benefits at work, including by prohibiting dismissal on the basis of pregnancy, maternity or marital status, introducing paid maternity leave without loss of seniority, and providing necessary supportive services such as childcare; protecting women's rights to health, to determine the number and spacing of children, and to equality irrespective of marital status; and specifying that the state must "ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation").

- **ICESCR**, **Articles 2(2), 3, 6–10(2), 12** (prohibiting discrimination based on sex or other status; guaranteeing the rights to social security and insurance and to health; providing for special protection for mothers "during a reasonable period before and after childbirth," during which working mothers should receive paid leave or social security benefits; and protecting the right to gain a living by work and to work under just, favourable, safe and healthy conditions, which include fair and non-discriminatory wages and working conditions for women and men as well as the right to the opportunity for promotion based solely on seniority and competence).
- **ICCPR, Articles 2(1), 3, 8, 17, 23(1), 23(4), 26** (prohibiting discrimination on the basis of sex or other status; and protecting the rights to life and privacy, to found a family, to equality between spouses, and to freedom from servitude, slavery and compulsory labour).
- **CRC**, **Articles 24(2)(a), 24(2)(d)–(f)** (outlining that States must ensure appropriate pre-natal and post-natal health care).

SELECTED GENERAL COMMENTS

- **Committee for Economic, Social and Cultural Rights (CESCR), *General Comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the ICESCR),*** U.N. Doc. E/C.12/GC/23 (2016), paras. 6, 9, 17, 26, 30-33, 36, 38, 42, 44, 47(a), (f)-(g) and (j), 53, 55, 61-62, 65, 78 (outlining that to ensure the right to just and favourable conditions of work, states must, *inter alia*, provide for paid maternity, paternity, parental and family leave as well as pregnancy and maternity protections; that the right to healthy and safe working conditions includes consideration for pregnancy-related health risks and women's hygiene needs; that measures to reconcile work and family responsibilities are required as part of the obligation to ensure equal opportunity for promotion and that such measures should not reinforce stereotypes about men's and women's roles in the family; that "[w]orkers benefiting from gender-specific measures should not be penalized in other areas"; and maternity, pregnancy and other protections for women in non-traditional workplaces, such as domestic, part-time, and self-employed work).
- **CESCR, *General Comment No. 22 (2016) on the right to sexual and reproductive health,*** U.N. Doc. E/C.12/GC/22 (2016), paras. 7, 9, 27, 48 (outlining that states must ensure the provision of maternity protections and parental leave in employment, including by prohibiting discrimination based on pregnancy, childbirth, or parenthood; and obliging states to eliminate social misconceptions and prejudices concerning menstruation, pregnancy and fertility).
- **CESCR, *General Comment No. 19: The right to social security (article 9 of the ICESCR),*** U.N. Doc. E/C.12/GC/19 (2008), paras. 2, 13, 18-19, 29, 32, 59, 62 (outlining that social security must be available, adequate, and accessible without discrimination and that it must cover, *inter alia*, health, family, and maternity benefits; specifying that medical benefits should cover perinatal, childbirth and postnatal care, and that paid maternity leave should be granted to all, including those involved in atypical work; highlighting the International Labour Organization recommendation that maternity leave cover not less than 14 weeks; and prescribing that state social security schemes should take account of factors that disadvantage women such as intermittent participation in the workforce due to family and child-rearing responsibilities, unequal wage outcomes, and differences in men and women's average life expectancy).
- **CESCR, *General Comment No. 18: The Right to Work (article 6 of the ICESCR),*** U.N. Doc. E/C.12/GC/18 (2006), paras. 13, 23, 26, 44 (underlining that in ensuring the equal right of men and women to work, pregnancies must not constitute an obstacle to employment or justification for loss of employment; and that states must combat discrimination and ensure equal access and opportunities to work, economic resources, and vocational training).

- **CESCR,** ***General Comment No. 16 (2005): The equal right of men and women to the enjoyment of all economic, social and cultural rights (article 3 of the ICESCR),*** U.N. Doc. E/C.12/2005/4 (2005), paras. 11-13, 23-26, 29 (requiring states to promote the reconciliation of work and family responsibilities, including through policies providing for care of children and dependent family members; to ensure that women receive equal benefits under pension schemes as well as adequate maternity leave; and to guarantee men and women equal access to all occupations, jobs at all levels, and vocational training and guidance).
- **CESCR,** ***General Comment No. 14: The Right to the Highest Attainable Standard of Health (article 12 of the ICESCR),*** U.N. Doc. E/C.12/2000/4 (2000), paras. 14-15, 20-21, 44(a), 51-52 (outlining that states must regulate employers to protect the right to health of workers, on a basis of equality between men and women; and must take a gender-sensitive approach to health including taking measures to improve maternal health).
- **Human Rights Committee,** ***General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women),*** U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000), paras. 20, 31 (requiring states to prohibit discrimination by employers, including private actors, such as required pregnancy tests for female job candidates).
- **CEDAW Committee,** ***General Recommendation No. 29 on Article 16 of the Convention on the Elimination of All Forms of Discrimination against Women (Economic consequences of marriage, family relations and their dissolution),*** U.N. Doc. CEDAW/C/GC/29 (2013), para. 8 ("[A] substantive equality approach must address matters such as discrimination in education and employment, the compatibility of work requirements and family needs, and the impact of gender stereotypes and gender roles on women's economic capacity.")
- **CEDAW Committee,** ***General Recommendation No. 26 on women migrant workers,*** U.N. Doc. CEDAW/C/2009/WP.1/R (2008), paras. 17-19, 24(a) and (d), 26(b) and (e)-(g), 27 (outlining the duties of countries of origin and destination to protect women migrant workers' right to health).
- **CEDAW Committee,** ***General Recommendation No. 24: Article 12 of the Convention (women and health),*** U.N. Doc. A/54/38/Rev.1, chap. I (1999), para. 28 (linking women's right to health with the right to healthy and safe working conditions, including the safeguarding of reproductive function, special protection from harmful types of work during pregnancy, and the provision of paid maternity leave).

INQUIRIES AND INDIVIDUAL COMPLAINTS

- **CEDAW Committee,** ***Medvedeva* v. *Russia,*** **Comm. No. 60/2013**, U.N. Doc. CEDAW/C/63/D/60/2013 (2016), paras. 11.2-11.4, 11.7, 13 (where laws banned women from working certain jobs because they might interfere with reproductive capacity: holding that such laws reflect detrimental stereotypes about women and that the State must make jobs safe for both men and women, accounting for biological differences).
- **CEDAW Committee,** ***Elisabeth de Blok et al. v. The Netherlands,*** **Comm. No. 36/2012**, U.N. Doc. CEDAW/C/57/D/36/2012 (2014), paras. 8.1-9 (holding that the abolition of an existing public maternity leave scheme, without establishing an adequate alternative scheme to cover maternity leave for self-employed women, constituted direct sex and gender-based discrimination in violation of the state obligation to introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances).

UNITED NATIONS HUMAN RIGHTS EXPERT AND WORKING GROUP REPORTS

- **Working Group on the issue of discrimination against women in law and in practice,** ***Report of the Working Group on the issue of discrimination against women in law and in practice, Thematic report,*** U.N. Doc. A/HRC/26/39 (2014), paras. 81-97 (highlighting that economic and social inequality of women is perpetuated by workplace discrimination in hiring, firing and workplace treatment of pregnant women and mothers, unequal caretaking burdens, and negative stereotyping of mothers and also fathers who care for children; outlining that effective measures are required to guarantee women's employment security during pregnancy and after birth; and recommending that maternity leave should be extended to self-employed women and women in the informal economy and paid through social insurance or public funds to help prevent employers from discriminating against women to avoid maternity leave costs).

- **Working Group on the issue of human rights and transnational corporations and other business enterprises, *Annex: Gender guidance for the Guiding Principles on Business and Human Rights,*** U.N. Doc. A/HRC/41/43 (2019), paras. 1-2, 7, 8(e)-(f), 11, 12(b), 21, 22(a) and (i) (outlining that states must address, including through temporary special measures, root causes of discriminatory power structures that operate against women; recommending that state-owned or –controlled businesses as well as private sector government contractors should protect the sexual and reproductive health and rights of women, including by addressing pregnancy- and maternity/paternity-based discrimination and the gender pay gap).
- **Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover,*** U.N. Doc. A/HRC/20/15 (2012), paras. 13-16, 18-19, 47-48, 60(a) (recognizing state responsibility to extend occupational health protections to workers in the informal economy, with special attention to gendered "biological and socio-cultural factors [that] play a significant role in influencing the health of men and women").
- **Special Rapporteur on violence against women, its causes and consequences, *Violence against women, its causes and consequences: Note by the Secretary-General,*** U.N. Doc. A/69/368 (2014), para. 34 (outlining that many forms of gender-based violence, including sexual harassment, prevent women from realizing their right to work or to enjoy just and favourable conditions of work without discrimination, including safe and healthy working conditions, fair and equal remuneration, free choice of profession and employment and non-discrimination on grounds of marriage or maternity).

SELECTED REGIONAL CASE LAW

EUROPEAN COURT OF HUMAN RIGHTS

- ***Emel Boyraz v. Turkey,* Application no. 61960/08 (2014)**, paras. 44-45, 48-56, 74-75 (where a woman had been fired from her job as a security officer because she was not a man and had not completed military service: outlining that the job's security risks and physical requirements did not justify any difference in treatment between men and women, and that the domestic courts' reliance on gender-based stereotypes violated the rights to non-discrimination in private and family life and to a fair trial).
- ***García Mateos v. Spain,* Application no. 38285/09 (2013)**, paras. 42-49 (where an employee requested and was refused the ability to work reduced hours in order to care for her young son, and she never received reparation or compensation from the subsequent legal judgment in her favour, which found that the employer had discriminated on the basis of sex: finding a breach of her right to non-discrimination in conjunction with the right to access justice).

RELEVANT EXCERPTS FROM SELECT CASE LAW

(Arranged chronologically)

IN THE SUPREME COURT OF INDIA

Air India v. Nergesh Meerza & Ors.
(1981) 4 SCC 335
S. Murtaza Fazal Ali, A. Varadarajan and A.N. Sen, JJ.

Air hostesses working for Air India and Indian Airlines were terminated from service on their first pregnancy as per their employment regulations. They filed writ petitions in the Supreme Court challenging the constitutional validity of these regulations arguing, inter alia, that these regulations violated their right to equality and non-discrimination under Articles 14, 15(1) and 16(2) of the Indian Constitution. The Court examined whether the regulations requiring air hostesses to retire on first pregnancy were arbitrary and unconstitutional.

Fazal Ali, J.: "… For the purpose of brevity, the various petitions, orders, rules, etc. shall be referred to as follows:

"(1) Air India as 'AI'

(2) Indian Airlines Corporation as 'IAC'

(3) Statutory regulations made under the Air Corporations Act, 1953 (27 of 1953) by Air India or the Indian Airlines Corporation would be referred to as 'AI Regulation' and 'IAC Regulation' respectively.

(4) Nergesh Meerza & Others as 'petitioners'.

(5) Declaration by the Central Government under Equal Remuneration Act as 'Declaration' and Equal Remuneration Act, 1976 as '1976 Act'.

(6) Air Corporation Act of 1953 as '1953 Act'.

(7) Justice Khosla Award as 'Khosla Award' and Justice Mahesh Chandra Award as 'Mahesh Award'.

(8) Assistant Flight Pursers as 'AFPs'

(9) Air Hostess as 'AH' and Air Hostesses as 'AHs'.

(10) Air India Cabin Crew as 'AI Crew' and Indian Airlines Corporation Cabin Crew as 'IAC Crew'.

(11) Flight Steward as "FS".

…

12. … [B]y virtue of a notification published in the Gazette of India on 12-4-1980 in Part III, Section 4, Para 3 of the amended Regulation 12 was further amended thus:

> "An Air Hostess shall retire from the service of the Corporation upon attaining the age of 35 years or on marriage if it takes place within four years of service or on first pregnancy, whichever occurs earlier."

…

14. … [A]n AH under AI was retired from service in the following contingencies:

(*1*) on attaining the age of 35 years,

(*2*) on marriage if it took place within 4 years of the service, and

(*3*) on first pregnancy.

…

18. Mr Atul Setalvad appearing for the AHs in Transfer Case No. 3 of 1981 has submitted some important and interesting points of law which may be summarised as follows:

> …
>
> (*4*) The termination of the services of AHs on the ground of pregnancy or marriage within four years is manifestly unreasonable and wholly arbitrary and violative of Article 14 of the Constitution and should, therefore, be struck down.
>
> ….

19. For the aforesaid reasons, it was contended that Regulations 46 and 47 of Air India Employees' Service Regulations and Regulation No. 12 of the Indian Airlines (Flying Crew) Service Regulations must be struck down as being discriminatory and ultra vires.

…

21. In answer to the contentions raised by Mr Setalvad and the counsel who followed him, Mr Nariman appearing for AI and Mr G.B. Pai for the IAC, adumbrated the following propositions:

> "…
>
> (*4*) Having regard to the circumstances prevailing in India and the effects of marriage, the bar of pregnancy and marriage is undoubtedly a reasonable restriction placed in public interest.
>
> (*5*) If the bar of marriage or pregnancy is removed, it will lead to huge practical difficulties as a result of which very heavy expenditure would have to be incurred by the Corporations to make arrangements for substitutes of the working AHs during their absence for a long period necessitated by pregnancy or domestic needs resulting from marriage.
>
> (*6*) The court should take into consideration the practical aspects of the matter which demonstrate the fact that a large number of AHs do not stick to the service but leave the same well before the age of retirement fixed under the Regulation."

…

62. In the same token, an additional argument advanced by Mr Setalvad was that certain terms and conditions of AHs were palpably discriminatory and violative of Article 14. For instance, under the Regulations concerned, AHs suffered from three important disabilities — (*1*) their services were terminated on first pregnancy, (*2*) they were not allowed to marry within four years from the date of their entry into service, and (*3*) the age of retirement of AHs was 35 years, extendable to 45 years at the option of the Managing Director, as against the retirement age of AFPs who retired at the age of 55 or 58 years. There can be no doubt that these peculiar conditions do form part of the Regulations governing AHs but once we have held that AHs form a separate category with different and separate incidents the circumstances pointed out by the petitioners cannot amount to discrimination so as to violate Article 14 of the Constitution on this ground. There is no complaint by the petitioners that between the separate class of AHs inter se there has been any discrimination regarding any matter. …

…

64. Coming now to the next limb of the argument of Mr Setalvad that even if there is no discrimination inter se between AHs, the conditions referred to above are so unreasonable and arbitrary that they violate Article 14 and must, therefore, be struck down, we feel that the argument merits serious consideration. Before, however, we deal with the various aspects of this argument, we might mention an important argument put forward by the Corporation that the class of AHs is a sex-based recruitment and, therefore, any discrimination made in their service conditions has not been made on the ground of sex only but due to a lot of other considerations also. Mr Setalvad tried to rebut this argument by contending that the real discrimination is based on the basis of sex which is sought to be smoke-screened by giving a halo of circumstances other than sex…

…

68. …[W]hat Articles 15(1) and 16(2) prohibit is that discrimination should not be made only and only on the ground of sex. These articles of the Constitution do not prohibit the State from making discrimination on the ground of sex coupled with other considerations. On this point, the matter is no longer res Integra but is covered by several authorities of this Court. In *Yusuf Abdul Aziz* v. *State of Bombay and Husseinbhoy Laljee* [AIR 1954 SC 321 : 1954 SCR 930] sex was held to be a permissible classification. …

…

70. For these reasons, therefore, the argument of Mr Setalvad that the conditions of service with regard to retirement, etc. amount to discrimination on the ground of sex only is overruled and it is held that the conditions of service indicated above are not violative of Article 16 on this ground.

71. This brings us now to the next limb of the argument of Mr Setalvad which pertains to the question as to whether and not the conditions imposed on the AHs regarding their retirement and termination are manifestly unreasonable or absolutely arbitrary. We might mention here that even though the conditions mentioned above may not be violative of Article 14 on the ground of discrimination but if it is proved to our satisfaction that the conditions laid down are entirely unreasonable and absolutely arbitrary, then the provisions will have to be struck down.

…

79. We now proceed to determine the constitutional validity of the impugned Regulations. …

80. A perusal of the Regulations shows that the normal age of retirement of an AH is 35 years, or on marriage, if it takes place within four years of service, or on first pregnancy whichever occurs earlier. Leaving the age of retirement for the time being, let us examine the constitutional validity of the other two conditions viz. termination if marriage takes place within four years or on first pregnancy. So far as the question of marriage within four years is concerned, we do not think that the provisions suffer from any constitutional infirmity. According to the Regulations an AH starts her career between the age of 19 to 26 years. Most of the AHs are not only SCC which is the minimum qualification but possess even higher qualifications and there are very few who decide to marry immediately after entering the service. Thus, the Regulation permits an AH to marry at the age of 23 if she has joined the service at the age of 19 which is by all standards a very sound and salutary provision. Apart from improving the health of the employee, it helps a good deal in the promotion and boosting up of our family planning programme. Secondly, if a woman marries near about the age of 20 to 23 years, she becomes fully mature and there is every chance of such a marriage proving a success, all things being equal. Thirdly, it has been rightly pointed out to us by the Corporation that if the bar of marriage within four years of service is removed then the Corporation will have to incur huge expenditure in recruiting additional AHs either on a temporary or on ad hoc basis to replace the working AHs if they conceive and any period short of four years would be too little a time for the Corporation to phase out such an ambitious plan.

81. Having regard to these circumstances, we are unable to find any unreasonableness or arbitrariness in the provisions of the Regulations which necessitate that the AHs should not marry within four years of the service failing which their services will have to be terminated. Mr Setalvad submitted that such a bar on marriage is an outrage on the dignity of the fair sex and is per se unreasonable. Though the argument of Mr Setalvad is extremely attractive but having taken into consideration an overall picture of the situation and the difficulties of both the parties, we are unable to find any constitutional infirmity or any element of arbitrariness in the aforesaid provisions. The argument of Mr Setalvad as also those who followed him on this point is, therefore, overruled.

82. Coming now to the second limb of the provisions according to which the services of AHs would stand terminated on first pregnancy, we find ourselves in complete agreement with the argument of Mr Setalvad that this is a most unreasonable and arbitrary provision which shocks the conscience of the Court. The Regulation does not prohibit marriage after four years and if an AH after having fulfilled the first condition becomes pregnant, there is no reason why pregnancy should stand in the way of her continuing in service. The Corporations represented to us that pregnancy leads to a number of complications and to medical disabilities which may stand in the efficient discharge of the duties by the AHs. It was said that even in the early stage of pregnancy some ladies are prone to get sick due to air pressure, nausea in long flights and such other technical factors. This, however, appears to be purely an artificial argument because once a married woman is allowed to continue in service then under the provisions of the Maternity Benefit Act, 1961 and the Maharashtra Maternity Rules, 1965 (these apply to both the Corporations as their Head Offices are at Bombay), she is entitled to certain benefits including maternity leave. In case, however, the Corporations feel that pregnancy from the very beginning may come in the way of the discharge of the duties by some of the AHs, they could be given maternity leave for

a period of 14 to 16 months and in the meanwhile there could be no difficulty in the Management making arrangements on a temporary or ad hoc basis by employing additional AHs. We are also unable to understand the argument of the Corporation that a woman after bearing children becomes weak in physique or in her constitution. There is neither any legal nor medical authority for this bald proposition. Having taken the AH in service and after having utilised her services for four years, to terminate her service by the Management if she becomes pregnant amounts to compelling the poor AH not to have any children and thus interfere with and divert the ordinary course of human nature. It seems to us that the termination of the services of an AH under such circumstances is not only a callous and cruel act but an open insult to Indian womanhood — the most sacrosanct and cherished institution. We are constrained to observe that such a course of action is extremely detestable and abhorrent to the notions of a civilised society. Apart from being grossly unethical, it smacks of a deep rooted sense of utter selfishness at the cost of all human values. Such a provision, therefore, is not only manifestly unreasonable and arbitrary but contains the quality of unfairness and exhibits naked despotism and is, therefore, clearly violative of Article 14 of the Constitution. In fact, as a very fair and conscientious counsel Mr Nariman realised the inherent weakness and the apparent absurdity of the aforesaid impugned provisions and in the course of his arguments he stated that he had been able to persuade the Management to amend the Rules so as to delete "first pregnancy" as a ground for termination of the service and would see that suitable amendments are made to Regulation 46 (*i*)(*c*) in the following manner:

> "*(a)* Regulation 46*(i)(c)* will be amended so as to substitute for the words 'or on first pregnancy', the words 'or on a third pregnancy'.
>
> *(b)* There will be a suitably framed Regulation to provide for the above and for the following:
>
> (*i*) An air hostess having reason to believe that she is pregnant will intimate this to Air India and will also elect in writing within a reasonable time whether or not to continue in service."
>
> (*ii*) If such air hostess elects to continue in service on pregnancy, she shall take leave from service for a period not later than that commencing from 90 days after conception and will be entitled to resume service only after confinement (or premature termination of pregnancy) and after she is certified by the Medical Officer of Air India as being fit for resuming her duties as an air hostess after delivery or confinement or prior termination of pregnancy. The said entire period will be treated as leave without pay subject to the air hostess being entitled to maternity leave with pay as in the case of other female employees and privilege leave under the Regulations.
>
> (*iii*) Every such air hostess will submit to an annual medical examination by the Medical Officer of Air India for certification of continued physical fitness or such other specifications of health and physical condition as may be prescribed by AIR INDIA in this behalf in the interest of maintenance of efficiency.
>
> (*iv*) It will be clarified that the provisions relating to continuance in service on pregnancy will only be available to married women — an unmarried woman on first pregnancy will have to retire from service."

