

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

Writ Petition No. 1778 of 2015 (S/S)

Smt. Urmla Masih

....Petitioner

Versus

State of Uttarakhand & another

....Respondents

Mr. Sanpreet Singh Azmani, Advocate for the petitioner.
Mr. P.C. Bisht, Standing Counsel for the State.

Dated - 30.07.2018

Hon'ble Rajiv Sharma, J.

Petitioner applied for maternity leave w.e.f. 30.06.2015 to 09.12.2015. The maternity leave was declined to the petitioner on the ground that she had already two living children, as such for third child the maternity leave could not be granted. It is in these circumstances, the present petition has been filed.

2. Section 27 of the Maternity Act, 1961 reads as under:-

“27. Effect of laws and agreements inconsistent with this Act.—

(1) The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law or in the terms of any award, agreement or contract of service, whether made before or after the coming into force of this Act:

Provided that where under any such award, agreement, contract of service or otherwise, a woman is entitled to benefits in respect of any matter which are more favourable to her than those to which she would be entitled under this Act, the woman shall continue to be entitled to the more favourable benefits in respect of that matter, notwithstanding that she is entitled to receive benefits in respect of other matters under this Act.

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

3. The Fundamental Rule 153 the Financial Hand Book of the U.P. Fundamental Rules, as adopted by the State of Uttarakhand, reads as under:-

“153. Maternity leave on full pay which a female government servant, whether permanent or temporary, may be drawing on the date or proceeding on such leave may be granted to her by the head of the department or by a lower authority to whom power may be delegated in this behalf subject to the following:—

(1) In cases of confinement the period of maternity leave may extend up to the end of three months from the date of the commencement of leave:

Provided that such leave shall not be granted for more than three times during the entire service including temporary service:

Provided also that if any female government servant has two or more living children, she shall not be granted maternity leave even though such leave may otherwise be admissible to her. If, however, either of the two living children of the female government servant is suffering from incurable disease or is disabled or crippled since birth or contracts some incurable disease or becomes disabled or crippled later, she may, as an exception, be granted maternity leave till one more child is born to her subject to the overall restriction that maternity leave shall not be granted for more than three times during the entire service.

Provided further that no such leave shall be admissible until a period of at least two years has elapsed from the date of expiry of the last maternity leave granted under this rule.”

4. According to second proviso of Fundamental Rule 153, produced hereinabove, in case, any female Govt. servant has two or more living children, she is not entitled to get maternity leave, even though, such leave may be otherwise admissible to her. This proviso is contrary to Section 27 of the Maternity Benefit Act, 1961. Section 27 of the Act, 1961 does not prohibit, in any manner, to grant of maternity leave to a female Govt. servant, who has already two children at the time of submission of application for maternity leave, after giving birth to third child.

5. Second proviso of the Fundamental Rule 153 is also against the letter and spirit of Article 42 of the Constitution of India. It reads as under:-

“42. Provision for just and humane conditions of work and maternity relief The State shall make provision for securing just and humane conditions of work and for maternity relief. The State shall make provision for securing just and humane conditions of work and for maternity relief.”

6. The legal issue raised in the petition has also been exclusively decided by the Punjab and Haryana High court Civil Writ Petition No.4229 of 2011, in the case of “*Ruksana vs. State of Haryana & others*”. The Division Bench of the Punjab and Haryana High Court has held as under:-

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

v. Union of India and Others (2006)12 Supreme Court Cases 753 wherein the validity of Section 3 of the East Punjab Urban Rent Restriction Act, 1949 was challenged, the Hon'ble Apex Court referred to a large number of decisions on subordinate legislation and held as under:-

"118. A statute can be amended, partially repealed or wholly repealed by the legislature only.

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

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

"24. We agree with the said view as also for the additional reason that the subordinate legislation cannot override the principal legislative provisions..."

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

7. Thus, this Court is also of the considered view that second proviso of Fundamental Rule 153 is not in conformity with Section 27 of the Maternity Benefit Act, 1961 and is also against the spirit of Article 42 of the Constitution of India.

8. Accordingly, the writ petition is allowed. The proviso Second of the Fundamental Rule 153 of the U.P. Fundamental Rules, as adopted by the State of Uttarakhand is declared ultra vires and unconstitutional and the same is struck down. The State Govt. is directed to provide maternity leave to the petitioner for 30.06.2015 to 09.12.2015, within six weeks from today.

9. Pending application, if any, also stands disposed of.

(Rajiv Sharma, J.)