

(2015) 07 BOM CK 0248
In the Bombay High Court
Case No : Writ Petition No. 3288 of 2015

Hema Vijay Menon

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 22-07-2015

Acts Referred:

Constitution of India, 1950 — Article 14, 21

Citation : (2015) 5 ABR 370 : AIR 2015 Bom 231 : (2015) LabIC 3470

Hon'ble Judges : V.A. Naik, J;A.M. Badar, J

Bench : Division Bench

Advocate : C.S. Dhore, for the Appellant; T. Udeshi, AGP, Advocates for the Respondent

Final Decision : Allowed

Judgement

V.A. Naik, J—Rule. Rule is made returnable forthwith. The petition is heard finally with the consent of the learned counsel for the parties.

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. Few facts giving rise to the petition are stated thus:

The petitioner is a highly qualified Lecturer who has participated in several National and International Seminars and Symposiums in law and is often invited as a guest faculty at several institutions to deliver lectures on various subjects of law. On 28.07.2010, the petitioner lost her only son who was 15 years of age. The petitioner and her husband suffered severe mental trauma due to the loss of their only son and decided to bear a child. The petitioner went through five cycles of In Vitro Fertility (IVF) procedures at Jaslok Hospital, Mumbai, to conceive the child, however, due to certain ailments, the petitioner was incapacitated to bear the child and the attempts were unsuccessful. Upon the failure of IVF procedures at Jaslok Hospital at Mumbai, the petitioner was asked

by an eminent Doctor at the Jaslok Hospital to opt for the surrogacy procedure. After consultation with her husband, the petitioner decided to have a child through surrogacy arrangement. In furtherance of the said desire, in March 2013, an embryo was successfully transplanted in the womb of a surrogate mother. On 04.12.2014, the surrogate mother went into labour and the petitioner and her husband rushed to Mumbai. The surrogate mother delivered a baby boy and the said child was immediately placed in the hands of the petitioner and her husband. It is worthwhile to mention that the petitioner has spent an amount of Rs. 45,00,000/- (Rs. Forty five lakh) for the surrogacy procedure. 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.

4. Shri Dhore, the learned counsel for the petitioner submitted that an employee mother, like the petitioner, is entitled to maternity leave under the provisions of the Maharashtra Civil Services (Leave) Rules, and also in terms of the Government Resolution dated 28.07.1995. It is submitted that merely because the petitioner has begotten a child through surrogacy procedure, maternity leave cannot be denied to the petitioner. It is submitted that the object of providing maternity leave is not only related to the health concerns of the mother but is also related with the health concern and the upbringing of the child. It is submitted that a bond of affection has to be created between the mother and the child in the first year of his/her birth. It is submitted that there is nothing in the provisions of Rule 74 of the Maharashtra Civil Services (Leave) Rules and the Government Resolution dated 28.07.1995 which disentitles the petitioner from availing the maternity leave. It is submitted that the action of the respondent No. 3 in declining permission to the petitioner to avail the maternity leave is arbitrary and discriminatory and the impugned order is liable to be set aside. The learned counsel for the petitioner relied on the unreported judgment of the Delhi High Court, dated 17.07.2015 in the case of Rama Pande vs. Union of India, which in turn has referred to some of the reported judgments of the other High Courts.

5. Ms. Udeshi, the learned Assistant Government Pleader appearing for the

respondent Nos. 1 to 3, supported the action of the Joint Director of Higher Education and submitted that the Government Resolution dated 28.07.1995 provides for maternity leave to an adoptive mother but it does not provide for maternity leave to a mother, who has secured the child through surrogacy. It is submitted that the Resolution of the Finance Department of the State Government, dated 28.07.1995 was rightly considered by the Joint Director of Higher Education, to refuse maternity leave to the petitioner. It is, however, not disputed that a natural mother and an adoptive mother is entitled to a paid maternity leave for one year from the date of the birth of the child.

6. Shri Bhole, the learned counsel for the respondent No. 4 - College, supported the case of the petitioner and submitted that it is inappropriate on the part of the respondent No. 3 - Joint Director of Higher Education, Nagpur, to refuse maternity leave to the petitioner on the ground that the petitioner had begotten the child through surrogacy.

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 vs. 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.