83. The proposed amendment seems to us to be quite reasonable but the decision of this case cannot await the amendment which may or may not be made. We would, therefore, have to give our decision regarding the constitutional validity of the said provision. Moreover, clause (*b*)(*iv*) above, which is the proposed amendment, also suffers from the infirmity that if an unmarried woman conceives then her service would be terminated on first pregnancy. This provision also appears to us to be wholly unreasonable because apart from being revolting to all sacred human values, it fails to take into consideration cases where a woman becomes a victim of rape or other circumstances resulting in pregnancy by force or fraud for reasons beyond the control of the woman and having gone through such a harrowing experience she has to face termination of service for no fault of hers. Furthermore, the distinction of first pregnancy of a married woman and that of an unmarried woman does not have any reasonable or rational basis and cannot be supported.

84. In *General Electric Company v. Martha V. Gilbert* [50 L Ed 2d 343 : 429 US 125 (1976)] although the majority of the Judges of the U.S. Supreme Court were of the opinion that exclusion of pregnancy did not constitute any sex discrimination in violation of Title VII nor did it amount to gender-based discrimination; three judges, namely Brennan, Marshall and Stevens, JJ. dissented from this view and held that the pregnancy disability exclusion amounted to downgrading women's role in labour force. The counsel for the Corporation relied on the majority judgments of

Rehnquist, Burger, Stewart, White and Powell, JJ. while the petitioners relied strongly on the dissenting opinion. We are inclined to accept the dissenting opinion which seems to take a more reasonable and rational view. Brennan, J. with whom Marshall, J. agreed, observed as follows:

> "(1) the record as to the history of the employer's practices showed that the pregnancy disability exclusion stemmed from a policy that purposefully downgraded women's role in the labour force, rather than from gender-neutral risk assignment considerations."

85. Stevens, J. while endorsing the view of Brennan, J. observed thus:

> "The case presented only a question of statutory construction, and the employer's rule placed the risk of absence caused by pregnancy in a class by itself, thus violating the statute as discriminating on the basis of sex, since it was the capacity to become pregnant which primarily differentiated the female from the male."

86. In the instant case, if the Corporation has permitted the AHs to marry after the expiry of four years then the decision to terminate the services on first pregnancy seems to be wholly inconsistent and incongruous with the concession given to the AHs by allowing them to marry. Moreover, the provision itself is so outrageous that it makes a mockery of doing justice to the AHs on the imaginative plea that pregnancy will result in a number of complications which can easily be avoided as pointed out by us earlier. Mr Setalvad cited a number of decisions of the U.S. Supreme Court on the question of sex but most of these decisions may not be relevant because they are on the question of denial of equality of opportunity. In view of our finding, however, that AHs form a separate class from the category consisting of AFPs, these authorities would have no application particularly in view of the fact that there is some difference between Articles 14, 15 and 16 of our Constitution and the due process clause and the 14th Amendment of the American Constitution. This Court has held that the provisions of the American Constitution cannot always be applied to Indian conditions or to the provisions of our Constitution. While some of the principles adumbrated by the American decisions may provide a useful guide yet this Court did not favour a close adherence to those principles while applying the same to the provisions of our Constitution, because the social conditions in this country are different. …

…

88. At any rate, we shall refer only to those authorities which deal with pregnancy as amounting to per se discriminatory or arbitrary. In *Cleveland Board of Education v. Jo Carol La Fleur* [39 L Ed 2d 52 : 414 US 632 (1974)] the U.S. Supreme Court made the following observations:

> "As long as the teachers are required to give substantial advance notice of their condition, the choice of firm dates later in pregnancy would serve the board's objectives just as well, while imposing a far lesser burden on the women's exercise of constitutionally protected freedom.
>
> * * *
>
> While it might be easier for the school boards to conclusively presume that all pregnant women are unfit to teach past the fourth or fifth month or even the first month, of pregnancy, administrative convenience alone is insufficient to make valid what otherwise is a violation of due process of law. The Fourteenth Amendment requires the school boards to employ alternative administrative means, which do not so broadly infringe upon basic constitutional liberty, in support of their legitimate goals....
>
> While the regulations no doubt represent a good-faith attempt to achieve a laudable goal, they cannot pass muster under the due process clause of the Fourteenth Amendment, because they employ irrebuttable presumptions that unduly penalize a female teacher for deciding to bear a child."

89. The observations made by the U.S. Supreme Court regarding the teachers fully apply to the case of the pregnant AHs. In *Sharron A. Frontiero v. Elliot L. Richardson* [36 L Ed 2d 583 : 411 US 677 (1973)] the following observations were made:

> "Moreover, since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility."

90. What is said about the fair sex by the Judges fully applies to a pregnant woman because pregnancy also is not a disability but one of the natural consequences of marriage and is an immutable characteristic of married life. Any distinction, therefore, made on the ground of pregnancy cannot but be held to be extremely arbitrary.

91. In *Mary Ann Turner v. Department of Employment Security* [46 L Ed 2d 181 : 423 US 44 (1975)] the U.S. Supreme Court severely criticised the maternity leave rules which required a teacher to quit her job several months before the expected child. In this connection the Court observed as follows:

> "The Court held that a school board's mandatory maternity leave rule which required a teacher to quit her job several months before the expected birth of her child and prohibited her return to work until three months after childbirth violated the Fourteenth Amendment... the Constitution required a more individualised approach to the question of the teacher's physical capacity to continue her employment during pregnancy and resume her duties after childbirth since 'the ability of any particular pregnant woman to continue at work past any fixed time in her pregnancy is very much an individual matter,
>
> It cannot be doubted that a substantial number of women are fully capable of working well into their last trimester of pregnancy and resuming employment shortly after childbirth....
>
> We conclude that the Utah unemployment compensation statute's incorporation of a conclusive presumption of incapacity during so long a period before and after childbirth is constitutionally invalid under the principles of the La Fleur case."

92. We fully endorse the observations made by the U.S. Supreme Court which, in our opinion, aptly apply to the facts of the present case. By making pregnancy a bar to continuance in service of an AH the Corporation seems to have made an individualised approach to a woman's physical capacity to continue her employment even after pregnancy which undoubtedly is a most unreasonable approach.

93. Similarly, very pregnant observations were made by the U.S. Supreme Court in *City of Los Angeles, Department of Water & Power v. Marie Manhart* [55 L Ed 2d 657 : 435 US 702 (1978)] thus:

> "It is now well recognized that employment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of males or females. Myths and purely habitual assumptions about a woman's inability to perform certain kinds of work are no longer acceptable reasons for refusing to employ qualified individuals, or for paying them less... The question, therefore, is whether the existence or non-existence of 'discrimination' is to be determined by comparison of class characteristics or individual characteristics. A 'stereotyped' answer to that question may not be the same as the answer that the language and purpose of the statute command.
>
> * * *
>
> Even if the statutory language were less clear, the basic policy of the statute requires that we focus on fairness to individuals rather than fairness to classes. Practices that classify employees in terms of religion, race, or sex tend to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals."

94. These observations also apply to the bar contained in the impugned regulation against continuance of service after pregnancy. In *Bombay Labour Union v. International Franchises Pvt. Ltd.* [(1966) 2 SCR 493 : (1966) 1 LLJ 417 : 28 FJR 233] this Court while dealing with a rule barring married women from working in a particular concern expressed views almost similar to the views taken by the U.S. Supreme Court in the decisions referred to above. In that case a particular rule required that unmarried women were to give up service on marriage — a rule which existed in the Regulations of the Corporation also but appears to have been deleted now. In criticising the validity of this rule this Court observed as follows [(1966) 2 SCR 493 : (1966) 1 LLJ 417 : 28 FJR 233] :

> "We are not impressed by these reasons for retaining a rule of this kind. Nor do we think that because the work has to be done as a team it cannot be done by married women. We also feel that there is nothing to show that married women would necessarily be more likely to be absent than unmarried women or widows. If it is the presence of children which may be said to account for

> greater absenteeism among married women, that would be so more or less in the case of widows with children also. The fact that the work has got to be done as a team and presence of all those workmen is necessary, is in our opinion no disqualification so far as married women are concerned. It cannot be disputed that even unmarried women or widows are entitled to such leave as the respondents rules provide and they would be availing themselves of these leave facilities."

95. These observations apply with equal force to the bar of pregnancy contained in the impugned Regulation.

96. It was suggested by one of the Corporations that after a woman becomes pregnant and bears children there may be lot of difficulties in her resuming service, the reason being that her husband may not permit her to work as an AH. These reasons, however, do not appeal to us because such circumstances can also exist even without pregnancy in the case of a married woman and if a married woman leaves the job, the Corporation will have to make arrangements for a substitute. Moreover, whether the woman after bearing children would continue in service or would find it difficult to look after the children is her personal matter and a problem which affects the AH concerned and the Corporation has nothing to do with the same. These are circumstances which happen in the normal course of business and cannot be helped. Suppose an AH dies or becomes incapacitated, it is manifest that the Corporation will have to make alternative arrangements for her substitute. In these circumstances, therefore, we are satisfied that the reasons given for imposing the bar are neither logical nor convincing.

97. In view of our recent decision explaining the scope of Article 14, it has been held that any arbitrary or unreasonable action or provision made by the State cannot be upheld. In *Dwarka Prasad Laxmi Narain v. State of Uttar Pradesh* [AIR 1954 SC 224 : 1954 SCR 803] this Court made the following observations:

> "Legislation, which arbitrarily or excessively invades the right, cannot be said to contain the quality of reasonableness, and unless it strikes a proper balance between the freedom guaranteed under Article 19(1)(*g*) and the social control permitted by clause (6) of Article 19, it must be held to be wanting in reasonableness."

98. In *Maneka Gandhi v. Union of India* [(1978) 1 SCC 248 : AIR 1978 SC 597 : (1978) 2 SCR 621] Beg, C.J. observed as follows: (SCC p. 400, para 217)

> "The view I have taken above proceeds on the assumption that there are inherent or natural human rights of the individual recognised by and embodied in our Constitution.... If either the reason sanctioned by the law is absent, or the procedure followed in arriving at the conclusion that such a reason exists is unreasonable, the order having the effect of deprivation or restriction must be quashed."

and Bhagwati, J. observed thus:

> "Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits.... Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence.... It must be 'right and just and fair' and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied."

99. In an earlier case in *E.P. Royappa v. State of Tamil Nadu* [(1974) 4 SCC 3 : 1974 SCC (L&S) 165 : (1974) 2 SCR 348 : (1974) 1 LLJ 172 : 1974 Lab IC 427] similar observations were made by this Court thus:

> "In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic, while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14."

100. In *State of Andhra Pradesh v. Nalla Raja Reddy* [AIR 1967 SC 1458 : (1967) 3 SCR 28] this Court made the following observations:

> "Official arbitrariness is more subversive of the doctrine of equality than statutory discrimination. In respect of a statutory discrimination one knows where he stands, but the wand of official arbitrariness can be waved in all directions indiscriminately."

The impugned provisions appear to us to be a clear case of official arbitrariness. As the impugned part of the regulation is severable from the rest of the regulation, it is not necessary for us to strike down the entire Regulation.

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.

…

121. So far as the case of AHs employed by IAC is concerned, the same reasons which we have detailed in the case of AHs employed by AI would apply with slight modifications which we shall indicate hereafter. …

…

126. So far as the age of retirement and termination of service on first pregnancy is concerned a short history of the Rules made by the IAC may be given. Regulation 12, as it stood may be extracted thus:

> "Flying Crew shall be retained in the service of the Corporation only for so long as they remain medically fit for flying duties.... Further, an Air Hostess shall retire from the service of Corporation on her attaining the age of thirty years or when she gets married whichever is earlier. An unmarried Air Hostess may, however, in the interest of the Corporation be retained in the service of the Corporation up to the age of 35 years with the approval of the General Manager."

127. It is obvious that under this Rule an AH had to retire at the age of 30 years or when she got married and an unmarried AH could continue up to 35 years. The Rule was obviously unjust and discriminatory and was therefore amended by a Notification published in the Gazette of India dated July 13, 1968. The amended rule ran thus:

> "An Air Hostess shall retire from the service of the Corporation on her attaining the age of 30 years or when she gets married, whichever is earlier. The General Manager, may, however, retain in the service an unmarried Air Hostess up to the age of 35 years."

128. This amendment continued the bar of marriage but gave discretion to the General Manager to retain an unmarried AH up to 35 years. In order, however, to bring the provision in line with the AI Regulation, the IAC Regulation was further amended by a Notification dated April 12, 1980 published in Part III, Section 4, Gazette of India by which para 3 of Regulation 12 was substituted thus:

> "An Air Hostess shall retire from the service of the Corporation upon attaining the age of 35 years or on marriage if it takes place within four years of service or on first pregnancy, whichever occurs earlier."

…

130. …the Notification as also the Rules suffer from two serious constitutional infirmities which are present in the case of Regulation 46 framed by the AI The clauses regarding retirement and pregnancy will have to be held as unconstitutional and therefore struck down. …

…"

IN THE HIGH COURT OF MADRAS

S. Amudha v. Chairman, Neyveli Lignite Corporation
1989 SCC OnLine Mad 234
S. Mohan, O.C.J. and S. Ramalingam, J.

The petitioner had been employed as a contract worker earning daily wage, by the respondent. As a result of previous litigation, the respondent sought to regularize the services of contract workers. The petitioner was called to appear for selection to the regular post, but was denied appointment on grounds of her pregnancy of more than four months. The respondent cited relevant employment rules under which a woman who was more than four months pregnant would be declared temporarily unfit for employment and her appointment would be deferred till after she gave birth. The petitioner challenged her non-selection only on the ground that she was pregnant as violative of Articles 14, 15 and 21 of the Indian Constitution. A single judge ruled in favour of the respondents. The present writ appeal was filed against this order.

Mohan, O.C.J.: "The short facts leading to the writ appeal are as follows :

1. The appellant herein is a B.Sc, Chemistry graduate of the University of Madras and she secured second class in the annual examination. She got married to one Mr. Palanivelu in the year 1979. Presently she is the mother of two daughters and she was in the family way by four months at the time of filing the writ petition.

2. The appellant was entertained as a Junior Chemist on and from 1-1-1986 on contract basis and Babu Engineering Corporation was given the contract pertaining to chemical test of soil, clay, water, oil and metal within the precincts of the Neyveli Lignite Corporation Ltd., Neyveli. Though the work involving chemical test by the chemist is necessarily throughout the year, the management of the Neyveli Lignite Corporation Ltd. extracted the work from the Chemists numbering about forty through Babu Engineering Corporation who paid at the rate of Rs. 10 per day to each chemist and in that capacity, the appellant worked for about three years.

3. The appellant filed W.P. 3920 of 1988 against the respondent to regularise her services and to abolish the contract labour system and the said writ petition has been admitted by this Court.

…

6. The appellant was asked to fill up a pro forma in order to appoint her as a Junior Chemist. In column No. 7, the appellant had categorically stated that she was having CARD (Centre for Applied Research and Development) for entry into the Centre for Applied Research and Development wing of the respondent. She had in fact worked as junior Chemist from 1-1-1986, to 28-12-1988, and even today she is working as a casual contract labourer on a daily wage of Rs. 15. Her duty involved chemical test of articles and her name has also been registered in the local Employment Exchange.

7. The appellant was called for an interview for selection as Junior Chemist on 11-2-1989 by a communication dated 28-1-1989. However, that interview did not take place and it was postponed. Therefore, by another communication dated 18-3-1989, the appellant was asked to attend the interview to be held on 4-4-1989. By a communication dated 14-5-1989, she was asked to appear before the Medical Officer of the respondent—Industrial Medical Officer, on 19-5-1989. On that date, about forty persons were medically examined. By another communication dated 29-5-1989 she was asked to appear before the Industrial Medical Officer on 2-6-1989. Accordingly, she appeared. Though appointment orders were issued to all the thirty-nine persons who were working along with the appellant under the contract labour system, the appellant alone was singled out. When the appellant approached the respondent, she was informed that she was in the family way carrying a child of sixteen weeks. Thereupon, the appellant and her husband met Mr. Mani Iyer, Mr Krishnan and others and the appellant was informed that the appointment order will be issued only after the appellant giving birth to the child and that too after a period of three months from the date of birth of the child.

8. On 4-6-1989, the appellant issued a lawyer's notice detailing all the facts. She informed the respondent Corporation that she had worked as Junior Chemist during her second pregnancy till the eve of giving birth to the child, that she was prepared to work in the same manner and that she will not claim any monetary benefits by reason of her pregnancy if the respondent Corporation objects to the same. For this no reply was sent by the respondent. It is under these circumstances, the writ petition was filed alleging that her non-selection only on the ground that she was in the family way by sixteen weeks is violative of Art, 14, 15 and 21 of the Constitution of India. At no point of time, the appellant was let known about this temporary unfitness. In so far as there is no stipulation when the application was made that a pregnant

woman cannot be considered, that ground cannot prevail. The appellant would also be entitled to the benefits under the Maternity Benefit Act, 1961. When there is no physical hindrance while the appellant was working under the contract labour system, pregnancy cannot be a ground even to temporarily disqualify her.

9. A counter affidavit was filed on behalf of the Neyveli Lignite Corporation wherein it is stated that the Medical Officer of the Corporation had a discretion to declare a person temporarily unfit in terms of R. 8 of the Medical Benefit Rules. Regulation 21 of the Medical Examination Rules states that "the duration of pregnancy, if any, should be recorded in case of female candidates. The women in advanced stages of pregnancy should be deemed to be temporarily unfit. For this purpose, pregnancy of four months and over may be taken as advanced stage of pregnancy." Such a clause is not peculiar to the respondent Corporation. Other major public Sector Undertakings like Bharat Heavy Electricals Ltd, and the National Thermal Power Corporation also follow similar pattern. The Medical Officer alone is competent to declare the physical fitness of a candidate. The other contentions of the appellant are untenable.

10. The matter came up before our learned brother, Baktavatsalam, J. The learned Judge was of the view that the court cannot issue a writ as prayed for since the Medical Officer alone was competent to say whether a person was physically fit for appointment or not. The Court cannot sit in appeal over such a decision. The learned Judge dismissed the writ petition for mandamus. It is against this order, the present writ appeal has been filed.

11. Mr. Prakash, learned counsel for the appellant, would urge that such a Regulation based on pregnancy is violative of Art. 14 of the Constitution of India. Further, in so far as the Regulation does not classify the category of services, it could arbitrarily be applied and therefore it suffers from the vice of arbitrariness, as well. Looked at from the point of view of Art. 21 of the Constitution, the appellant has a right to life. Such a life does not mean a mechanical one, but based on personal freedom. In the case of a woman, certainly she has every freedom to have a child and the Constitutional right cannot be taken away by a regulation of this character. The right to beget children is a very valuable right… Learned counsel submitted that if the working of the appellant under a contract labour is not hazardous, the same could be so if she is obliged to work under the Corporation as well. Therefore, this cannot be a valid ground at all. Lastly it is submitted that the Maternity Benefit Act. 1961 itself has not thought of medical unfitness for a pregnancy of 16 weeks old and the Regulation in question cannot exceed a parliamentary legislation and lay down a prescription which cannot be supported even from the medical point of view.

12. Mr. R. Krishnaswami, learned counsel for the respondent after referring to the Regulations states that this is one conceived in the interest of the employees themselves. Further, such a regulation requiring medical examination at the time of the first appointment is not peculiar. Such regulations are there in police organisation as well. Where the work is of a hazardous nature, it becomes necessary for the employer to lay down such a condition like this. In any event, as the counter affidavit states, this is only a temporary unfitness. After the delivery of the child, the appellant is entitled to join and her seniority will not in any way be interfered with. This position has been fully clarified in the counter affidavit filed in the writ appeal.

13. Having regard to the above submissions made on both sides, the only question that arises for our consideration is, whether the regulation in question in relation to medical examination of a female candidate is violative of any of the provisions of the Constitution and is therefore liable to be struck down. We will now straightway, extract the said regulation as under :—

> "R. 21: The duration of pregnancy, if any, should be recorded in case of female candidates. The woman in advanced stages of pregnancy should be deemed to be temporarily unfit. For this purpose, pregnancy of four months and over may be taken as advanced stage of pregnancy."

14. It is admitted that the appellant was interviewed and she was also selected. However, her selection was withheld on the only ground that she was in the family way by 16 weeks. The counter affidavit filed in the writ appeal in paragraphs 6 and 7 states as follows :—

> "She was in the advanced stage of pregnancy as per rules in force of the respondent company and she was temporarily disqualified from joining duty immediately. She was also advised to report before the Medical Committee after six weeks of confinement. It is also submitted that the appellant is not likely to loose any benefit such as seniority, etc., and as the seniority would be reckoned based upon her position in the selection panel as recommended by the committee. Orders were issued to 19 outside general candidates out of which the appellant's position is 16 in order of merit as recommended by the selection committee. It is submitted that her position is 16 out of the 19

> outside general candidates issued with the offer of appointment (*sic)* will hold good notwithstanding her joining later than the candidates whose place in the panel are below her. The notional seniority for the appellant would be maintained. The only loss that the appellant has to suffer is the loss of wages for the period during which she was not employed and this is inevitable because of the rules in force. She is not actually working during that period.

It is further submitted that the area of work where the appellant has to work as Junior Chemist will be either CARD (Centre for Applied Research) or Fertilizer, B & C factory. In all these areas, a Junior Chemist has to handle chemicals and has to be exposed to the different chemicals and gases which are likely to endanger the health of a pregnant lady. While a normal person can withstand these hazards, a lady carrying the baby is quite likely to be affected by exposure to these elements and which may endanger the life of the child or result in miscarriage. This statement is based upon the medical opinion."

15. We may at once state that we are not in a position to accept what is stated in paragraph 7 of the counter because this was not the stand taken by the respondent before the learned single Judge and this is an ingenious attempt by the respondent to defeat the claim of the appellant. In this connection it should be remembered that the appellant was working as a contract labourer in the very post for which she was selected and the post has not been considered as one involving health hazard, If the ground of 'health hazard' has not been pressed into service when the appellant was working under the contract labour, how could the same be projected at the time of her permanent appointment? We find great difficulty in accepting this argument, and therefore, the rejection of the claim of the appellant for appointment on the ground of 'health hazard' is not sustainable. Regarding the argument that such 'temporary unfitness' is not anything peculiar to the respondent Corporation, but is also there in similar public sector Corporations like Bharat Heavy Electricals Ltd, and National Thermal Power Corporation, we would refer to a passage occurring at page 166 of Swamy's Complete Manual on Establishment and Administration. The passage reads as under:

> "Employment of women candidates in a state of pregnancy—
>
> (a) For appointment against posts carrying hazardous nature of duties—Where a pregnant woman candidate is to be appointed against a post carrying hazardous nature of duties, e g, in Police Organisations, etc., and she has to complete a period of training as a condition of service and who as a result of tests is found to be pregnant of twelve weeks standing or over shall be declared temporarily unfit and her appointment held in abeyance until the confinement is over.
>
> She should be re-examined for a fitness certificate six weeks after the date of confinement, subject to the production of medical certificate of fitness from a registered medical practitioner. The vacancy against which the woman candidate was selected should be kept reserved for her. If she is found fit, she may be appointed to the post kept reserved for her and allowed the benefit of seniority in accordance with para 4 of Annexure to MHA O.M. No. 9/11/55—R.S. dated the 22nd December, 1959.
>
> (b) For appointments against posts which do not prescribe any elaborate training.—it shall no longer be necessary to declare a woman candidate 'compulsorily unfit' if she is found to be pregnant during medical examination before appointment against posts which do not prescribe any elaborate training, i.e, she can be appointed straightway on the job."

16. The question now is, whether there could be a prescription of this type in the light of the fundamental rights conferred under Art. 21 of the Constitution of India. That Article reads as follows :—

> "Art. 21. No person shall be deprived of his life or personal liberty except according to procedure established by law."

'Life' in this article cannot be considered to be a mechanical one. It is attendant with all that is required to make the life blossom and all enjoyment within the permissible limits of law. Here is the case of a married woman. If she chooses to have a child, can the State or an authority like the respondent corporation impose itself and curtail this life or the personal freedom of the appellant? In this connection, we find the various American decisions relied on by the learned counsel for the appellant throw a good deal of light.

…

24. …The right to personal life and liberty enshrined in Art. 21 of the Constitution must receive its full scope and meaning and therefore the resolution of this character would be violative of Art. 21…

25. …What we want to emphasise here is a State within the meaning of Art. 12 of the Constitution wanting to interfere with the free married life. So long as the right to beget a child is considered to be a fundamental right on which we have not the slightest doubt, such a regulation must be held to be not only archaic, but also opposed to even civilised life.

26. An attempt was made to call the restriction as 'temporary unfitness' and that she could join duty after the birth of the child. On this aspect of the matter, we have already extracted paragraphs 6 and 7 of the counter affidavit. This stand, to our mind, appears to be a ruse, to get over a difficult situation. The maintaining of the original seniority and her obtaining the proper place is poor consolation indeed. As the respondent himself has categorically stated, she will have to suffer the loss of wages for the period during which she was not in employment. Who is to compensate her for the loss of money? Does it not mean deprivation of livelihood which is a fundamental right contemplated under Art. 21 of the Constitution? In these days of acute unemployment, to deprive a woman of her right to earn in spite of her selection is something which we cannot appreciate at all. To say that she is temporarily unfit is something which cannot stand scrutiny from the medical point of view. It is not an uncommon sight in India to see a woman in advanced stages of pregnancy working in agricultural fields, on roads or even in mines where there is every risk. Yet, they dare work, compelled by poverty and by the dire necessity of life.

…

28. The Regulation since so far as it does not classify the category of services, and it is made applicable to all services whether a stenographer or an assistant doing desk work, undoubtedly suffers from the vice of arbitrariness. Therefore, it is violative of Art. 14 of the Constitution as well.

29. To our mind, conclusion, we would only say that what this Regulation wants to perpetuate is: 'Bachelors, wives and old maid's children are always perfect'. Let it be remembered that where children are, there is the golden age. One begets children not merely to keep up the race, but to enlarge our hearts and make us unselfish and full of kindly sympathies and affections, to give our souls higher aims, to call out all our faculties to extended enterprise and exertion and to bring round our fireside a bright faces, happy smiles, and loving, tender hearts. If this is sought to be deprived by the Regulation in question what hesitation there could be in declaring the same to be violative of the fundamental rights guaranteed under Art. 21, as well as Art. 14 of the Constitution?

30. In the result, the order of the learned Judge is set aside and the appeal will stand allowed with cost. Counsel's fee Rs. 1000."

IN THE SUPREME COURT OF INDIA

Mrs. Neera Mathur v. Life Insurance Corporation of India & Anr.
(1992) 1 SCC 286
K. Jagannatha Shetty and Yogeshwar Dayal, JJ.

The petitioner challenged her termination from employment for going on maternity leave during the initial probation period of six months. While no reasons were given by the respondent for the termination, in Court it was argued that the petitioner was discharged inter alia on the ground that she had not correctly stated her last date of menstruation on the employee declaration form, while joining the employment. The Supreme Court discussed whether the respondent's request for information regarding menstruation on the employee declaration form was appropriate.

Shetty, J.: " …

2. When we are moving forward to achieve the constitutional guarantee of equal rights for women the Life Insurance Corporation of India seems to be not moving beyond the status quo. The case on hand illustrates this typical attitude of the Corporation.

3. The petitioner applied for the post of Assistant in the Life Insurance Corporation of India ("the Corporation")…She was successful in both the tests. She was asked to fill a declaration form which she did and submitted to the Corporation on May 25, 1989. On the same day, she was also examined by a lady doctor and found medically fit for the job. The doctor who examined the petitioner was in the approved panel of the Corporation.

4. …After successful completion of the training she was given an appointment letter dated September 25, 1989…She was put on probation for a period of 6 months. She was entitled to be confirmed in the service subject to satisfactory work report.

5. The petitioner took leave from December 9, 1989 till March 8, 1990. In fact, she applied for maternity leave on December 27, 1989 followed by medical certificate dated January 6, 1990. She was admitted to the Nursing Home of Dr Hira Lal on January 10, 1990. She delivered a full-term baby on January 11, 1990. She was discharged from Nursing Home on January 19, 1990.

6. On February 13, 1990, the petitioner was discharged from the service. It was during the period of her probation. It would appear from the order of discharge that no ground was assigned in it and it seems to be a discharge simpliciter. The petitioner moved the High Court under Article 226 of the Constitution challenging that order on the ground that it was not a discharge simpliciter but based on some discrepancy in the declaration made by her before joining the service. The Corporation in the counter resisted the case stating that the petitioner's work was not satisfactory and as such under the terms of the appointment she was discharged without notice and without assigning any reason. The High Court refused to interfere with the termination. The High Court observed that the petitioner's work during the period of probation was found to be not satisfactory.

7. The petitioner has now appealed to this Court. When the appeal was listed for preliminary hearing this Court issued notice for final disposal and made an order as follows:

> "The facts of the case compel us to issue an interim mandamus directing the respondents to put the petitioner back to service and we accordingly issue a direction to the respondent to reinstate the petitioner within 15 days from the date of receipt of this order.

8. The Corporation upon service has filed the counter seeking to justify the termination of the petitioner's services. It has been stated that the Corporation discharged the service of the petitioner while she was still a probationer. At the time of discontinuing her services as a probationer, no reasons were given and it was an order of discharge simpliciter. No stigma was imputed to the petitioner. The petitioner was on leave from December 9, 1989 till March 8, 1990. The petitioner had deliberately withheld to mention the fact of being in the family way at the time of filling up the declaration form before medical examination for fitness…This was revealed later when she informed the Corporation that she had given birth to a daughter.

9. The Corporation also made reference to the terms of the declaration as filled in by the petitioner on May 25, 1989:

> "6. To be filled in by female candidates only in the presence of the Medical Examiner:
>
> (*a*) Are you married — Yes.
>
> (*b*) If so, please state:
>
> (*i*) Your husband's name in full and occupation.
>
> Mr Pradeep Mathur, Law Officer, Central Pollution Control Board, Nehru Place, New Delhi.
>
> (*ii*) State the number of children, if any, and their present ages: One daughter: 1 year and 6 months.
>
> (*iii*) Have the menstrual periods always been regular and painless, and are they so now? … Yes.
>
> (*iv*) How many conceptions have taken place?
>
> How many have gone full-term? One.
>
> (*v*) State the date of last menstruation: … April 29, 1989.
>
> (*vi*) Are you pregnant now? … No.
>
> (*vii*) State the date of last delivery: November 14, 1987.
>
> (*viii*) Have you had any abortion or miscarriage? … No."

10. It was further alleged in the counter-affidavit that the declaration given by the petitioner was false to the knowledge of the petitioner inasmuch as, as per her own averment she had delivered a full term baby on January 11, 1990. The petitioner to her own knowledge, could not have had a menstruation cycle on April 29, 1989 as stated by her in the declaration on May 25, 1989. Dr S.K. Gupta, M.D., of Dr Hira Lal Child and Maternity Home, where the petitioner was admitted for delivery has certified that the petitioner had LMP on April 3, 1989…[T]he decision to discharge the petitioner from the service of the Corporation was on 2 grounds: (1) because of a false declaration given by her at the very initial stage of her service; and (2) her work during the period of probation was not satisfactory.

11. Reference was also made to the Instruction 16 issued by the Corporation as to the medical examination for recruitment of class III and class IV staff. Clause 16 of the Instructions reads as under:

> "16. *Medical Examination*.— No person shall be appointed to the services of the Corporation unless he/she has been certified to be of sound constitution and medically fit for discharging his/her duties. The certificates in the form given in Annexure IX should be from a doctor, duly authorised for the purpose by the Appointing Authority. If at the time of medical examination, any lady applicant is found to be pregnant, her appointment to the Corporation shall be considered three months after the delivery. This would be subject to a further medical examination at the candidate's cost and subject to the ranking list continuing to be valid."

12. We have examined the matter carefully. We have nothing on record to indicate that the petitioner's work during the period of probation was not satisfactory. Indeed, the reason for termination seems to be different. It was the declaration given by her at the stage of entering the service. It is said that she gave a false declaration regarding the last menstruation period with a view to suppress her pregnancy.

13. It seems to us that the petitioner cannot be blamed in this case. She was medically examined by the doctor who was in the panel approved by the Corporation. She was found medically fit to join the post. The real mischief though unintended is about the nature of the declaration required from a lady candidate. The particulars to be furnished under columns (*iii*) to (*viii*) in the declaration are indeed embarrassing if not humiliating. The modesty and self-respect may perhaps preclude the disclosure of such personal problems like whether her menstrual period is regular or painless, the number of conceptions taken place; how many have gone full term etc. The Corporation would do well to delete such columns in the declaration. If the purpose of the declaration is to deny the maternity leave and benefits to a lady candidate who is pregnant at the time of entering the service (the legality of which we express no opinion since not challenged), the Corporation could subject her to medical examination including the pregnancy test.

14. In the circumstances the interim order already issued is made absolute…"

IN THE SUPREME COURT OF INDIA

Municipal Corporation of Delhi v. Female Workers (Muster Roll) & Anr.
(2000) 3 SCC 224
S. Saghir Ahmad and D.P. Wadhwa, JJ.

The Municipal Corporation of Delhi denied maternity benefits to female muster roll workers since their services were not regularized, even though they performed the same duties as regular workers. On a reference to the Industrial Tribunal, the Tribunal allowed the claim of maternity benefits by muster roll workers who had worked for 3 years or more. A challenge to the tribunal's order was dismissed by the Delhi High Court. In this special leave petition, the Supreme Court determined whether denial of maternity benefits to female muster roll workers was constitutional in light of fundamental rights enshrined in Articles 14 and 15, Directive Principles of State Policy reflected in Articles 39, 42 and 43 of the Indian Constitution, and India's obligations under Article 11 of CEDAW.

Ahmad, J.: "**1.** Female workers (muster roll), engaged by the Municipal Corporation of Delhi (for short "the Corporation"), raised a demand for grant of maternity leave which was made available only to regular female workers but was denied to them on the ground that their services were not regularised and, therefore, they were not entitled to any maternity leave. Their case was espoused by the Delhi Municipal Workers' Union (for short "the Union") and, consequently, the following question was referred by the Secretary (Labour), Delhi Administration to the Industrial Tribunal for adjudication:

> "Whether the female workers working on muster roll should be given any maternity benefit? If so, what directions are necessary in this regard?"

2. The Union filed a statement of claim in which it was stated that the Municipal Corporation of Delhi employs a large number of persons including female workers on muster roll and they are made to work in that capacity for years together though they are recruited against the work of perennial nature. It was further stated that the nature of duties and responsibilities performed and undertaken by the muster-roll employees are the same as those of the regular employees.

The women employed on muster roll, which have been working with the Municipal Corporation of Delhi for years together, have to work very hard in construction projects and maintenance of roads including the work of digging trenches etc. but the Corporation does not grant any maternity benefit to female workers who are required to work even during the period of mature pregnancy or soon after the delivery of the child. It was pleaded that the female workers required the same maternity benefits as were enjoyed by regular female workers under the Maternity Benefit Act, 1961. The denial of these benefits exhibits a negative attitude of the Corporation in respect of a humane problem.

3. The Corporation in their written statement, filed before the Industrial Tribunal, pleaded that the provisions under the Maternity Benefit Act, 1961 or the Central Civil Services (Leave) Rules were not applicable to the female workers, engaged on muster roll, as they were all engaged only on daily wages. It was also contended that they were not entitled to any benefit under the Employees' State Insurance Act, 1948. It was for these reasons that the Corporation contended that the demand of the female workers (muster roll) for grant of maternity leave was liable to be rejected.

4. The Tribunal, by its award dated 2-4-1996, allowed the claim of the female workers (muster roll) and directed the Corporation to extend the benefits under the Maternity Benefit Act, 1961 to muster-roll female workers who were in the continuous service of the Corporation for three years or more. The Corporation challenged this judgment in a writ petition before the Delhi High Court which was dismissed by the Single Judge on 7-1-1997. The Letters Patent Appeal (LPA No. 64 of 1998), filed thereafter by the Corporation was dismissed by the Division Bench on 9-3-1998 on the ground of delay.

5. …Since the High Court has already exercised its discretion and has not condoned the delay in filing the appeal, we find it difficult to enter into that controversy and examine the reasons why the appeal was filed before the Division Bench after the expiry of the period of limitation. However, since the question involved in this case is important, we deem it fit to express ourselves on the merits of the matter as we have heard the counsel for the Corporation on merits also.

6. Not long ago, the place of a woman in rural areas had been traditionally her home; but the poor illiterate women forced by sheer poverty now come out to seek various jobs so as to overcome the economic hardship. They also take up jobs which involve hard physical labour. The female workers who are engaged by the Corporation on muster roll have to work at the site of construction and repairing of roads. Their services have also been utilised for digging of trenches. Since they are engaged on daily wages, they, in order to earn their daily bread, work even in an advanced stage of pregnancy and also soon after delivery, unmindful of detriment to their health or to the health of the new-born. It is in this background that we have to look to our Constitution which, in its Preamble, promises social and economic justice. We may first look at the fundamental rights contained in Part III of the Constitution. Article 14 provides that the State shall not deny to any person equality before law or the equal protection of the laws within the territory of India. Dealing with this article vis-à-vis the labour laws, this Court in *Hindustan Antibiotics Ltd. v. Workmen* [AIR 1967 SC 948 : (1967) 1 SCR 652 : (1967) 1 LLJ 114] has held that labour to whichever sector it may belong in a particular region and in a particular industry will be treated on equal basis. Article 15 provides that the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. Clause (3) of this article provides as under:

> "15. (3) Nothing in this article shall prevent the State from making any special provision for women and children."

7. In *Yusuf Abdul Aziz v. State of Bombay* [AIR 1954 SC 321 : 1954 SCR 930] it was held that Article 15(3) applies both to existing and future laws.

8. From Part III, we may shift to Part IV of the Constitution containing the Directive Principles of State Policy. Article 38 provides that the State shall strive to promote the welfare of the people by securing and protecting, as effectively as it may, a social order in which justice, social, economic and political shall inform all the institutions of the national life. Sub-clause (2) of this article mandates that the State shall strive to minimise the inequalities in income and endeavour to eliminate inequalities in status, facilities and opportunities.

9. Article 39 provides, inter alia, as under:

> "39. *Certain principles of policy to be followed by the State.*—The State shall, in particular, direct its policy towards securing—
>
> (*a*) that the citizens, men and women equally, have the right to an adequate means of livelihood;
>
> (*b*)-(*c*)***
>
> (*d*) that there is equal pay for equal work for both men and women;

(*e*) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;

(*f*) ***"

10. Articles 42 and 43 provide as under:

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

43. *Living wage, etc., for workers.*—…"

11. It is in the background of the provisions contained in Article 39, specially in Articles 42 and 43, that the claim of the respondents for maternity benefit and the action of the petitioner in denying that benefit to its women employees has to be scrutinised so as to determine whether the denial of maternity benefit by the petitioner is justified in law or not.

12. Since Article 42 specifically speaks of "just and humane conditions of work" and "maternity relief", the validity of an executive or administrative action in denying maternity benefit has to be examined on the anvil of Article 42 which, though not enforceable at law, is nevertheless available for determining the legal efficacy of the action complained of.

13. Parliament has already made the Maternity Benefit Act, 1961. It is not disputed that the benefits available under this Act have been made available to a class of employees of the petitioner Corporation. But the benefit is not being made available to the women employees engaged on muster roll, on the ground that they are not regular employees of the Corporation. As we shall presently see, there is no justification for denying the benefit of this Act to casual workers or workers employed on daily-wage basis.

14. Section 2 of the Maternity Benefit Act, 1961 deals with the applicability of the Act. Section 3 contains definitions. The word "child" as defined in Section 3(*b*) includes a "stillborn" child. "Delivery" as defined in Section 3(*c*) means the birth of a child. "Maternity benefit" has been defined in Section 3(*h*), which means the payment referred to in sub-section (1) of Section 5. "Woman" has been defined in clause (*o*) of Section 3 which means "a woman employed, whether directly or through any agency, for wages in any establishment". "Wages" have been defined in clause (*n*) of Section 3 which provides, inter alia, as under:

"3. (*n*) 'wages' means all remuneration paid or payable in cash to a woman…"

15. Section 5 provides, inter alia, as under:

"5. *Right to payment of maternity benefit.*—(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, that is to say, the period immediately preceding the day of her delivery, the actual day of her delivery and any period 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 rates of wages fixed or revised under the Minimum Wages Act, 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 eighty days in the twelve months immediately preceding the date of her expected delivery:

***

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 or was on holidays declared under any law for the time being in force to be holidays with wages 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 six weeks shall precede the date of her expected delivery:

***"

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."

17. With regard to the period of 240 days, the Select Committee remarked as under:

> "The Committee are of the view that the qualifying condition of employment for a period of 240 days during the 12 months immediately preceding the expected date of delivery to entitle a worker to maternity benefit is too rigorous and the period should be reduced to 160 actual working days inclusive of the period of 'lay-off', if any."

18. Section 5-A provides that if the Employees' State Insurance Act, 1948 is applied or becomes applicable to the establishment where a woman is employed, such woman shall continue to be entitled to receive the maternity benefits under this Act so long as she does not become qualified to claim maternity benefits under Section 50 of that Act.

19. It may be stated that Section 50 of the Employees' State Insurance Act, 1948 provides as under:

> "50. *Maternity benefit.*—The qualification of an insured woman to claim maternity benefit, the conditions subject to which such benefit may be given, the rates and period thereof shall be such as may be prescribed by the Central Government."

20. Section 5-B of the Maternity Act speaks of payment of maternity benefit in certain cases. Section 6 provides notice of claim for maternity benefit and payment thereof. Section 8 provides that every woman entitled to maternity benefit under this Act shall also be entitled to receive from her employer a medical bonus of 250 rupees, if no pre-natal confinement or post-natal care is provided by the employer free of charge.

…

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 42. 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.

28. The Industrial Tribunal, which has given an award in favour of the respondents, has noticed that women employees have been engaged by the Corporation on muster roll, that is to say, on daily-wage basis for doing various kinds of works in projects like construction of buildings, digging of trenches, making of roads, etc., but have been denied the benefit of maternity leave. The Tribunal has found that though the women employees were on muster roll and had been working for the Corporation for more than 10 years, they were not regularised. The Tribunal, however, came to the conclusion that the provisions of the Maternity Benefit Act had not been applied to the Corporation and, therefore, it felt that there was a lacuna in the Act. It further felt that having regard to the activities of the Corporation, which had employed more than a thousand women employees, it should have been brought within the purview of the Act so that the maternity benefits contemplated by the Act could be extended to the women employees of the Corporation. It felt that this lacuna could be removed by the State Government by issuing the necessary notification under the proviso to Section 2 of the Maternity Act. This proviso lays down as under:

> "Provided that the State Government may, with the approval of the Central Government, after giving not less than two months' notice of its intention of so doing, by notification in the Official Gazette, declare that all or any of the provisions of this Act shall apply also to any other establishment or class of establishments, industrial, commercial, agricultural or otherwise."

29. It consequently issued a direction to the management of the Municipal Corporation, Delhi to extend the benefits of the Maternity Benefit Act, 1961 to such muster-roll female employees who were in continuous service of the management for three years or more and who fulfilled the conditions set out in Section 5 of the Act.

30. …This direction is fully in consonance with the reference made to the Industrial Tribunal.

…

32. Learned counsel for the Corporation contended that since the provisions of the Act have not been applied to the Corporation, such a direction could not have been issued by the Tribunal. This is a narrow way of looking at the problem which essentially is human in nature and anyone acquainted with the working of the Constitution, which aims at providing social and economic justice to the citizens of this country, would outrightly reject the contention. The relevance and significance of the doctrine of social justice has, times out of number, been emphasised by this Court in several decisions. …

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 phenomenon 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 workplace 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 the 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. Now, it is to be remembered that the municipal corporations or boards have already been held to be "industry" within the meaning of "the Industrial Disputes Act". …

…

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 10-12-1948, 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 18-12-1979, 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*
>
> …
>
> 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 the 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.

39. For the reasons stated above, the special leave petition is dismissed."

IN THE HIGH COURT OF DELHI

Seema Gupta v. Guru Nanak Institute of Management
2006 SCC OnLine Del 1421
S. Ravindra Bhat, J.

The petitioner was employed as a lecturer in the respondent college, a non-State institution governed by Central Civil Service Rules (CCS Rules). After the expiry of her initial maternity leave of 135 days and further extended leave, the petitioner applied for further periods of leave. She was served show-cause notices, asking her to rejoin service. The petitioner sought continuation of maternity leave relying on the CCS Rules that provided for such extension up to a period of one year without production of any medical certificate. However, the petitioner's service was terminated on grounds of unauthorized leave. While deciding on the legality of such termination, the Court considered the State's obligations to provide maternity relief arising from Articles 14, 15 and 42 of the Indian Constitution, Universal Declaration of Human Rights and CEDAW, and its horizontal application to non-State institutions.

Bhat, J: "…

18. It would be essential, before discussing the merits of the case, to notice the relevant provisions. Rule 43 of the CCS Rules, which governs the situation, as per the version of both parties, reads as follows:

"Chapter V

Special kinds of leave other than study leave

43. *Maternity Leave*

(1) A female Government servant (including an apprentice) with less than two surviving children may be granted maternity leave by an authority competent to grant leave for a period of (135 days) from the date of its commencement.

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

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

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

> Rule 19:
>
> Provided that the maternity leave granted and availed of before the commencement of the CCS (Leave) Amendment Rules, 1995 shall not be taken into account for the purpose of this sub-rule.
>
> (4) (a) Maternity leave may be combined with leave of any other kind.
>
> (b) Notwithstanding the requirement of production of medical certificate contained in Sub-rule (1) of Rule 30 or Sub-rule (1) of Rule 31, leave of the kind due and admissible (including commuted leave for a period not exceeding 60 days and leave not due) upto a maximum of one year may, if applied for, be granted in continuation of maternity leave granted under Sub-rule (1).
>
> (5) Maternity leave shall not be debited against the leave account."

19. Article 15(3) of the Constitution empowers the State to make special provisions *inter alia*, for women. Article 42 provides for just and humane conditions of work and maternity relief. The State is directed to make provision for securing just and humane conditions of work and for maternity relief.

20. The Maternity Leave Benefit Act was enacted to fulfil the mandate of Article 42 of the Constitution of India. Section 12 Act prohibits the dismissal of a woman during or on account of her absence from work due to her pregnancy. Section 21 provides for penalty for discharge or dismissal of such woman of during or on account of her absence from work connected with the birth of a child.

21. Long ago, the Universal Declaration of Human Rights, by Article 25 had declared that everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. Article 25(2) provides that:

> "(2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection."

22. It would, while on the topic, also be essential to quote relevant provisions of the Convention for Elimination of All Forms of Discrimination Against Women (CEDAW). They are as follows:

> "11(2). In order to prevent discrimination against women on the ground 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 martial status;
>
> (b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances."

23. The facts here show that the petitioner was initially granted 135 days maternity leave. The trouble, however seems to have started after expiry of that period. It is alleged (and not denied by the respondent) that the leave due to the petitioner, including medical leave was not credited to her. She sought extension of leave, which was granted up to end of June, 2004. Thereafter, she joined duties, but had applied for leave on 7 occasions. The management took exception, and issued three memos, on different dates. The petitioner replied, again, on several dates, refuting allegations of absenteeism, and claiming that she ought to be given leave as per Rule 43, for one year. The management, however, treated this as an instance of wilful and truant behaviour, and granted a final opportunity to report for duties. After that, the termination letter was issued.

24. The entire correspondence between parties discloses that the petitioner's request was on account of her erratic, and indifferent health condition as well as that of her infant child. It is an undisputed fact that Rule 43 of the CCS Rules applies as a term or condition of her service. No doubt, the request for one full years' leave was initially not made by the petitioner; she made the request after she rejoined duties, in July 2004. Yet she did make an application for the purpose, after being served with repeated show cause notices alleging habitual absenteeism.

25. The importance of treating female employees who avail of maternity leave and who might face problems in raising infants, was foreseen by the rule making authority, when Rule 43(4)(b) was framed. The provision enables the employer to grant, and the employee to seek up to one years' leave in continuation of the initial maternity leave. The concern shown may be gauged by the fact that the employee is absolved of the normal requirement of having to produce a certificate—which implies that medical concerns alone are not determinative in granting such extended leave. The provision, in my

opinion, has to be construed in the background of the Universal Declaration of Human Rights and CEDAW, as an integral part of the State's obligation to promote the Directive Principle embodied in Article 42, of the Constitution.

26. The nature of the right, in the above rule, to my mind, also constitutes a special provision under Article 15(3). Although the respondent institution is not 'State' yet, it is admittedly governed by the CCS Rules. In these circumstances, it has a duty to fulfil those conditions. The present case, and application of Rule 43, falls into what may be justly described as a 'horizontal' application of the fundamental right, *viz.* Article 15(3) in order to give effect to Article 42. Fundamental rights are ordinarily enforceable against State or State agencies, or those 'authorities' acting as instrumentalities of the state. Yet, once the object of a fundamental right, such as for instance, the equality clause, or protective legislation relating to gender, is sought to be given shape through some statute, and made applicable to non-State 'actors' such intervention is known as horizontal application of the concerned fundamental right. In this case, Rule 43 is an instance of application of gender protective rights to public, but non state entities like the respondent institution. In another sense, the rule has to be understood as a larger social concern for extending special care to employees who are given maternity benefits. It promotes non-discriminatory practices, and forces employers to give reasonable accommodation to female employees.

27. Viewed from this perspective, the contentions of the respondents about the application of the rule in the Executive Committee of *Vaish Degree College case* (supra) and the *Indian Oil Corporation case* (supra) are inapt. This is not a traditional case of an employee seeking enforcement of her contract of service, but her lament that in spite of protective provisions, relating to maternity, and in spite of her request for extended leave, which was permissible, the employer, in disdain of those norms, terminated her from the service. I am also not impressed with the submission that the petitioner was an employee with lesser rights, since she was on *ad hoc* basis. As per the version of the respondent, she was entitled to the benefits under Rule 43.

28. The respondent, in my considered opinion treated the request for extension of leave by five months, as a normal request, without applying its mind to the peculiarities of the case. It has not furnished any reasons or justification as to why the right to claim the extended period, of one years' leave, a valuable one at that, had to be rejected. Exigencies of service bind all employers; that reason would be available in all cases where a request for extended maternity leave is sought. If such reasons given in a routine manner are to be upheld, the right for extended maternity leave of up to one year, would be meaningless, as every employer can cite that as a ground for denial. The special nature of the right then would exist only on paper, in negation.

…"

IN THE HIGH COURT OF MADRAS

K. Kalaiselvi v. Chennai Port Trust
(2013) 3 Mad LJ 493
K. Chandru, J.

In this case, the Madras High Court examined whether a woman employee who had a child born through surrogacy arrangement was entitled to maternity leave as available to adoptive mothers under Rule 3-A of the Madras Port Trust (Leave) Regulations, 1987.

Chandru, J.: "**1.** The short question that arises for consideration in this writ petition is whether a woman employee working in the Chennai Port Trust is entitled to avail maternity leave even in case where she gets the child through arrangement by Surrogate parents?

2. The petitioner is working as an Assistant Superintendent in the Traffic department of the Chennai Port Trust...[S]he in order to have a child had entered into an arrangement with Prashanth Multispeciality hospital, Chennai to have a baby through surrogate procedure…In order to look after the newly born baby, she had applied for maternity leave. But she was informed that she was not entitled for maternity leave (post delivery) for having a child through surrogate procedure though such a rejection was not possible in case of a person adopting a child. The petitioner, therefore, requested for sanction of maternity leave to look after the newly born girl child and reimburse the medical expenses and also to issue the FMI Card incorporating the newly born child through her representation, dated 17.6.2011…However, by proceedings, dated 22.11.2011, she was informed that the Chairman of the Port Trust had granted her two months period leave as

a special case, which will be treated as an eligible leave. But the leave granted on 17.9.2011 for a period of 59 days from 08.02.2011 to 07.04.2011 vide medical certificate dated 17.09.2011 was subsequently cancelled. Her request for inclusion of the female child in the FMI card was also rejected. She was informed by a letter dated 05.12.2011 that inclusion of her daughter name G.K. Sharanya in the FMI Card does not arise. The petitioner produced before the respondent Port Trust all documents relating to surrogate arrangement, hospital expenditures incurred by her as well as the birth certificate given by the Corporation of Chennai evidencing that the female child was born on 08.02.2011. The name of the parents are described as the petitioner being the mother and her husband as her father. It is under these circumstances, writ petition came to be filed seeking to set aside the order dated 05.12.2011 and for a consequential direction to the Chennai Port Trust to grant leave to the petitioner on equal footing in terms of Rule 3-A of the Madras Port Trust (Leave) Regulations, 1987, which benefit was granted to adoptive parents.

3. In order to appreciate the contentions, it is necessary to extract Rule 3A, which reads as follows:

> "3-A. Leave to female employees on adoption of a child:
>
> A female employee on her adoption [*sic*] a child may be granted leave of the kind and admissible (including commuted leave without production of medical certificate for a period not exceeding 60 days and leave not due) upto one year subject to the following conditions:
>
> (i) the facility will not be available to an adoptive mother already having two living children at the time of adoption;
>
> (ii) the maximum admissible period of leave of the kind due and admissible will be regulated as under:
>
> (a) If the age of the adopted child is less than one month, leave upto one year may be allowed.
>
> (b) If the age of the child is six months or more, leave upto six months may be allowed.
>
> (c) If the age of the child is nine months or more leave upto three months may be allowed."

…

5. …The Ministry in their letter dated 20.9.2011 informed the Port Trust that there was no provision/guidelines available in the CCS (Leave) Rules for the grant of maternity leave to a female Government employee for looking after her baby obtained through surrogate procedure. It was based upon the advice given by the Ministry, the leave given to her was cancelled and it was treated as eligible leave. Her further request to include the child in the FMI card was also rejected and it was informed that it cannot be considered. It was further stated that it was a peculiar case. In our Country getting a child through surrogate procedure is at a nascent stage. There are no rules or guidelines available. There are no provision in the Chennai Port Trust (Leave) Regulations, 1987 granting maternity leave to an employee who underwent surrogate procedure. No inspiration can be drawn from the Maternity Benefit Act, 1961. Apart from referring to the practice in the [*sic*] Australia where surrogacy was never treated as legal and in U.K., where surrogacy arrangement was legal, but advertising and other aspects of commercial surrogacy was prohibited under the Surrogacy Arrangements Act, 1985. Strangely the respondent in paragraph 18 made the following averments:

> "18. It is submitted that apart from legal, other issues such as moral, ethical, psychological and religious are involved in surrogacy procedure. Hence, in India a comprehensive legislation is very much the need of the hour to address the complex legal issues related to surrogacy."

6. The question of becoming parents through surrogacy came to be considered by the Supreme Court in a judgment in *Baby Manji Yamada v. Union of India* reported in (2008) 13 SCC 518. Though in that case, there was a dispute between biological parents and host, the matter was directed to be taken to the Commission for Protection of Child Rights Act, 2005. But, however various forms of surrogacy was discussed in the said judgment from paragraph 8 to 16 and it was stated as follows:…

7. Mr. Srinath Sridevan, learned counsel for the petitioner also referred to a judgment of the Supreme Court of California in a case relating to *Anna Johnson v. Mark Calvert et al.*, reported in 5 Cal 4th 84, wherein the court affirmed the judgment of the lower court that genetic parents were the natural parents of child gestated through surrogate. He also drew attention of this court to the Universal Declaration of Human Rights evolved by the United Nations and adopted by the General Assembly on 10.12.1948. He placed reliance upon Article 25(2) which reads as follows:

> "(2) Motherhood and childhood are entitled to special care and assistance. All children whether born in or out of wedlock, shall enjoy the same social protection."

8. He also referred to the Beijing Declaration and Platform for Action Fourth World Conference on Women, dated 15.09.1995, wherein the right of all women to control all aspects of their health, in particular their own fertility is basic to their empowerment was reaffirmed. Articles 17 and 33 reads as follows:

> "17. The explicit recognition and reaffirmation of the right of all women to control all aspects of their health, in particular their own fertility, is basic to their empowerment;
>
> 33. Ensure respect for international law, including humanitarian law, in order to protect women and girls in particular;"

9. He further referred to the Convention on the Rights of the Child by United Nations General Assembly by a resolution on 20.11.1989, wherein Article 6 reads as follows:

> "Article 6.
>
> 1. States Parties recognize that every child has the inherent right to life.
>
> 2. States Parties shall ensure to the maximum extent possible the survival and development of the child."

10. In the light of this, he submitted that the petitioner is undoubtedly the mother of a minor girl child and she is entitled to develop a bondage with the child obtained through surrogate agreement and there is no moral issue involved in this matter. In the interest of the child, the petitioner is entitled to have the leave granted in her favour and in future also she is entitled to have the name included as her daughter in the FMI card as she is the legitimate daughter of the petitioner. He further contended that even if the rule do not contemplate the surrogate arrangement, at the time of enacting of Maternity Benefit Act, 1961, such a practice was not there. What was not recognised by the law, at some point of time need not be the same in the light of the changed situation.

…

13. Alternatively, he contended that if law can provide child care leave in case of adoptive parents as in the case of Rule 3-A of the Madras Port Trust (Leave) Regulations, 1987, then they should also apply to parents like the petitioner who obtained child through surrogate agreement since the object of such leave is to take care of the child and developing good bond between the child and the parents.

15. In the light of these rival contentions, it has to be seen whether the petitioner is entitled for a leave similar to that of the leave provided under Rule 3-A and whether her child's name is to be included in the FMI Card for availing future benefits?

16. This court do not find anything immoral and unethical about the petitioner having obtained a child through surrogate arrangement. For all practical purpose, the petitioner is the mother of the girl child G.K. Sharanya and her husband is the father of the said child. When once it is admitted that the said minor child is the daughter of the petitioner and at the time of the application, she was only one day old, she is entitled for leave akin to persons who are granted leave in terms of Rule 3-A of the Leave Regulations. The purpose of the said rule is for proper bonding between the child and parents. Even in the case of adoption, the adoptive mother does not give birth to the child, but yet the necessity of bonding of the mother with the adoptive child has been recognised by the Central Government. Therefore, the petitioner is entitled for leave in terms of Rule 3-A. Any other interpretation will do violence to various international obligations referred to by the learned counsel for the petitioner. Further, it is unnecessary to rely upon the provisions of the Maternity Benefit Act for the purpose of grant of leave, since that act deals with actual child birth and it is mother centric. The Act do not [*sic*] deal with leave for taking care of the child beyond 6 weeks, i.e., the post natal period. The right for child care leave has to be found elsewhere. However, this court is inclined to interpret Rule 3-A of the Madras Port Trust (Leave) Regulations, 1987 also to include a person who obtain child through surrogate arrangement.

17. It will not be unnecessary if a reference is made to the All India Services (Leave) Rules, 1955, wherein the Central Government had recognised even paternity leave to be granted. Rule 18(D) was introduced with effect from 21.09.2011. The child care leave is given to a female member of the service. Rule 18(D) reads as follows:

> "18(D) Child Care Leave to a female member of the Service—(1) A female member of the Service having minor children below the age of eighteen years may be granted child care leave by the competent authority for a maximum of 730 days during her entire service for taking care of upto two children.
>
> (2) During the period of child care leave, such member shall be paid leave salary equal to the pay drawn immediately before proceeding on leave.

(3) Child care leave may be combined with leave of the kind due and admissible.

(4) (Notwithstanding the requirement of production of medical certificates contained in sub-rule (1) of rule 13 or rule 14, leave of the kind due and admissible (including commuted leave not exceeding 60 days and leave not due) up to a maximum of one year, if applied for, be granted in continuation of child care leave granted under sub-rule(1).

(5) Child care leave may be availed in more than one spell.

(6) Child care leave shall not be debited against the leave account of the member of the Service."

18. In the result, the writ petition will stand allowed.

The respondent Chennai Port Trust is directed to grant leave to the petitioner in terms of Rule 3-A recognising the child obtained surrogate procedure. Further a direction is issued to the respondent to include the name of the child G.K. Sharanya, as a member of the petitioner's family and also include her name in the FMI card forthwith…"

IN THE HIGH COURT OF DELHI

Bilju A.T. v. Union of India & Ors.
2013 SCC OnLine Del 2152
Gita Mittal and J.R. Midha, JJ.

In the instant case, petitioners challenged Rules and practices of the Central Reserve Police Force ("CRPF"), on grounds that these rules and practices discriminated against women employees of CRPF and as such violated Articles 14 and 16 of the Indian Constitution. Inter alia, the Delhi High Court was called upon to decide the constitutionality of denying seniority to women who could not complete mandatory promotional courses due to pregnancy, by denying them the opportunity to complete these courses immediately after being declared medically fit post-delivery.

Mittal and Midha, JJ.: " …

3. The challenge, as premised by the petitioner, inter alia, is on the grounds of violation of Article 14, 16 and 21 of the Constitution of India…

…

22. …[T]he petitioner in WP (C) No. 1368/2012 as well as the writ petitioner No. 4 in WP (C) No. 8744/2011 (newly added) were…asked in August, 2008 to submit their willingness for the promotional course to be held from 6th October, 2008 to 2nd January, 2009. However, these petitioners were unable to give their willingness at that stage on account of their pregnancy and as such were not permitted to undertake the course. Shortly, after their delivery and after being upgraded to medical category SHAPE-I they requested for being detailed for next course for SSICC but their request was not acceded to. These writ petitioners were detailed for the 46th SSICC course only in June, 2011 and as such were denied further promotion for a further period of almost two years. They successfully completed the SSICC course, yet till date, are continuing to work as SI/GD while their male batchmates, as noted above, stand promoted as Inspectors in the year 2007 and have further been appointed as Assistant Commandants since, 2010.

The injustice done to these women has been further exacerbated on account of their pregnancies and they have suffered double discrimination inasmuch as even their female counter parts have been granted promotion much before they have even been considered for the same.

…

49. The above narration of fact would also show that the respondents are causing grave prejudice to women who are unable to undergo a promotional course on account of pregnancy. Instead of enabling such female Sub-Inspectors to undertake the course immediately after she delivers her child, she is made to wait for several years even to undergo the promotional course resulting in denial of promotion to her for several years. In fact the petitioner in WP(C) No.1368/2012 were so denied an opportunity to undergo a promotional course even though they were permitted to undergo the SSIC course. We are informed that they are still continuing to work as Sub-Inspector only because they could not be detailed for the SSIC promotional course in August, 2008 on account of their pregnancy and were sent for this course only in June, 2011.

…

53. We find that so far as the placement in temporary low medical category of male officers is concerned, immediately after upgradation of their medical category, the respondents place the male officials at the appropriate place in their seniority gradation which is being unfairly denied to the women SI/GDs who were placed in temporary low medical category, not on account of sickness, but only on account of their pregnancy. Yet they are denied promotion or placement at the appropriate place in the seniority list after their deliveries. Such female personnel have not been permitted to undertake the promotion course for several years as noted herein above. The specific pleas of the petitioners in this regard have not been disputed by the respondents. This treatment of the female incumbents, who were denied participation for a promotional course because of the pregnancy, is not provided in any statutory authority or rule framed therein and is certainly not sustainable."

IN THE HIGH COURT OF KERALA

P. Geetha v. Kerala Livestock Development Board Limited
(2015) 1 KLJ 494
Dama Seshadri Naidu, J.

The petitioner's request for maternity leave for taking care of a child born through surrogacy was denied by the respondent board on the grounds that the Staff Rules and Regulations permitted maternity leave only for childbirth under "normal circumstances". In this challenge to the Board's decision, the Kerala High Court examined whether a woman who has a child through surrogacy is entitled to all statutory benefits that accrue to an employee after delivering a child.

Naidu, J.: " …

FACTS:

3. Briefly stated, having joined just about a year ago, the petitioner is a Deputy General Manager working in the first respondent Board, a Government of Kerala undertaking. …[T]he petitioner, along with her husband, had recently entered into an arrangement with a fertility clinic in Hyderabad, Telengana State, to have a baby through surrogate procedure…

4. With a view to looking after the new born baby, the petitioner is said to have submitted Exhibit P1 application for leave with effect from 19.06.2014 'as applicable for child birth in the normal process'. The first respondent, however, through Exhibit P2 letter dated 10.07.2014, informed the petitioner that the Staff Rules and Regulations do not permit any leave to the employees on maternity ground other than the maternity leave envisaged under 'normal circumstances'.

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

…

ISSUES:

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

ii. Whether, in the face of a particular legislative field having been occupied by an extant domestic enactment, the International Law conventions and treaty obligations can be enforced through Municipal Courts?

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

DISCUSSION:

In re: Issue No. 1

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

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

…

33. …The employees of the first respondent Board are governed by the provisions of the Kerala Livestock Development Board Limited Staff Rules & Regulations, 1993 ('the Staff Rules' for brevity)…Rule 50 provides for maternity leave as under:

"MATERNITY LEAVE:

i. Maternity leave may be granted to a female employee, not covered by the ESI Act, up to 90 days from the date of commencement of leave.

ii. Maternity leave for a period not exceeding 42 days may be granted in case of miscarriage including medical termination of pregnancy.

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

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

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

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

(emphasis added)

…

35. Now, we may examine the statutory scheme of the Maternity Benefit Act, 1961 ('the Act' for brevity)…

…

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

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

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

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

42. Indeed, there cannot be any discrimination regarding the genetic mother in extending the statutory benefits to the extent they are applicable, as is evident from the discussion on issue No. 3 below.

…

IN RE: ISSUE NO. 3:

57. The gravamen of the submissions of the learned counsel for the petitioner is that motherhood is an integral and inherent part of womanhood and that with advanced reproduction techniques, one cannot cling on to the traditional meaning of maternity. She also contends that there ought not to be any discrimination on account of woman getting a child through surrogacy, for all practical purposes, that woman shall be treated as the natural biological mother with all the rights flowing from the acceptance of the said factum, unhindered. All the international covenants and the domestic declarations only go to establish that there ought not be any discrimination based on the method of maternity, or in other words, merely on the ground that the mother did not actually bear the child in her womb…

58. ...Now, the proposition is that a genetic mother is required to be placed on the same pedestal as the natural, biological mother is placed…In this case, as a matter of legal fiction, if the petitioner is to be treated as the woman who has undergone the pregnancy and has been delivered of the baby, what rights accrue to her?

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

KALAISELVI:

60. It is pertinent to refer to *Kalaiselvi* (supra), a decision rendered by the High Court of Madras.... A learned Single Judge of the Hon'ble High Court of Madras likened the obtaining of a child through surrogacy to adoption and held that the benefit of Rule 3-A ought to be extended to the said employee as well. Referring to All India Services (Leave) Rules, 1955, it is observed that the Central Government has recognised even paternity leave to be granted.

61. In my considered view, the High Court of Madras has justly interpreted Rule 3-A expansively to take into the fold of adoption even the child obtained through surrogacy. Thus, the court has declared that a female employee on her getting a child through surrogacy, instead of adoption, be granted leave of the kind and admissible (including commuted leave without production of medical certificate for a period not exceeding 60 days and leave not due) up to one year subject to the conditions provided in the Rule itself.

62. I am afraid, there is no analogous provision in the Staff Rules governing the petitioner;…I am unable to persuade myself to hold that *Kalaiselvi* (supra) has any relevance in the present factual and legal matrix.

…

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

72. The relief sought by the petitioner reads thus:

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

73. I do not see any difficulty in acceding to the above prayer, provided the dichotomy is applied and only the benefit, namely, the leave that can be given post-delivery, is extended. Admittedly, the petitioner did not physically bear the child; as such, she cannot insist on having any leave for convalescing and regaining her health. For child rearing, no specific provision is made a la Rule 3-A of Madras Port Trust (Leave) Regulations, 1987. Resultantly, the only option left for the petitioner is to avail herself of leave under other heads, as has been specified under Rule 44 of the Staff Rules. In fact, it has already been noted that the petitioner has been given extraordinary leave, as a special case.

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

IN THE HIGH COURT OF DELHI

Rama Pandey v. Union of India
(2015) 221 DLT 756
Rajiv Shakdher, J.

A commissioning mother, whose application for maternity leave had been rejected by the central government on the ground that she was not a biological mother, invoked the Delhi High Court's writ jurisdiction for relief. The Court was to adjudicate on the issue of whether a commissioning mother is eligible for maternity leave under the Central Civil Services (Leave) Rules, 1972. In its decision, the Court also examined the impact of the principle of "best interests of the child" in determining the entitlement to maternity leave for a commissioning mother.

Shakdher J.: "…

2. The fact that the surrogacy agreement reached fruition, is exemplified by the birth of twins, as indicated above, on 09.02.2013…

…

2.3 In sum, it was conveyed to the petitioner that there was no provision for grant of maternity leave in cases where the surrogacy route is adopted. The petitioner was, however, informed that the CCL could be sanctioned, in her favour, under Rule 43-A, which was applicable to "female government servants". It now transpires that reference ought to have been made to Rule 43 and not Rule 43-A; a fact which was confirmed by the counsel for respondent no. 2 and 3.

…

3. The petitioner being aggrieved, approached this court by way of the instant petition, filed, under Article 226 of the Constitution.

…

SUBMISSIONS OF COUNSELS

5. The counsel for the petitioner has equated the position of a commissioning mother to that of a biological mother who bears and carries the child till delivery. It is the submission of the learned counsel for the petitioner, that more often than not, as in this case, the commissioning parents have a huge emotional interest in the well-being of both the surrogate mother and the child, which the surrogate mother carries, albeit under a contractual arrangement. The well-being of the child and the surrogate mother can best be addressed by the commissioning parents, in particular, the commissioning mother. This object, according to the learned counsel, can only be effectuated, if maternity leave is granted to the commissioning mother.

5.1 The fact that a commissioning mother has been judicially recognized as one who is similarly circumstanced, as an adoptive mother, was sought to be established by placing reliance on the judgement of the Madras High Court in the case of *K. Kalaiselvi v. Chennai Port Trust*, dated 04.03.2013, passed in W.P (C) No. 8188/2012.

6. Counsels for the respondents, on the other hand, while being sympathetic to the cause of the petitioner, expressed their disagreement with the submission that maternity leave could be extended to the petitioner or female employees who are similarly circumstanced.

6.1 Mr. Rajappa, who appeared for respondent no. 2 and 3, in particular, made submissions, which can be, broadly, paraphrased as follows:

> (i) There is no provision under the extant rules for granting maternity leave to women who become mothers via the surrogacy route. Therefore, in law, no entitlement to maternity leave, in these circumstances, inhered in the petitioner.
>
> (ii) The prime objective for grant of maternity leave is to protect the health and to provide safety to pregnant women in workplace, both during pregnancy and after delivery. Lactating mothers, who need to breast-feed their children, fall within a "specific risk group", and hence, are given maternity leave, based on factors which are relatable to safety and health parameters.

(iii) A woman, who gives birth to a child, undergoes mental and physical fatigue and stress and, is often, subjected to confinement both during and after pregnancy. These circumstances do not impact the commissioning mother, who takes recourse to the surrogacy route. Therefore, there is no justification for according maternity leave in such like cases.

(iv) If leave is granted to the commissioning mother, it could set a precedent for grant of leave in future to a single male or female parent or to same sex parents as well, who may take recourse to the surrogacy route.

(iv)(a) Therefore, the legislature would be the best forum for the enactment of necessary rules/ regulations to deal with such like situations, including the situation which arose in the present case.

(v) In the *K. Kalaiselvi's* case, the Madras High Court was interpreting Rule 3-A of the Madras Port Trust (Leave) Regulations, 1987, pertaining to leave, made available, to female employees on adoption of a child. The court, in that case, equated the circumstances which arise in the case of the adoptive mother with those which emerge in the case of a female employee, who takes recourse to a surrogacy route. …Such parity, in principle, was erroneous for the following reasons: Firstly, in the absence of a valid adoption, the relevant Rule, in the instant case, does not get triggered. Secondly, such an interpretation would involve re-writing of the Rules by reading adoptive parent as the Commissioning Parent.

REASONS

7. I have heard the learned counsels for the parties. According to me, what needs to be borne in mind, is this: there are two stages to pregnancy, the pre-natal and post-natal stage. Biologically pregnancy takes place upon union of an ovum with spermatozoon. This union results in development of an embryo or a foetus in the body of the female. A typical pregnancy has a duration of 266 days from conception to delivery. The pregnancy brings about physiological changes in the female body which, inter alia, includes, nausea (morning sickness), enlargement of the abdomen etc.

7.1 Pregnancy brings about restriction in the movement of the female carrying the child as it progresses through the term. In case complications arise, during the term, movement of the pregnant female may get restricted even prior to the pregnancy reaching full term. It is for these reasons that maternity leave of 180 days is accorded to pregnant female employees.

7.2 Those amongst pregnant female employees, who are constitutionally strong and do not face medical complications, more often than not, avail of a substantial part of their maternity leave in the period commencing after delivery. Rules and regulations framed in this regard by most organizations, including those applicable to respondent no. 3, do not provide for bifurcation of maternity leave, that is, division of leave between pre-natal and post-natal stages.

7.3 The reason, perhaps, why substantial part of the leave is availed of by the female employees (depending on their well-being), post delivery, is that, the challenging part, of bringing a new life into the world, begins thereafter, that is, in the post-natal period. There are other factors as well, which play a part in a pregnant women postponing a substantial part of her maternity leave till after delivery, such as, family circumstances (including the fact she is part of a nuclear family) or, the health of the child or, even the fact that she already has had successful deliveries; albeit without sufficient time lag between them.

8. Thus, it is evident that except for the physiological changes and difficulties, all other challenges of child rearing are common to all female employees, irrespective of the manner, she chooses, to bring a child into this world.

9. But the law, as it stands today, and therefore, the rules and regulations as framed by most organisations do not envisage attainment of parenthood via the surrogacy route.

9.1 It is not unknown, and there are several such examples that legislatures, usually, in most situations, act ex-post facto. Advancement in science and change in societal attitudes, often raise issues, which require courts to infuse fresh insight into existing law. This legal technique, if you like, is often alluded to as the "updating principle". Simply put, the court by using this principle, updates the construction of a statute bearing in mind, inter alia, the current norms, changes in social attitudes or, even advancement in science and technology. The principle of updating resembles another principle which the courts have referred to as the "dynamic processing of an enactment"…

…

11. With the advent of New Reproductive Technologies (NRT) or what are also known as Assisted Reproductive Technologies (ART), (after the birth of the first test-tube baby Louise Joy Brown, in 1978), there has been a veritable explosion of possibilities for achieving and bringing to term a pregnancy. It appears that in future one would have three kinds of mothers:

(i) a genetic mother, who donates or sells her eggs;

(ii) a surrogate or natal mother, who carries the baby; and

(iii) a social mother, who raises the child.

…

11.3 Rule 43 implicitly recognises that there are two principal reasons why maternity leave is accorded. First, that with pregnancy, biological changes occur. Second, post childbirth "multiple burdens" follow. (See: C-366/99 *Griesmar*, [2001] ECR 1-9383)

11.4 Therefore, if one were to recognise even the latter reason the commissioning mother, to my mind, ought to be entitled to maternity leave.

11.5 It is clearly foreseeable that a commissioning mother needs to bond with the child and at times take over the role of a breast-feeding mother, immediately after the delivery of the child.

11.6 In sum, the commissioning mother would become the principal care giver upon the birth of child; notwithstanding the fact that child in a given situation is bottle-fed.

11.7 It follows thus, to my mind, that the commissioning mother's entitlement to maternity leave cannot be denied only on the ground that she did not bear the child. This is dehors the fact that a commissioning mother may require to be at the bed side of the surrogate mother, in a given situation, even at the pre-natal stage; an aspect I have elaborated upon in the latter part of my judgment.

…

12.2 The rules as framed do not restrict the grant of leave to only those female employees, who are themselves pregnant…

12.3 The word 'maternity' has not been defined in the Central Civil Services (Leave) Rules, 1972 (in short the Leave Rules), which respondents say are applicable to the petitioner.

…

12.5 A perusal of Rule 43 would show that a female employee including an apprentice with less than two surviving children, can avail of maternity leave for 180 days from the date of its commencement. Sub-rule (3) of Rule 43 is indicative of the fact that where the female employee has suffered a miscarriage, including abortion, she can avail of maternity leave not exceeding 45 days. Importantly, clause (a) of sub-rule (4) of Rule 43, states that maternity leave can be combined with leave of any other kind. Furthermore, under clause (b) of sub-rule (4) such a female employee is entitled to leave of the kind referred to in Rule 31(1) notwithstanding the requirement to produce a medical certificate, subject to a maximum of two years, if applied for, in continuation of maternity leave granted to her. Sub-rule (5) of Rule 43 states that, maternity leave shall not be debited against leave account.

…

13.7 Rule 43-B, which enables the female employee with fewer than two surviving children, to avail of child adoption leave for a period of 180 days affixes, inter alia, a condition that there should be in place a "valid adoption" of a child below the age of one year. The period of 180 days commences immediately after the date of valid adoption. [See sub-rule (1) of Rule 43-B]

…

14. Thus, a reading of Rule 43 would show that while it is indicated in sub-rule (1) as to when the period of leave is to commence, that is, from the date of maternity; the expression 'maternity' by itself has not been defined…

15. There are two ways of looking at Rule 43. One, that the word, 'maternity' should be given the same meaning, which one may argue inheres in it, on a reading of sub-rule (3) of Rule 43; which is the notion of child bearing. The other, that the word "***maternity***", as appearing in sub-rule (1) of Rule 43, with advancement of science and technology, should

be given a meaning, which includes within it, the concept of motherhood attained via the surrogacy route. The latter appears to be more logical if, the language of Rule 43-A, which deals with paternity leave, is contrasted with sub-rule (1) of Rule 43. Rule 43-A makes it clear that a male employee would get 15 days of leave "***during the confinement of his wife for child birth***", either 15 days prior to the event, or thereafter, i.e after child birth, subject to the said leave being availed of within 6 months of the delivery of the child.

15.1 There is no express stipulation in sub-rule (1) of Rule 43 to the effect that the female employee (applying for leave) should also be one who is carrying the child. The said aspect while being implicit in sub-rule (1) of Rule 43, does not exclude attainment of motherhood via surrogacy. The attributes such as "confinement" of the female employee during child birth or the conditionality of division of leave into periods before and after child birth do not find mention in Rule 43(1).

15.2 Having regard to the aforesaid position emanating upon reading of the Rules, one is required to examine the tenability of the objections raised by the respondents.

16. The argument of the respondents, in sum, boils down to this: that the word 'maternity' can be attributed to only those female employees, who conceive and carry the child during pregnancy. In my view, the argument is partially correct, for the reason that the word 'maternity' pertains to the 'character, condition, relation or state of a mother'. In my opinion, where a surrogacy arrangement is in place, the commissioning mother continues to remain the legal mother of the child, both during and after the pregnancy. To cite an example: suppose on account of a disagreement between the surrogate mother and the commissioning parents, the surrogate mother takes a unilateral decision to terminate the pregnancy, albeit within the period permissible in law for termination of pregnancy - quite clearly, to my mind, the commissioning parents would have a legal right to restrain the surrogate mother from taking any such action which may be detrimental to the interest of the child. The legal basis for the court to entertain such a plea would, in my view, be, amongst others, the fact that the commissioning mother is the legal mother of the child. The basis for reaching such a conclusion is that, surrogacy, is recognized as a lawful agreement in the eyes of law in this country. [See *Baby Manji Yamada v. Union of India*, (2008) 13 SCC 518]. In some jurisdictions though, a formal parental order is required after child birth.

16.1 Therefore, according to me, maternity is established vis-a-vis the commissioning mother, once the child is conceived, albeit in a womb, other than that of the commissioning mother.

16.2 It is to be appreciated that Maternity, in law and/or on facts can be established in any one of the three situations: First, where a female employee herself conceives and carries the child. Second, where a female employee engages the services of another female to conceive a child with or without the genetic material being supplied by her and/or her male partner. Third, where female employee adopts a child.

16.3 In so far as the third circumstance is concerned, a specific rule is available for availing leave, which as indicated above, is provided for in Rule 43-B. In so far as the first situation is concerned, it is covered under sub-rule (1) of Rule 43. However, as regards the second situation, it would necessarily have to be read into sub-rule (1) of Rule 43.

16.4 To confine sub-rule (1) of Rule 43 to only to that situation, where the female employee herself carries a child, would be turning a blind eye to the advancement that science has made in the meanwhile. On the other hand, if a truncated meaning is given to the word 'maternity', it would result in depriving a large number of women of their right to avail of a vital service benefit, only on account of the choice that they would have exercised in respect of child birth.

17. The argument of the respondents that the underlying rationale, for according maternity leave (which is to secure the health and safety of pregnant female employee), would be rendered nugatory - to my mind, loses sight of the following:

(i) First, that entitlement to leave is an aspect different from the right to avail leave.

(ii) Second, the argument centres, substantially, around, the interest of the carrier, and in a sense, gives, in relative terms, lesser weight to the best interest of the child.

17.1 In a surrogacy arrangement, the concern of the commissioning parents, in particular, the commissioning mother is to a large extent, focused on the child carried by the gestational mother. There may be myriad situations in which the interest of the child, while still in the womb of the gestational mother, may require to be safeguarded by the commissioning mother. To cite an example, a situation may arise where a commissioning mother may need to attend to the surrogate/gestational mother during the term of pregnancy; because the latter may be bereft of the necessary wherewithal. The lack of wherewithal could be of: financial nature (the arrangement in place may not suffice for whatever reasons), physical condition or emotional support or even a combination of one or more factors stated above. In such like

circumstances, the commissioning mother can function effectively, as a care-giver, only if, she is in a position to exercise the right to take maternity leave. To my mind, to curtail the commissioning mother's entitlement to leave, on the ground that she has not conceived the child, would work, both to her detriment, as well as, that of the child.

18. The likelihood of such right, if accorded to the commissioning mother, being misused can always be curtailed by the competent leave sanctioning authority.

18.1 At the time of sanctioning leave the competent authority can always seek information with regard to circumstances which obtain in a given case, where application for grant of maternity leave is made…If conditions do not commend that leave be given at the pre-natal stage, then the same can be declined.

18.2 In so far as post-natal stage is concerned, ordinarily, leave cannot be declined as, under most surrogacy arrangements, once the child is born, its custody is immediately handed over to the commissioning parents. The commissioning mother, post the birth of the child, would, in all probability, have to play a very crucial role in rearing the child.

18.3 However, these are aspects which are relatable to the time and the period for which maternity leave ought to be granted. The entitlement to leave cannot be denied, to my mind, on this ground.

19. In this context, I may only refer to a judgement of the Labour Court of South Africa, in Durban in *MIA v. State Information Technology Agency (Pty) Ltd.*, (D312/2012) [2015] ZALCD 20 (dated: 26 March 2015). The applicant before the court, who was a male employee, challenged the refusal by his employer to grant him maternity leave on the ground that he was not the biological mother of the child under the surrogacy agreement.

…

19.5 The ruling of the Court sheds some light, in my view, on the issue at hand. The observations made in the judgment being relevant, are extracted hereinbelow.

> "…[13] This approach ignores the fact that the right to maternity leave as created in the Basic Conditions of Employment Act in the current circumstances is an entitlement not linked solely to the welfare and health of the child's mother but must of necessity be interpreted to and take into account the best interests of the child. Not to do so would be to ignore the Bill of Rights in the Constitution of the Republic of South Africa and the Children's Act…

20. In our Constitution, under Article 39(f), which falls in part IV, under the heading Directive Principles of the States policy, the state is obliged to, inter alia, ensure that the children are given opportunities and facilities to develop in a healthy manner. Similarly, under Article 45, State has an obligation to provide early childhood care.

20.1 Non-provision of leave to a commissioning mother, who is a employee, would, to my mind, be in derogation of the stated Directive Principles of State Policy as contained in the Constitution.

21. In this context, regard may also be had to Article 6 of the United Nations Convention on Rights of Child (UNCRC).

21.1 Article 6 of the UNCRC provides that the States, which are party to the Convention, shall recognize that every child has the inherent right to life. A State-party is thus obliged to ensure, to the maximum extent possible, the survival and development of the child…

…

22. The Madras High Court in *K. Kalaiselvi's* case equated the position of an adoptive parent to that of a parent who obtains a child via a surrogacy arrangement…

22.1 The ratio of the judgement, to my mind, is that, an adoptive parent is no different from a commissioning parent, which seeks to obtain a child via a surrogacy arrangement.

23. In the instant case, in so far as Rule 43-B obtains, the situation is somewhat similar to that which prevailed in *K. Kalaiselvi's* case.

…

23.2 For the sake of completeness I must refer to the judgement of the Kerala High Court on somewhat similar issue in the matter of *P. Geetha v. The Kerela Livestock Development Board Ltd.* 2015 (1) KLJ 494. However, the gamut of rules that this court is called upon to examine are not, in their entirety, similar to the ones that were before the Kerala High Court…

…

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

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

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

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

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

IN THE HIGH COURT OF BOMBAY

Hema Vijay Menon v. State of Maharashtra & Ors.
2015 SCC OnLine Bom 6127
Vasanti A. Naik and A.M. Badar, JJ.

The petitioner was denied maternity leave on the grounds that there was no provision under the Maharashtra Civil Services (Leave) Rules, 1981 for granting such leave to a woman who commissions a child through surrogacy. The rules, however, provided maternity leave for adoptive mothers. While examining the validity of the communication rejecting the petitioner's maternity leave, the Bombay High Court observed that at least, no distinction should be drawn between an adoptive mother and a mother who has a child through surrogacy.

Naik, J.: " …

2. The short question that arises for consideration in this petition is, whether a mother is entitled to avail maternity leave, though she begets the child through surrogacy.

3. …[T]he petitioner decided to have a child through surrogacy arrangement…With a view to look after the newly born baby, the petitioner applied for maternity/child care leave to the Principal of the respondent No. 4 - College as according to the petitioner, the petitioner was entitled to maternity leave in view of the provisions of Maharashtra Civil Services (Leave) Rules, 1981, which recognize the right of a woman to maternity leave and are applicable to the Lecturers like the petitioner. The petitioner also sought support from the Government Resolution dated 28.07.1995, that provides for maternity leave to the adoptive mother in the same manner as is available to a natural mother. The Principal of the respondent No. 4 - College approved the leave and the proposal was forwarded to the Joint Director of Higher Education, for necessary action. To the surprise of the petitioner, the Respondent No. 3 - the Joint Director of Higher Education, Nagpur informed the respondent No. 4 - Principal of the College, by the impugned communication dated 07.05.2015, that there was no provision for granting maternity leave to a mother who begets a child through surrogacy procedure, in the Government Resolution dated 28.07.1995. The petitioner has challenged the communication dated 07.05.2015, by this petition.

…

7. On hearing the learned counsel for the parties, it appears that the Joint Director of Higher Education, Nagpur, was not justified in refusing maternity leave to the petitioner. According to Oxford English Dictionary, maternity means - motherhood. Maternity means the period during pregnancy and shortly after the child's birth. If Maternity means motherhood, it would not be proper to distinguish between a natural and biological mother and a mother who has

begotten a child through surrogacy or has adopted a child from the date of his/her birth. The object of maternity leave is to protect the dignity of motherhood by providing for full and healthy maintenance of the woman and her child. Maternity leave is intended to achieve the object of ensuring social justice to women. Motherhood and childhood both require special attention. Not only are the health issues of the mother and the child considered while providing for maternity leave but the leave is provided for creating a bond of affection between the two. It is said that being a mother is one of the most rewarding jobs on the earth and also one of the most challenging. To distinguish between a mother who begets a child through surrogacy and a natural mother who gives birth to a child, would result in insulting womanhood and the intention of a woman to bring up a child begotten through surrogacy, as her own. A commissioning mother like the petitioner would have the same rights and obligations towards the child as the natural mother. Motherhood never ends on the birth of the child and a commissioning mother like the petitioner cannot be refused paid maternity leave. A woman cannot be discriminated, as far as maternity benefits are concerned, only on the ground that she has obtained the baby through surrogacy. Though the petitioner did not give birth to the child, the child was placed in the secured hands of the petitioner as soon as it was born. A newly born child cannot be left at the mercy of others. A maternity leave to the commissioning mother like the petitioner would be necessary. A newly born child needs rearing and that is the most crucial period during which the child requires the care and attention of his mother. There is a tremendous amount of learning that takes place in the first year of the baby's life, the baby learns a lot too. Also, the bond of affection has to be developed. A mother, as already stated hereinabove, would include a commissioning mother or a mother securing a child through surrogacy. Any other interpretation would result in frustrating the object of providing maternity leave to a mother, who has begotten the child.

8. As rightly pointed out on behalf of the petitioner, there is nothing in Rule 74 of the Maharashtra Civil Services (Leave) Rules, 1961, which would disentitle a woman, who has attained motherhood through the surrogacy procedure to maternity leave. Rule 74 provides for maternity leave to a female government employee. We do not find anything in Rule 74 which disentitles the petitioner to maternity leave, like any other female government servant, only because she has attained motherhood through the route of surrogacy procedure. It is worthwhile to note that by the Government Resolution dated 28.07.1995, maternity leave is not only provided to a natural mother but is also provided to an adoptive mother, who adopts a child on its birth. The only reason for refusing maternity leave to the petitioner is that there is nothing in the Government Resolution, dated 28.07.1995 for providing maternity leave to the mother who begets the child through surrogacy. If the Government Resolution, dated 28.07.1995 provides maternity leave to an adoptive mother, it is difficult to gauge why maternity leave should be refused to the mother, who secures the child through surrogacy. In our view, there cannot be any distinction whatsoever between an adoptive mother that adopts a child and a mother that begets a child through a surrogate mother, after implanting an embryo in the womb of the surrogate mother. In our view, the case of the mother who begets a child through surrogacy procedure, by implanting an embryo created by using either the eggs or sperm of the intended parents in the womb of the surrogate mother, would stand on a better footing than the case of an adoptive mother. At least, there cannot be any distinction between the two. Right to life under Article 21 of the Constitution of India includes the right to motherhood and also the right of every child to full development. If the government can provide maternity leave to an adoptive mother, it is difficult to digest the refusal on the part of the Government to provide maternity leave to a mother who begets a child through the surrogacy procedure. We do not find any propriety in the action on the part of the Joint Director of Higher Education, Nagpur, of rejecting the claim of the petitioner for maternity leave. The action of the respondent Nos. 1 to 3 is clearly arbitrary, discriminatory and violative of the provisions of Articles 14 and 21 of the Constitution of India. It is useful to refer to the unreported judgment of the Delhi High Court in the case of *Rama Pande v. Union of India*, and relied on by the learned counsel for the petitioner, in this regard.

9. Hence, for the reasons aforesaid, the writ petition is allowed. The impugned communication dated 07.05.2015 is quashed and set aside. It is hereby declared that the petitioner is entitled to the maternity leave for a period of one year from the date of the birth of the child i.e. 04.12.2014. Rule is made absolute in the aforesaid terms with no order as to costs."

IN THE HIGH COURT OF DELHI

Inspector (Mahila) Ravina v. Union of India & Ors.
MANU/DE/3946/2015
S. Ravindra Bhat and V.K. Shali, JJ.

The petitioner was unable to attend a pre-promotional course as she was pregnant. She had cleared the course in the next batch after her pregnancy was over. However, she was denied restoration of her seniority to the position that she would have been in, had she cleared the first course. The CRPF justified the denial of seniority on grounds of the petitioner's "unwillingness" to attend the first pre-promotional course. While deciding whether the petitioner's pregnancy signified her unwillingness or inability to attend the course, the Court examined whether penalising the petitioner for her pregnancy and forcing her to choose between having a child and her career violated her rights under Articles 21, 14, 15 (1) and 16 (2) of the Indian Constitution.

Bhat, J.: "…

7. The main question which this court has to decide is whether the Petitioner's pregnancy would amount to unwillingness or signify her inability to attend a required promotional course and if she is entitled to a relaxation of rules to claim seniority at par with her batchmates.

8. The facts are not in controversy; the petitioner had to approach this court, on an earlier occasion, along with her colleagues, due to the CRPF"s stand that she lacked two years' experience in an operational post. The promotion list dated 06.09.2007 omitted her name. This was set right pursuant to W.P. (C) No. 617/2011 and the CRPF restored the Petitioner's seniority and consequential benefits w.e.f. 06.09.2007. In the meanwhile, the pre-promotional courses were conducted; the petitioner could not attend those, on account of pendency of dispute. Her colleagues/batchmates got the first opportunity to do so, when Batch No. 85 was sent for the course. She could not attend the course - not on account of her volition, but for medical reasons (she was declared Shape III as she was pregnant). She ultimately cleared the course in the next batch.

9. To conclude that pregnancy amounts to mere unwillingness - as the respondents did in this case- was an indefensible. The choice to bear a child is not only a deeply personal one for a family but is also a physically taxing time for the mother. This right to reproduction and child rearing is an essential facet of Article 21 of the Constitution; it is underscored by the commitment of the Constitution framers to ensure that circumstances conducive to the exercise of this choice are created and maintained by the State at all times. This commitment is signified by Article 42 ("Provision for just and humane conditions of work and maternity relief- The State shall provide conditions for securing just and humane conditions of work and for maternity relief") and Article 45 ("Provision for early childhood care and education to children below the age of six years- The State shall endeavour to provide for early childhood care... "). The Maternity Benefits Act, 1976 protects the expecting mother's interests in employment. Provisions of the Factories Act, 1948 and the Central Civil Service (Leave) Rules, 1972 provide for post-natal care leave enabling mothers to spend time with infants who need early childhood care.

10. The International Covenant on Economic, Social and Cultural Rights (ICESCR), which has been ratified by India, spells out in greater detail the various facets of the broad right to health. Article 10 of ICESCR which is relevant, reads as under:

"Article 10

1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.

2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits…"

The ruling of the Supreme Court in *Suchita Srivastava v. Chandigarh Administration*, AIR 2010 SC 235 upholds the autonomy of a woman's right to make a choice of parenting. The Court held that:

> "11. ... There is no doubt that a woman's right to make reproductive choices is also a dimension of 'personal liberty' as understood under Article 21 of the Constitution of India. It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods. Furthermore, women are also free to choose birth-control methods such as undergoing sterilisation procedures. Taken to their logical conclusion, reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children..."

11. It would be a travesty of justice if a female public employee were forced to choose between having a child and her career. This is exactly what the CRPF's position entails. Pregnancy is a departure from an employee's "normal" condition and to equate both sets of public employees- i.e. those who do not have to make such choice and those who do (like the petitioner) and apply the same standards mechanically is discriminatory. Unlike plain unwillingness- on the part of an officer to undertake the course, which can possibly entail loss of seniority- the choice exercised by a female employee to become a parent stands on an entirely different footing. If the latter is treated as expressing unwillingness, CRPF would clearly violate Article 21. As between a male official and female official, there is no distinction, in regard to promotional avenues; none was asserted. In fact, there is a common pre-promotional programme which both have to undergo; both belong to a common cadre. In these circumstances, the denial of seniority benefit to the petitioner amounts to an infraction of Article 16 (1) and (2) of the Constitution, which guarantee equality to all in matters of public employment, regardless of religion, caste, sex, descent, place of birth, residence etc. A seemingly "neutral" reason such as inability of the employee, or unwillingness, if not probed closely, would act in a discriminatory manner, directly impacting her service rights. That is exactly what has happened here: though CRPF asserts that seniority benefit at par with the petitioner's colleagues and batchmates (who were able to clear course No. 85) cannot be given to her because she did not attend that course, in truth, her "unwillingness" stemmed from her inability due to her pregnancy. In this present situation the course was in Coimbatore. Travelling and living in an alien area without support was not a feasible proposition for an expecting mother; besides, the CRPF had determined that her medical category was SHAPE III. Mercifully, the CRPF does not contend that its regulations imposed any restrictions on a female employee's pregnancy at the stage of the Petitioner's career. That the petitioner exercised her right therefore to become a parent should not operate to penalise her, and her "choice" to do so was irrelevant, in the circumstances of the case; the CRPF should have taken the reasons for the unwillingness into account given the admitted fact that she was pregnant.

12. Standing Order dated 19.03.1999, by clause (J), clothes the Director General, CRPF with discretion – through non-obstante and overriding power. This case was eminently suitable for the Director General to exercise his powers on a compassionate basis, enabling the petitioner to catch up on lost opportunity due to her involuntary condition (on account of her exercise of reproductive rights) and regain her seniority with her batchmates who cleared the 85th course. … The lack of an express plea of pregnancy based discrimination does not in any way stop this court from doing complete justice, to further the rights of the petitioner under Articles 14, 15 (1), 16 (2) and 21 of the Constitution of India.

13. For the foregoing reasons, this Court hereby directs the Respondents to restore seniority of the Petitioner from 10.07.2010, the completion date of SICC SL. No. 83- as in the case of her other batchmates who completed that course, and consequently promote as well as assign her consequential seniority. Consequential seniority and all pay benefits including fixation of pay and arrears of pay shall also be disbursed to the petitioner within twelve weeks. The writ petition is allowed in the above terms. No costs."

IN THE HIGH COURT OF KERALA

Neetu Bala v. Union of India
2016 SCC OnLine P&H 602
Harinder Singh Sidhu, J.

The petitioner was declared "unfit" for appointment to the Short Service Commission in the Army Medical Corps on account of her pregnancy. Respondents did not reply to her request to keep a vacancy for her to join service after delivery of the child. In this writ petition, the Court examined the legality of denial of appointment on grounds of pregnancy, in light of the constitutional guarantees of equality and non-discrimination on grounds of sex under Articles 14, 15 and 16 (1) of the Indian Constitution and obligations under international conventions.

Sidhu, J.: "…

10. In the aforesaid facts, the question that arises is whether the denial of appointment to the petitioner holding her to be 'unfit' solely on account of pregnancy is legal and justified? Consequently, is Page 5 of the Appendix to DGAFMS/DG 3A letter No. 9450/USG Abd/DGAFMS/DG 3A dated 22.10.2009 to the extent it lays down that detection of pregnancy would render a candidate UNFIT for commissioning legal and Constitutional?

CONSTITUTIONAL PROVISIONS AND THE SUPREME COURT:

11. The Constitution of India accords socio economic and political justice, equality of status and of opportunity assuring the dignity of individual. Article 14 guarantees equality by providing that 'The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India'. Article 15(1) abolishes discrimination on grounds only of religion, race, caste, sex, place of birth or any of them. Article 15(2) requires that there shall be no disability, liability or restriction on grounds of sex and ensures equality of status. Article 15(3) enables the State to make special provisions for women and children. Article 16(1) accords equality of opportunity in public service for appointment or employment to an office or post under the State and ordains that no citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State. There is thus a specific prohibition against gender discrimination in matters relating to public employment.

12. It is in the light of these Constitutional provisions that the validity of the impugned action has to be judged.

13. At the outset, it would be helpful to refer to two important decisions of the Hon'ble Supreme Court on the issue of gender discrimination in the context of marriage and pregnancy.

14. In *C.B. Muthamma v. Union of India*, (1979) 4 SCC 260, Rule 8(2) of Indian Foreign Service (Conduct and Discipline) Rules, 1961, was challenged by Miss Muthamma, a member of the Indian Foreign Service. As per this Rule, a woman member of the service was required to obtain the permission of the Government in writing before her marriage was solemnized. Further, as per this Rule, at any time after the marriage, a woman member of the Service could be required to resign from service, if the Government was satisfied that her family and domestic commitments were likely to come in the way of the due and efficient discharge of her duties.

15. Though, the Court was saved of the necessity to strike down the Rule, as it was stated that the Rule had been deleted, but it made very pertinent observations regarding the invalidity thereof. The Court observed that gender discrimination was patent in the Rule, that sex prejudice against Indian Womanhood was writ large in the Rule and that it was in violation of Article 16 of the Constitution.

> "*This writ petition by Miss Muthamma, a senior member of the Indian Foreign Service, bespeaks a story which makes one wonder whether Articles 14 and 16 belong to myth or reality. The credibility of constitutional mandates shall not be shaken by governmental action or inaction but it is the effect of the grievances of Miss Muthamma that sex prejudice against Indian womanhood pervades the service rules even a third of a century after Freedom. There is some basis for the charge of bias in the rules and this makes the ominous indifference of the executive to bring about the banishment of discrimination in the heritage of service rules. If high officials lose hopes of equal justice under the rules, the legal lot of the little Indian, already priced out of the expensive judicial market, is best left to guess. This disturbing thought induces us to make a few observations about the two impugned*

rules which appear prima facie, discriminatory against the female of the species in public service and have surprisingly survived so long, presumably, because servants of government are afraid to challenge unconstitutional rule making by the Administration……

3. If a fragment of these assertions were true, unconstitutionality is writ large in the administrative psyche and masculine hubris which is the anathema for Part III haunts the echelons in the concerned Ministry. If there be such gender injustice in action, it deserves scrupulous attention from the summit so as to obliterate such tendency……

5. Discrimination against women, in traumatic transparency, is found in this rule. If a woman member shall obtain the permission of government before she marries, the same risk is run by the Government if a male member contracts a marriage. If the family and domestic commitments of a woman member of the Service are likely to come in the way of efficient discharge of duties, a similar situation may well arise in the case of a male member. In these days of nuclear families, inter, continental marriages and unconventional behaviour, one fails to understand the naked bias against the gentler of the species. Rule 18 of the Indian Foreign Service (Recruitment, Cadre, Seniority and Promotion) Rules, 1961, runs in the same prejudicial strain:

*"(1), (3) * * *

(4) No married woman shall be entitled as of right to be appointed to the service."*

6. At the first blush this rule is in defiance of Article 16. If a married man has a right, a married woman, other things being equal, stands on no worse footing. This misogynous posture is a hangover of the masculine culture of manacling the weaker sex forgetting how our struggle for national freedom was also a battle against woman's thraldom. Freedom is indivisible, so is Justice. That our founding faith enshrined in Articles 14 and 16 should have been tragically ignored vis, a, vis half of India's humanity viz. our women, is a sad reflection on the distance between Constitution in the book and law in action. And if the executive as the surrogate of Parliament, makes rules in the teeth of Part III especially when high political office, even diplomatic assignment has been filled by women, the inference of diehard allergy to gender parity is inevitable."

16. The next case is *Air India v. Nergesh Meerza*, (1981) 4 SCC 335, which is a locus classicus on the issue.

17. In this case, challenge was to the Constitutional validity of Regulation 46(1)(c) of the Air India Employees Service Regulations, as per which, as against the normal age of retirement of the employees of the Air India Corporation of 58 years, an Air Hostess was to be retired upon attaining the age of 35 years or on marriage if it took place within four years of service or on first pregnancy, whichever occurs earlier. This Regulation was challenged on the ground of being arbitrary and unreasonable and violative of Article 14 of the Constitution.

…

19. The Court held that as marriage after four years was not prohibited, there was no reason as to why pregnancy should stand in the way of the Air Hostesses continuing in service. It negated the argument that from the very beginning of pregnancy women may be prone to sickness during long flights. It was observed that, in any case, the difficulty in discharge of duties by pregnant Air Hostesses could be mitigated by granting them maternity leave even up to periods of 14 to 16 months and making alternative arrangements on temporary or ad hoc basis. Termination of service in such circumstances was held to be callous and cruel. It was termed as an insult to Indian Womanhood and violative of Article 14 of the Constitution.

20. It was emphatically held that pregnancy is not a disability but one of the natural consequences of marriage. Any distinction made on the ground of pregnancy was held to be arbitrary.

…

24. Thus, as per this decision, in cases where a married woman is not disqualified for appointment, the fact that she is pregnant, cannot be a disqualification for continuing with appointment. Nor can pregnancy, in such circumstances, be treated as a bar to be appointed. Any inability to discharge duties during the months, before and after child birth, can be taken care of by granting maternity leave for the period required.

25. Apart from Articles 14 and 16 which were the basis of the Supreme Court decisions, discriminatory treatment of pregnant women would also fall foul of Article 42 of the Constitution which requires the State to make provision for securing just and humane conditions of work and for maternity relief. In *Municipal Corpn. of Delhi v. Female Workers (Muster Roll)*, (2000) 3 SCC 224, it has been held that the validity of an executive or administrative action in denying maternity benefit has to be examined on the anvil of Article 42 which, though not enforceable at law, is nevertheless available for determining the legal efficacy of the action complained of.

INTERNATIONAL CONVENTIONS.

26. While in the earlier decisions reliance was only on the provisions of the Constitution, an additional dimension to Constitutional adjudication, of gender discrimination/gender justice issues has emerged in view of the increasing reference by the Hon'ble Supreme Court to International Conventions. It has declared that International Conventions would be enforceable when they elucidate and effectuate the fundamental rights and that the Courts are obliged to apply them when there is no inconsistency with the domestic law.

27. India is a signatory to various international covenants and treaties. The Universal Declaration of Human Rights, adopted by the United Nations on 10.12.1948, set in motion the universal thinking that human rights are supreme and ought to be preserved at all costs. There have followed a series of conventions, which reflect the broad international consensus on important issues of global concern.

28. Of the International Conventions, two which are very relevant for the present issue are "*Convention on the Elimination of all Forms of Discrimination against Women" (CEDAW) and "ILO: Maternity Protection Convention 2000*".

CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW):

…

33. Article 11 of this Convention which requires States/parties to take all appropriate measures to eliminate discrimination against women in the field of employment is of particular relevance. It is reproduced below:

"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."

34. By its provisions CEDAW attempts to ensure substantive equality as against merely formal equality. Towards this end, it requires the State/parties to take all appropriate measures to eliminate discrimination against women in the field of employment and provide the same employment opportunities, including the application of the same criteria for selection in matters of employment. To prevent discrimination against women on the grounds of marriage or maternity, it requires States/parties to take appropriate measures to prohibit dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status. It also requires the introduction of maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowance.

ILO:MATERNITY PROTECTION CONVENTION 2000:

35. As noted in the preamble to this convention, it takes into account the circumstances of women workers and the need to provide protection for pregnancy, which are the shared responsibility of government and society and seeks to further promote equality of all women in the workforce and the health and safety of the mother and child.

36. This Convention has entered into force on 7th February, 2002. Thirty countries have ratified it, though India is not amongst them.

37. Article 8 of this Convention is concerned with 'Employment Protection and Non Discrimination'. It makes it unlawful for an employer to terminate the employment of a woman during her pregnancy or absence on leave on that account except on grounds unrelated to the pregnancy or birth of the child and its consequences or nursing. Article 9 requires members to take measures to ensure that pregnancy does not constitute a source of discrimination in employment.

…

39. CEDAW, in particular, has been invoked by the Hon'ble Supreme Court in numerous cases while deciding different issues of gender discrimination.

…

CONCLUSION:

67. Based on the aforesaid discussion, there can be no conclusion other than to hold that the action of the respondents in denying appointment to the petitioner merely on account of her pregnancy is arbitrary and illegal. It is violative of Articles 14 and 16 of the Constitution. It is against the express provisions of the International Conventions referred to above. It is against the weight of the judicial precedents from major jurisdictions across the globe interpreting laws prohibiting gender discrimination. Most of all by forcing a choice between bearing a child and employment, it interferes both, with her reproductive rights and her right to employment. Such an action can have no place in modern India.

68. Page 5 of the Appendix to DGAFMS/DG 3A letter No. 9450/USG Abd/DGAFMS/DG 3A dated 22.10.2009 to the extent it lays down that pregnancy would render a candidate UNFIT for commissioning is also illegal and unconstitutional and is so declared.

69. However, keeping in view the nature and responsibilities of the job in question, it would be open to the respondents to devise any appropriate procedure to either give appointment on selection and grant maternity leave or keep a vacancy against which the woman candidate who is pregnant was selected, reserved for her to be offered to her after confinement.

…"

IN THE HIGH COURT OF MADRAS

T. Priyadharsini v. The Secretary to Government, Department of School Education, Government of Tamil Nadu & Ors.,
and
R. Gayathri v. The Secretary to Government, Education Department, Fort St. George & Ors.,
2016 SCC OnLine Mad 30096
S. Vimala, J.

The petitioners, each having delivered twin children in their first pregnancy, applied for maternity leave for their second pregnancy. Their application was denied on account of the orders issued by the Tamil Nadu government restricting maternity leave and benefits up to two surviving children. In this decision, the validity of these government orders was examined by the Madras High Court.

Vimala, J.: " …

BRIEF FACTS:-

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.

4.1. Similarly placed persons like that of the petitioner, one Mary Josephine Angeli had been granted the benefit of maternity leave for her second delivery, after the delivery of twin babies during the first delivery.

4.2. The intention of the said Government Order is only to grant maternity leave for two deliveries and not for number(s) of children in each delivery.

…

5.1. As per the proceedings of the second respondent, dated 04.01.2003 and G.O. No. 51 (P&AR) Department, dated 16.05.2011 and G.O.Ms. No. 237, dated 29.06.1993, a woman Government servant with less than two surviving children are allowed to take maternity leave for a period of 180 days from the date of its commencement.

5.2. This petitioner (T. Priyadharsini) gave birth to twin children (one male and one female) on 08.07.2011 and then applied for second maternity leave on 12.10.2014. As per G.O.Ms. No. 51, dated 16.05.2011, maternity leave was sanctioned to the petitioner for 179 days, i.e., from 13.10.2014 to 09.04.2015 and after leave, she was permitted to join duty on 10.04.2015. But to the shock and dismay of the petitioner, she received the impugned proceedings of the sixth respondent, dated 21.04.2015, on the basis of the proceedings of the fourth respondent, dated 09.04.2015, stating that in the maternity leave application of the petitioner, dated 07.04.2015, the petitioner has not furnished the fact that she already had two surviving children, therefore, she is not entitled to avail maternity leave for the second time.

…

6. The issue, whether a married woman Government Servant is entitled to get fully paid maternity leave, if she has already two surviving children, when the Government order in G.O.Ms. No. 173, dated 27.06.1997, stipulates that on and from 29.06.1993, maternity leave shall be granted to a woman Government servant with less than two surviving children has been answered by this Court, in detail, in W.P. (MD) No. 13555 of 2009 (*J. Sharmila v. The Secretary to Govt. Education Department, Govt. of Tamil Nadu*).

7. According to the petitioners, the said order is squarely applicable to the facts of the case and the petitioner is entitled to avail 180 days of maternity leave, as per G.O.Ms. No. 237, dated 29.06.1993 and G.O.Ms. No. 51, dated 16.05.2011…

…

16. The object of the Maternity leave has been highlighted by the Hon'ble Supreme Court in the decision reported in *Municipal Corporation of Delhi v. Female Workers (Muster Roll)*, on 8 March, 2000, in Special Leave Petition (Civil) 12797 of 1998, where-under it has been held as follow:—

> "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."

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 [*sic*] 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:—

> Highlights of the Bill:
>
> 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 writ petitions are allowed as prayed for. No costs."

IN THE HIGH COURT OF KERALA

Mini K.T. v. Life Insurance Corporation of India
2017 SCC OnLine Ker 41588
Muhamed Mustaque, J.

The petitioner's employment was terminated by the respondent on grounds of unauthorised absence, disregarding her request for extension of leave and transfer to her husband's place of employment for the purpose of availing effective care facilities for their disabled child. The appellate authority, although sympathetic to the petitioner's case, upheld the order of termination of employment in light of the larger organisational interest. In this writ petition, the High Court examined whether women had a right to non-discrimination in employment on the basis of compelling family care giving responsibility under the fundamental rights guaranteed under Articles 14, 15, 16 and 21 of the Indian Constitution and the international human rights framework.

Mustaque, J: "…

2. A child born to a family sees the world first through the eyes of his mother and develops his cognitive skills through the vision of his family. In earlier centuries, predominantly, in agrarian society, the role of woman was limited to taking care of children, household and family. Social conditions of modern family underwent transformation due to industrialisation and urbanisation. As a result, the social and legal concept related to the society also got changed. Motherhood then has become a contentious issue in the modern society, particularly, in economic frontier, as the competing market interests override notions of culture and social justice like gender equity. Identity of a women is often tangled within the patriarchal structure of a commercially or profit motivated enterprise which dare to see mothering or family responsibility remain subordinate to their interest. Complexity of working environment as above is designed by an architecture without adhering to rules of gender equality; often overwhelmingly to suit men. In this writ petition, a distressed mother, a working woman, finds herself confronted with the institutional structure of her employer. She was thrown out of her service for continuous absence for taking care of her differently abled child. The disciplinary authority after enquiry found that absence from employment to take care of such child cannot be a reason to remain out of service. Treating unauthorised absence from service as misconduct, not justifying her continuation in service, she was removed.

3. Brief facts which are not in dispute are as follows:

> The petitioner Smt. K.T. Mini, Assistant with the Life Insurance Corporation of India (hereinafter referred to as the "Corporation"), a State owned Insurance group, had unblemished and uninterrupted 17 years of service before she was removed. She joined service as an Assistant on 24.11.1989. All her trouble seems to have started on the birth of her second girl child. She was born on 14.11.2001. She was afflicted with chicken pox after two years. Later she developed speech impairment and abnormal behavior. According to the petitioner, doctors treating her, diagnosed her condition as mild autism. She was at that time working at Calicut. She took her daughter to Chennai sometime in the year 2007 on the firm belief that the child would get a better treatment. Child was admitted in Priya Speech and Hearing Centre, Madippakam Chennai. She applied for transfer to Chennai on 20.6.2007. She also applied for extra ordinary leave before proceeding for leave on 29.6.2007. Her husband, at that time, appears to be working as the Manager of a private Bank at Tirupur. It appears that she was granted LWA till 30.4.2008. In the meanwhile, her husband got a job in Bahrain in Middle East. Therefore, during the period of leave, on 28.1.2008, Mini made another request to cancel her request for transfer to Chennai and permit her to go abroad. She also requested for issuance of no objection certificate. No objection certificate was issued for obtaining passport. On 21.4.2008, she sought an extension of leave of 60 days on the ground that she has to join her husband abroad. In the meanwhile, the petitioner's request for extension has been rejected from 1.5.2008. This appears to have been communicated to her as per Ext.P6 dated 15.7.2008. The petitioner was directed to join duty within 15 days. The petitioner by Ext.P7 dated 27.7.2008 narrated the circumstances under which she has to stay back in Bahrain. The reason being that she need to take care of her child and she found the facilities in Bahrain, of par excellance and she could do well with the support of her husband. Ignoring her request, she was proceeded under disciplinary action. In a response to show cause notice, she reiterated the circumstances for granting her special

leave to take care of her child. She also moved the Chairman of LIC narrating her grievance. She even requested to get a transfer to any of the Branches in Bahrain. All that ended in vain for the simple reason that overstay of the petitioner without sanction of leave is found in violation of LIC (Staff) Regulations, 1960. After enquiry, the petitioner has been ordered to be removed from service. As I adverted earlier, there is no dispute regarding the facts involved. Interestingly, the appellate authority was considerate regarding the petitioner's reason for not joining duty, however, finding that such sympathetic approach is against organisational interest, did not interfere with the order passed by the disciplinary authority. It is appropriate to reproduce the findings of the appellate authority in this regard which would better tell how conflict between identity of a woman; organisational interest and motherhood of working women remain incongruous for want of protective measures under law.

"…in her appeal, the appellant has mainly contended that her prolonged unauthorised absence was mainly for the treatment of her daughter who was suffering from certain developmental disabilities and that she had to leave for Bahrain only for her husband's moral support and also for availing effective training/therapies for her sick child. In this regard, I may state that the appellant's problems, as a mother, are quite understandable and deserve all pity. On the other hand, viewing broader interest of the Organisation, Office cannot run without the support of its employees and long absence from work of any employee is sure to deter our services to customers. It was for this reason that the appellant was advised repeatedly to report for duty. Records reveal that the appellant had been given ample leniency in the matter of availing leave which only shows that Office had been considerate and sensitive to her problems. However, as pointed out earler, viewed from the office angle, organiszational interest overweighs individual interest. I have also gone through the representations dated 08/06/2010 and 18/10/2010 subsequent to her preferring the appeal against the Order of the Disciplinary Authority. I have only come to conclusion that in spite of being advised with all seriousness to join duty, she had not heeded to our advice and had taken her own time to settle down in India and prefer a representation. While leaving India, she did not obtain prior permission from the Office and it only shows that she had taken the Office for granted in the matter of extending her absence. Although her problems may be genuine, it is not possible for the Office to grant leave indefinitely to every employee who is undergoing similar problems. Therefore, from the Organisational point of view, her unauthorized absence cannot be justified."

(emphasis supplied)

4. In the light of the undisputed facts, this court is called upon to adjudicate on a unique problem related to working women in Constitutional context of fundamental rights. Can a State or its instrumentality as an employer discriminate a woman employee based on compelling family care giving responsibility?

5. Though, there is no protective legislation to protect a working woman against compelling family responsibility discrimination, the Constitutional court cannot ignore involvement of fundamental rights as against the State. The question of legality of disciplinary proceedings should not be assessed in the narrow compass of rules or regulations of the Corporation, but rather within the framework of fundamental rights qua principles relating to family responsibility developed through International Human Rights Law embedded into our constitutional principles. The standards and norms enunciated under the International Human Rights Law can be juxtaposed while assimilating Fundamental Rights of citizens which are not inconsistent with domestic law in India. (See judgments in *Vishaka v. State of Rajasthan* [(1997) 6 SCC 241]; *Pratap Singh v. State of Jarkhand* [(2005) 3 SCC 551] and *National Legal Services Authority v. Union of India* [(2014) 5 SCC 438].

…

RELEVANT INTERNATIONAL LAWS AND ITS IMPACT:

12. Any debate on human rights begins with principles enunciated in universal declaration of human rights. Article 16 of UDHR states as follows:

"Article 16(3). The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."

13. Article 25(2) of UDHR provides as follows:

> "Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection."

14. In International Covenant on Economic, Social and Cultural Rights (ICESCR) adopted by General Assembly resolution 2200 A (XXI) of 16 December 1966:

> "Article 10 The States Parties to the present Covenant recognize that:
>
> 1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.
>
> 2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.
>
> 3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also 14 The Core International Human Rights Treaties set age-limits below which the paid employment of child labour should be prohibited and punishable by law."

15. International Covenant on Civil and Political Rights (ICCPR) was ratified by India on 11.12.1977. ICCPR provides as follows:

> "Article 23
>
> 1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
>
> 2. The right of men and women of marriageable age to marry and to found a family shall be recognized.
>
> 3. No marriage shall be entered into without the free and full consent of the intending spouses.
>
> 4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children."

16. Convention on the Rights of the Child adopted by General Assembly resolution 44/25 of 20 November 1989 states:

> "Article 5 States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.
>
> Article 23(4). States Parties shall promote, in the spirit of international cooperation, the exchange of appropriate information in the field of preventive health care and of medical, psychological and functional treatment of disabled children, including dissemination of and access to information concerning methods of rehabilitation, education and vocational services, with the aim of enabling States Parties to improve their capabilities and skills and to widen their experience in these areas. In this regard, particular account shall be taken of the needs of developing countries."

17. Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was adopted by the United Nations General Assembly on 18.12.1979. This convention had significant place for evolving legal principles to determine rights of women.

18. Article 1 of CEDAW provides as follows:

> "Article I
>
> For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

19. Articles 2(d) & 2(e) of CEDAW states as follows:

> "Article 2
>
> (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
>
> (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;"

20. Article 11 of CEDAW contemplates elimination of discrimination against women in employment under broader rights of human rights law. Article 11 reads as follows:

> "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."

21. Relying on CEDAW convention in *Vishaka's Case* (supra), the Apex Court held that provisions of the above conventions are binding and enforceable as such in India. It is appropriate to refer para 8 of *Vishaka's case*, which reads as follows:

> "8. Thus, the power of this Court under Article 32 for enforcement of the fundamental rights and the executive power of the Union have to meet the challenge to protect the working women from sexual harassment and to make their fundamental rights meaningful. Governance of the society by the rule of law mandates this requirement as a logical concomitant of the constitutional scheme…"

22. The Apex Court in, *Municipal Corporation of Delhi v. Female Workers (Muster Roll)*, [(2000) 3 SCC 224], while considering a matter arising under the Maternity Benefit Act, 1961, referred to Article 11 of CEDAW and observed that the principles contained in Article 11 are to be read into with contract of service between Municipal Corporation of Delhi and the women employees (muster roll) working therein. Therefore, there may not be any difficulty in incorporating standards and norms referred in the International Human Rights Law not repugnant to any domestic law to have a vision on justice as enshrined under the Constitution or the Statutory Laws.

23. Status, dignity and self respect of a woman as mother; evolution of her rights in India: Motherhood is all about love, care, affection, protection, nurturing of child etc. It is a dignity inherent in a woman. Dignity means the quality that holds her in esteem. She is considered to be noble and honourable on account of the status as above. Motherhood is perhaps the most important challenging job in the world. The principles enunciated through the Human Rights Law demand the dignity of the individual is protected. On account of her social status as above, a woman shall not be discriminated while competing with men in the field of employment or in any other segment. The issue involved in this writ petition calls for determination based on the status, dignity and self respect and also on the ground of discrimination. The status essentially involves a question whether motherhood is integral to the dignity of a woman or not. In *Justice K.S. Puttaswamy's case* (supra), the Hon'ble Supreme Court while adverting to the privacy of individual observed that privacy is an essential aspect of dignity. It is further observed that dignity has both intrinsic and instrumental values. According to the Apex Court an intrinsic value of human dignity is an entitlement or a constitutional protection interest in itself. Thus, it was concluded that the family, marriage, procreation and sexual orientation etc are integral to the dignity of individual. To understand the dignity of a woman, the societal background has to be considered. The value cherished and nourished by a society that matters for recognition of such dignity. As adverted above, this court has to consider the issue in the light of Articles 21 and 14, 15 and 16 of the Constitution. For deciding the issue within the scope of Article 21, the Court has to find how Indian society viewed motherhood.

…

32. As seen from the discussions as above, motherhood is an integral part of dignity of a woman. Motherhood encompass status, dignity and self respect as elements. Article 21 protects life and personal liberty. It can be deprived only in accordance with the procedure established by law. Motherhood is an option. In this Universe life of everyone is an option of his parents, but that does not mean that motherhood has to be subjugated to any other interest. Right to procreation is intrinsically associated with right to live. It is a basic right of man. Thus, choice of option does not change character of such right as fundamental right. In general, employer has no legal obligation to have concern over employee's private affairs. However, this has an exception, if those private affairs are interest protected as fundamental rights. To understand the nature of fundamental rights, in fact, in the foregoing paragraph, this court had adverted to the standards and norms developed through international human rights law.

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

34. A mother cannot be compelled to choose between her motherhood and employment. A woman employee is not expected to surrender her self respect fearing action against her for not being able to attend duty for compelling family responsibility. John Rawls in the book, "A Theory of Justice", identifies that in a just Society, self respect is not subject to political bargaining while parties in original position thrust for justice as fairness. He describes self respect thus:

> "67. SELF-RESPECT, EXCELLENCES, AND SHAME
>
> …We may define self-respect (or self-esteem) as having two aspects. First of all, as we noted earlier, it includes a person's sense of his own value, his secure conviction that his conception of his good, his plan of life, is worth carrying out. And second, self-respect implies a confidence in one's ability, so far as within one's power, to fulfill one's intentions. When we feel that our plans are of little value, we cannot pursue them with pleasure or take delight in their execution. Nor plagued by failure and self-doubt can we continue in our endeavors. It is clear then why self-respect is a primary good. Without it nothing may seem worth doing, or if some things have value for us, we lack the will to strive for them. All desire and activity becomes empty and vain, and we sink into apathy and cynicism. Therefore the parties in the original position would wish to avoid at almost any cost the social conditions that undermine self-respect. The fact that justice as fairness gives more support to self-esteem than other principles is a strong reason for them to adopt it."

…

36. In patriarchy, woman belonged to kitchen. It needs to be realised that girls do have a dream and woman do have a vision, and motherhood cannot be seen as a burden on them to pursue such dreams and visions. The court while considering amplitude and meaning of life under Article 21 of the Constitution has to embrace its full meaning in the societal background on which the court is called upon to decide such disputes. Thus, a woman employee cannot be thrown out from service for remaining absent on account of taking care of child, if such taking care is indispensable for her. It is made clear that it is only in compelling circumstances, such right can be claimed and protected. In the enforcement of fundamental right, the employer cannot raise a plea to defend themselves by referring to financial implication or organisational interest. Whatever be the inconvenience that the employer may suffer, that is no excuse against claim of protection of fundamental rights. Our culture, tradition and practice venerate motherhood; our Constitution proclaim and protect status, dignity and self-respect of motherhood; let our deeds, action and decision not be allowed to become profane on motherhood of a woman.

37. The issue has another dimension in the context of Articles 14, 15 and 16 of the Constitution. Our Constitution proclaims through Preamble, the equality of status and opportunity. When a dignity is denied, that would amount to denial of status. That denial is a discrimination and amounts to violation of equality before law and equal protection before law as enshrined under Article 14. The fundamental rights are considered as part of a common thread of liberty, therefore, fundamental rights enumerated under different articles may overlap. A woman employee cannot be discriminated on account of compelling family responsibility. Nor can she be thrown out from employment on account of compelling family responsibility. The Constitution makers foresaw woman can be deprived from opportunity in public employment on account of her position in the traditional Society. Constitutional provisions, therefore, want to ensure that woman shall not be discriminated on account of her sex. Right to equal opportunity for a woman, for office or position is not possible, if her shackles of chain to confine her to household, is not removed. Their familial obligation cannot hamper her prospects of obtaining employment or continuing in employment. Our constitutional scheme under Articles 14 to 16 is well designed to insulate any discrimination against woman likely to be suffered by her on account of her familial obligations. Her womanhood as mother flows from her moral personality and can be distinguished as a superior right in any social standards. Any denial of such status certainly would offend protection accorded to her under Articles 14 to 16.

38. The crux of determination is whether a woman employee is unjustly denied an opportunity to compete with men in public employment.

39. Fairness in the workplace is a facet of equal opportunity in employment. The organisation should have policies in place to prevent discrimination. In the absence of any Regulations protecting her, the constitutional court has to adopt an approach reconciling service Regulations with Fundamental Rights to protect from any impending discrimination. Therefore, the service Regulations have to be read in harmony with the constitutional principles and those Regulations cannot be understood having an operational domain to invalidate such Fundamental Rights conferred on woman under the Constitution. Thus, any action of the employer denying an opportunity to woman to compete with men in public employment on account of her obligation as a woman, as a mother would amount to discrimination.

40. Convention on rights of child, cast an obligation on the State to respect the responsibility, rights and duties of parents. ICESCR Convention also obligates the State to take special measures for protection of children without any discrimination. UDHR also mandates that motherhood and child are entitled for special care. A woman as a mother, in fact, discharges those obligations cast on her which the State had been mandated to protect under the International conventions and laws. The modern State is having a pervasive control over the family. The State declared right of children upto elementary school as a Fundamental Right. The State also under Juvenile Justice (Care and Protection of Children) Act, 2015 protects the best interest of the child. Any neglect in the welfare of child or failure to secure best interest in child would entail in taking over custody of the child by the State through its agencies. State invested its resources on children. It is in that background the care giving to a child by a mother has to be addressed. A woman cannot therefore be discriminated on account of her compelling family responsibility of care giving to a child.

41. There is no right for an employee to get leave. Right to obtain leave would depend upon service Regulations. However, in the context of a claim based on fundamental right, the right to claim for leave has to be understood from the perspective of Fundamental Right. The fact that a woman discharges her duties as a mother, cannot be a reason to claim leave or to remain absent from employment in the absence of enabling provisions. She will have to show that she was deprived of attending duties on account of child care. There must be a correlation between absence and reasons for such absence. If on account of compelling familial obligation, a woman employee is unable to attend duty, that cannot be a reason to initiate any disciplinary proceedings against her. A compelling circumstance alone can be considered for such absence.

42. How does a compelling circumstance arise for consideration in a given context? It has to be ascertained whether a woman employee was prevented on account of the responsibility attached with the family and a woman employee has no other option in those circumstances. In the absence of protective legislation, the court can consider only 'compelling circumstance' in the sense protecting a woman employee under negative conception of liberty. In negative concept of liberty, the State is expected to protect its citizen from interference of others. In all other circumstances, a woman employee can claim only through positive liberty which requires a legislation. In a famous article, Two Concepts of Liberty, published in the year 1958, Isaiah Berlin refers to the concept of negative and positive liberty. The author introduced this concept beautifully in narratives in a prelude to the article…

43. It is not possible for the court to determine the area that falls for positive liberty. The court can very well determine existence of negative liberty, if the liberty is allowed to be encroached that might cause harm to her. 'Harm' means to refer, injury to her own individual value as protected 'interest'. This is the criteria to find out compelling circumstances. Consideration of the issues involved in this case:

44. In this case, there are two charges levelled against the petitioner; one is for remaining absent and the other for going abroad without permission.

45. In respect of the first charge, it is to be noted that the petitioner never wanted to be absent from employment. She requested the Corporation to transfer her to Chennai so as to enable her to provide better treatment to her child. This was not acceded. When the petitioner moved to Bahrain, she also sought a transfer to Bahrain. According to her, in Bahrain she found out better facilities to take care of her child. This was also not considered. Autism impacts communication, language and social skill. The study in *Embodying Motherhood* supra, the author refers to the position of the mother in such a situation as follows:…

46. The mother in such a situation has to give all her care to the child in precedence to any other affairs. That priority cannot be a reason for initiating disciplinary proceedings against her. If there is any causal connection between her absence and child care, the Corporation is bound to inquire and to make necessary adjustments for her. The Corporation could have considered her request, to transfer her to any other place where they can accommodate her to continue with the treatment of her child. The Corporation remained insensitive to the cry and love of a mother for her child, who suffered mild autism. Perhaps, it is for the reason that the Corporation have no regulation in its place to consider such request. It is to be noted that the Central Government incorporated a rule in the Central Central Civil Services (Leave) Rules, 1972 by inserting Rule 43C to grant leave to a woman Government servant as 'child care leave' for a maximum period of two years for taking care of upto two children. It shows that the State is sensitive about the issue of child care. The petitioner applied for extra ordinary leave. As per the Regulation of the Corporation, extra ordinary leave can be granted to an employee when no leave is due, not exceeding three months on any one occasion and 12 months during the entire period of service (see Regulation 65). Therefore, the Corporation did not accede to the request of the petitioner. But that does not fail the Corporation in recognising the petitioner's fundamental rights. The communication between the petitioner and the Corporation would clearly go to show that the petitioner does not want to remain absent

from employment but only wanted to work at a place where she can provide better treatment to her child. All her communication would go to show that she was absent as she was compelled to remain at a place where she could give the best treatment to her child. As already noted, it is the insensitiveness of the organisation that led to the conclusion that the petitioner was unauthorisedly absent.

47. The next serious charge against the petitioner is going abroad without permission. It is to be noted that the petitioner made a request as per Ext.P1 to go abroad. The Corporation did not reject her request. On the other hand, the Corporation issued a no objection certificate for obtaining passport. The Corporation never raised any objection to her going abroad. On the other hand, the Corporation knowing well that she was at abroad, directed her to report for duty as seen from Ext.P6. That itself would show that Corporation had no intention to take action against her for going abroad without getting permission. It may be true that in terms of Regulation 31, no employee shall remain absent from station without permission of the Corporation. However, the Corporation had never raised any objection. Further, there is no specific Regulation that written permission shall be obtained before going abroad. Ext.P1 request and Ext.P2 no objection certificate issued by the Corporation would clearly establish that the Corporation had no objection in allowing the petitioner to go abroad. Therefore, the charge on this misconduct is legally unsustainable.

48. Thus, the disciplinary proceedings were initiated against the petitioner as the Corporation had no measures to deal with the situation encountered by the petitioner. Incapacity of the organisation to deal with woes of a woman employee cannot be capitalised to penalise her. The inevitable conclusion thus has to be drawn is that the impugned orders have to be set aside and the petitioner has to be reinstated in service forthwith. However, taking note of the fact that the petitioner was requesting for extra ordinary leave without pay, this court is not ordering back wages. The petitioner will be entitled to reckon the broken period of service for all other service benefits. Thus, the petitioner is ordered to be reinstated forthwith.

49. Before parting with this judgment, this court has to remind the State the requirement of a legislation to protect an employee from discrimination based on family responsibility. Family responsibility may be equally applicable to male and woman employees. The State has to pursue family as an important unit for its own sustenance. The employers both in private and public remain oblivious as to the right of the employees on account of family responsibility and they are equally insensitive to such rights. Family responsibility discrimination arises when an employee suffers an adverse employment action owing to family care giving responsibility. Family responsibility may occur in different circumstances like, taking care of elderly parents, accidents, child care, diseases etc. It may not be possible for this court to enumerate all the circumstances. If an employee is able to demonstrate that on account of family responsibility, she/he requires adjustments in workplace, the employer or organisation must be in a position to accommodate such claim of the employee. The importance given to the family in the tradition and culture of this great Country must survive. It is for the State to come out with a legislation protecting employees against family responsibility discrimination. Therefore, the Registry shall forward a copy of this judgment to the Law Commission of India, Department of Labour and Social Welfare of the State and the Union and also to the Law Department of the Union and the State. The writ petition is disposed of as above. No orders as to costs."

IN THE SUPREME COURT OF INDIA

Navtej Singh Johar & Ors. v. Union of India
(2018) 10 SCC 1
Dipak Misra C.J., and R.F. Nariman, A.M. Khanwilkar, D.Y. Chandrachud and Indu Malhotra, JJ.

A five-judge bench of the Supreme Court read down Section 377 of the Indian Penal Code, 1860 in so far as it criminalised consensual sexual intercourse between adults of the same sex. In his concurring opinion, Chandrachud J., questioned the correctness of the Court's decision in Air India v. Nergesh Meerza ((1981) 4 SCC 335), on grounds of perpetuating sex and gender stereotypes by placing the entire burden of family planning and raising children on women.

Chandrachud, J.: "…

430. One of the earliest cases decided in 1951 was by the Calcutta High Court in *Mahadev Jiew v. B.B. Sen* [*Mahadev Jiew v. B.B. Sen*, 1951 SCC OnLine Cal 182 : AIR 1951 Cal 563] . Under Order 25 Rule 1 of the Code of Civil Procedure, men could be made liable for paying a security cost if they did not possess sufficient movable property in India only if

they were residing outside India. However, women were responsible for paying such security, regardless of whether or not they were residing in India. In other words, the law drew a distinction between resident males who did not have sufficient immovable property, and resident females who did not have sufficient immovable property. Upholding the provision, the Calcutta High Court held: (SCC p. 460, para 31)

> "*31*. Article 15(1) of the Constitution provides, inter alia, — The State shall not discriminate against any citizen on grounds only of sex. The word "only" in this article is of great importance and significance which should not be missed. The impugned law must be shown to discriminate because of sex alone. *If other factors in addition to sex come into play in making the discriminatory law, then such discrimination does not, in my judgment, come within the provision of Article 15(1) of the Constitution*."
>
> (emphasis supplied)

This interpretation was upheld by this Court in *Air India v. Nergesh Meerza* [*Air India v. Nergesh Meerza*, (1981) 4 SCC 335 : 1981 SCC (L&S) 599] ("*Nergesh Meerza*"). Regulations 46 and 47 of the Air India Employees' Service Regulations were challenged for causing a disparity between the pay and promotional opportunities of men and women in-flight cabin crew. Under Regulation 46, while the retirement age for male Flight Pursers was fifty-eight, Air Hostesses were required to retire at thirty-five, or on marriage (if they married within four years of joining service), or on their first pregnancy, whichever occurred earlier. This period could be extended in the absolute discretion of the Managing Director. Even though the two cadres were constituted on the grounds of sex, the Court upheld the Regulations in part and opined: (SCC p. 362, para 68)

> "*68. Even otherwise, what Articles 15(1) and 16(2) prohibit is that discrimination should not be made only and only on the ground of sex. These Articles of the Constitution do not prohibit the State from making discrimination on the ground of sex coupled with other considerations*."
>
> (emphasis supplied)

431. This formalistic interpretation of Article 15 would render the constitutional guarantee against discrimination meaningless. For it would allow the State to claim that the discrimination was based on sex and another ground ("Sex plus") and hence outside the ambit of Article 15. Latent in the argument of the discrimination, are stereotypical notions of the differences between men and women which are then used to justify the discrimination. This narrow view of Article 15 strips the prohibition on discrimination of its essential content. This fails to take into account the intersectional nature of sex discrimination, which cannot be said to operate in isolation of other identities, especially from the socio-political and economic context. For example, a rule that people over six feet would not be employed in the army would be able to stand an attack on its disproportionate impact on women if it was maintained that the discrimination is on the basis of sex and height. Such a formalistic view of the prohibition in Article 15, rejects the true operation of discrimination, which intersects varied identities and characteristics.

432. A divergent note was struck by this Court in *Anuj Garg v. Hotel Assn. of India* [*Anuj Garg v. Hotel Assn. of India*, (2008) 3 SCC 1] . Section 30 of the Punjab Excise Act, 1914 prohibited the employment of women (and men under 25 years) in premises where liquor or other intoxicating drugs were consumed by the public. Striking down the law as suffering from "incurable fixations of stereotype morality and conception of sexual role", the Court held: (SCC pp. 16-17, paras 42-43)

> "*42. … one issue of immediate relevance in such cases is the effect of the traditional cultural norms as also the state of general ambience in the society which women have to face while opting for an employment which is otherwise completely innocuous for the male counterpart. …*
>
> "*43. …* It is State's duty to ensure circumstances of safety which inspire confidence in women to discharge the duty freely in accordance to the requirements of the profession they choose to follow. *Any other* [**Ed.**: The matter between two asterisks has been emphasised in original.] *policy inference* [**Ed.**: The matter between two asterisks has been emphasised in original.] *(such as the one embodied under Section 30) from societal conditions would be oppressive on the women and against the* [**Ed.**: The matter between two asterisks has been emphasised in original.] *privacy rights* [**Ed.**: The matter between two asterisks has been emphasised in original.] ."
>
> (emphasis supplied)

The Court recognised that traditional cultural norms stereotype gender roles. These stereotypes are premised on assumptions about socially ascribed roles of gender which discriminate against women. The Court held that:

> "insofar as governmental policy is based on the aforesaid cultural norms, it is constitutionally invalid".

In the same line, the Court also cited with approval, the judgments of the US Supreme Court in *Frontiero v. Richardson* [*Frontiero v. Richardson*, 1973 SCC OnLine US SC 101 : 36 L Ed 2d 583 : 411 US 677 (1973). The case concerned a statute that allowed service-members to claim additional benefits if their spouse was dependent on them. A male claimant would automatically be entitled to such benefits while a female claimant would have to prove that her spouse was dependent on her for more than half his support. The Court struck down this statute stating that the legislation violated the equal protection clause of the American Constitution.] and *United States v. Virginia* [*United States v. Virginia*, 1996 SCC OnLine US SC 74 : 135 L Ed 2d 735 : 518 US 515 (1996). The case concerned the Virginia Military Institute (VMI), which had a stated object of producing "citizen-soldiers". However, it did not admit women. The Court held that such a provision was unconstitutional and that there were no "*fixed notions concerning the roles and abilities of males and females*".] , and Marshall, J.'s dissent in *Dothard v. Rawlinson* [*Dothard v. Rawlinson*, 1977 SCC OnLine US SC 148 : 53 L Ed 2d 786 : 433 US 321 (1977). The case concerned an effective bar on females for the position of guards or correctional counsellors in the Alabama State Penitentiary system. Justice Marshall's dissent held that prohibition of women in "contact positions" violated the Title VII guarantee.] . The Court grounded the anti-stereotyping principle as firmly rooted in the prohibition under Article 15.

433. In *National Legal Services Authority v. Union of India* [*National Legal Services Authority v. Union of India*, (2014) 5 SCC 438] ("NALSA"), while dealing with the rights of transgender persons under the Constitution, this Court opined: (SCC p. 488, para 66)

> "*66. Articles 15 and 16 sought to prohibit discrimination on the basis of sex, recognising that sex discrimination is a historical fact and needs to be addressed. The Constitution makers, it can be gathered, gave emphasis to the fundamental right against sex discrimination so as to prevent the direct or indirect attitude to treat people differently, for the reason of not being in conformity with stereotypical generalisations of binary genders.* Both gender and biological attributes constitute distinct components of sex. The biological characteristics, of course, include genitals, chromosomes and secondary sexual features, but gender attributes include one's self-image, the deep psychological or emotional sense of sexual identity and character. The discrimination on the ground of "sex" under Articles 15 and 16, therefore, includes discrimination on the ground of gender identity."
>
> (emphasis supplied)
>
> This approach, in my view, is correct.

434. In *Nergesh Meerza* [*Air India v. Nergesh Meerza*, (1981) 4 SCC 335 : 1981 SCC (L&S) 599], this Court held that where persons of a particular class, in view of the "special attributes, qualities" are treated differently in "public interest", such a classification would not be discriminatory. The Court opined that since the modes of recruitment, promotional avenues and other matters were different for Air Hostesses, they constituted a class separate from male Flight Pursers. This, despite noting that

> "a perusal of the job functions which have been detailed in the affidavit, clearly shows that the functions of the two, though obviously different overlap on some points but the difference, if any, is one of degree rather than of kind" (SCC p. 359, para 60).

435. The Court did not embark on the preliminary enquiry as to whether the initial classification between the two cadres, being grounded in sex, was violative of the constitutional guarantee against discrimination. Referring specifically to the three significant disabilities that the Regulations imposed on Air Hostesses, the Court held that: (*Nergesh Meerza case* [*Air India v. Nergesh Meerza*, (1981) 4 SCC 335 : 1981 SCC (L&S) 599] , SCC p. 360, para 62)

> "*62.* … There can be no doubt that these peculiar conditions do form part of the Regulations governing [Air Hostesses] but once we have held that [Air Hostesses] form a separate category with different and separate incidents the circumstances pointed out by the petitioners cannot amount to discrimination so as to violate Article 14 of the Constitution on this ground."

436. The basis of the classification was that only men could become male Flight Pursers and only women could become Air Hostesses. The very constitution of the cadre was based on sex. What this meant was, that to pass the non-discrimination test found in Article 15, the State merely had to create two separate classes based on sex and constitute two separate cadres. That would not be discriminatory. The Court went a step ahead and opined: (*Nergesh Meerza case* [*Air India v. Nergesh Meerza*, (1981) 4 SCC 335 : 1981 SCC (L&S) 599] , SCC p. 366, para 80)

> "*80.* … Thus, the Regulation permits an AH to marry at the age of 23 if she has joined the service at the age of 19 which is by all standards a very sound and salutary provision. *Apart from improving the health of the employee, it helps a good deal in the promotion and boosting up of our family planning programme. Secondly, if a woman marries near about the age of 20 to 23 years, she becomes fully mature and there is every chance of such a marriage proving a success, all things being equal. Thirdly, it has been rightly pointed out to us by the Corporation that if the bar of marriage within four years of service is removed then the Corporation will have to incur huge expenditure in recruiting additional AHs either on a temporary or on ad hoc basis to replace the working AHs if they conceive and any period short of four years would be too little a time for the Corporation to phase out such an ambitious plan*."
>
> (emphasis supplied)

437. A strong stereotype underlines the judgment. The Court did not recognise that men were not subject to the same standards with respect to marriage. It holds that the burdens of health and family planning rest solely on women. This perpetuates the notion that the obligations of raising family are those solely of the woman. In dealing with the provision for termination of service on the first pregnancy, the Court opined that a substituted provision for termination on the third pregnancy would be in the "larger interest of the health of the Air Hostesses concerned as also for the good upbringing of the children". Here again, the Court's view rested on a stereotype. The patronising attitude towards the role of women compounds the difficulty in accepting the logic of *Nergesh Meerza*[*Air India v. Nergesh Meerza*, (1981) 4 SCC 335 : 1981 SCC (L&S) 599] . This approach, in my view, is patently incorrect.

438. A discriminatory act will be tested against constitutional values. A discrimination will not survive constitutional scrutiny when it is grounded in and perpetuates stereotypes about a class constituted by the grounds prohibited in Article 15(1). If any ground of discrimination, whether direct or indirect is founded on a stereotypical understanding of the role of the sex, it would not be distinguishable from the discrimination which is prohibited by Article 15 on the grounds only of sex. If certain characteristics grounded in stereotypes, are to be associated with entire classes of people constituted as groups by any of the grounds prohibited in Article 15(1), that cannot establish a permissible reason to discriminate. Such a discrimination will be in violation of the constitutional guarantee against discrimination in Article 15(1). That such a discrimination is a result of grounds rooted in sex and other considerations, can no longer be held to be a position supported by the intersectional understanding of how discrimination operates. This infuses Article 15 with true rigour to give it a complete constitutional dimension in prohibiting discrimination.

439. The approach adopted by the Court in *Nergesh Meerza* [*Air India v. Nergesh Meerza*, (1981) 4 SCC 335 : 1981 SCC (L&S) 599] , is incorrect.

440. A provision challenged as being ultra vires the prohibition of discrimination on the grounds only of sex under Article 15(1) is to be assessed not by the objects of the State in enacting it, but by the effect that the provision has on affected individuals and on their fundamental rights. Any ground of discrimination, direct or indirect, which is founded on a particular understanding of the role of the sex, would not be distinguishable from the discrimination which is prohibited by Article 15 on the grounds only of sex.

…"

Endnotes

1 Article 19, Constitution of India.

2 Article 16 (1), Constitution of India.

3 Articles 15 (1) and 16 (2), Constitution of India.

4 *See* Air India v. Nergesh Meerza, (1981) 4 SCC 335; Inspector (Mahila) Ravina v. Union of India, MANU/DE/3946/2015.

5 Municipal Corporation of Delhi v. Female Workers (Muster Roll), (2000) 3 SCC 224.

6 (1981) 4 SCC 335.

7 (2018) 10 SCC 1.

8 2016 SCC OnLine P&H 602.

9 1989 SCC OnLine Mad 234.

10 (1992) 1 SCC 286.

11 (2000) 3 SCC 224. *See also* Rakhi P.V. v. State of Kerala, 2018 SCC OnLine Ker 864 (where the High Court of Kerala extended the protection of the MB Act 1961 to contract employees engaged by the Government).

12 2006 SCC OnLine Del 1421.

13 2017 SCC OnLine Ker 41588.

14 (2013) 3 Mad LJ 493.

15 2015 SCC OnLine Bom 6127.

16 (2015) 1 KLJ 494.

17 (2015) 221 DLT 756.

18 Section 5 (4), Maternity Benefits Act, 1961.

19 Section 3 (ba), Maternity Benefits Act, 1961.

20 2016 SCC OnLine Mad 30096. *See also* J. Sharmila v. The Secretary to Govt. Education Department, Govt. of Tamil Nadu W.P. (MD) No. 13555 of 2009 (Order dated Oct. 19, 2010) (High Court of Madras).

21 *See also* Javed v. State of Haryana, (2003) 8 SCC 369 (upholding a law that disqualified otherwise eligible persons from holding office in local government institutions on the basis of the number of children one has).

22 2013 SCC OnLine Del 2152.

23 MANU/DE/3946/2015.

24 U.N. Office of the High Commissioner for Human Rights, "Status of Ratification Interactive Dashboard—India," http://indicators.ohchr.org/.

25 Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the Commission at its fifty-third session in 2001 (Final Outcome) (International Law Commission [ILC]), contained in U.N. Doc. A/56/49(Vol. I)/Corr.4 (2001), Arts. 3-4.

26 Vishaka v. State of Rajasthan, AIR 1997 SC 3011.