

(2011) 09 KAR CK 0034

In the Karnataka High Court

Case No : Writ Petition No. 6568 of 2009 (S-DIS)

Smt. C. Vidya Murthy

APPELLANT

Vs

Bangalore Metro Rail Corporation Ltd.

RESPONDENT

Date of Decision : 20-09-2011

Acts Referred:

Constitution of India, 1950 — Article 42

Maternity Benefits Act, 1961 — Section 2, 2 (1), 4, 5

Citation : (2011) 6 KarLJ 375

Hon'ble Judges : A.N. Venugopala Gowda, J

Bench : Single Bench

Advocate : D. Leelakrishnan, for the Appellant; Sumana Baliga M ., for the Respondent

Final Decision : Allowed

Judgement

A.N. Venugopala Gowda

1. In response to an application dated 07.12.2006 and the interview by the Selection Committee held on 07.07.2007, the Bangalore Metro Rail Corporation Limited, offered appointment to the petitioner for the post of Manager (Finance), purely on contract basis, for a period of three years, in the scale of pay of Rs. 7500-250- 12000/- , with a basic pay of Rs. 7,500/- and fringe benefits/allowances, stipulating the terms and conditions of appointment. Petitioner accepted the offer of appointment and joined duty in the respondent-Corporation on 31.08.2007. The petitioner was placed in-charge of establishment, computation, preparation of pay bills, settlement of perquisites, passing of traveling and medical claim bills etc.,

2. Around June 2008, the petitioner became pregnant. Between 27.06.2008 and 10.11.2008, the petitioner absented from duty for 106 days and worked for 53 days only. On 06.12.2008, the petitioner applied for maternity leave of 180 days, stating that she is running 7th month of her pregnancy and produced a medical certificate, certifying that the expected date of delivery as 21.03.2009. On

17.12.2008, the respondent directed the petitioner to handover the charge and the files. Petitioner was notified that, till the date of handing over the charge, the absence will be treated as leave without allowance and she was directed to handover office mobile handset and other BMRCL assets, if any, held by her. The petitioner handed over the charge on 22.12.2008. Since the maternity leave applied was not sanctioned, petitioner got issued a legal notice on 05.01.2009, for sanction of maternity leave of 180 days and for extending the legitimate benefits. The petitioner delivered twins on 28.01.2009. The respondent issued an office order on 28.01.2009, regularizing the period of absence of the petitioner, taking note of the period of absence on health grounds, on different dates, between 27.06.2008 and 10.11.2008. The respondent sent a reply dated 20.02.2009 and invoked Clause 27 of the terms and conditions of the appointment order and terminated the contract with the petitioner, by giving one month's notice. This writ petition was filed on 16.03.2009, to quash the reply/communication, as at Annexure-K, terminating the contract and the office order dated 28.01.2009, as at Annexure-J, treating the period of absence as leave without allowances and to direct the respondent to sanction maternity leave from 06.12.2008 and disburse the pay and allowances for the period of maternity leave and for consequential benefits, including permitting her to resume duty after the expiry of maternity leave or as per the medical advice.

3. The respondent in the counter has resisted the case, contending that the petitioner accepted the offer made on 30.07.2007 and having entered into the contract of service, is bound by the terms and conditions of the contract, which does not provide for maternity leave benefits and hence, it is not open to the petitioner to claim maternity leave benefits. It was stated that, the petitioner remained absent frequently on different dates between 27.06.2008 & 10.11.2008, on health grounds and hence, the period was regularized by issue of an office order dated 28.01.2009 (Annexure-J) and in response to the leave application dated 06.12.2008 and also the notice dated 05.01.2009 of the petitioner, suitable reply was sent on 20.02.2009 (Annexure-K). It was stated that, the post to which the petitioner was appointed was crucial post of Manager (Finance), which could not be kept vacant, as it adversely affects the work in the finance division and hence, she was given one month's notice from 20.02.2009 and her service was terminated from 23.03.2009, as per Clause 27 of the terms of contractual appointment. It has been further stated that, respondent is not notified u/s 2 of the Maternity Benefits Act, 1961 (for short "the Act") and hence, the provisions of the Act are not applicable to it.

4. Sri D. Leelakrishnan, learned counsel appearing for the petitioner, contended as follows:

i. That in the absence of any term of appointment or Rules & Regulations regulating the subject matter of maternity benefits to a woman employee, the provisions of the Act will automatically apply as a matter of Public Policy, the enactment being a social welfare legislation enacted by the Parliament in

pursuance of Article 42 of the Constitution of India and as per the ILO Conventions, ratified by the Government of India;

ii. That the Act and the Rules framed thereunder, are with the object of protecting the dignity of motherhood by providing for full and healthy maintenance of women and her child, when she is not working, which the respondent has failed to note and appreciate;

iii. That the action of the respondent in not granting maternity leave as well as regularizing the period of absence on different dates between 27.06.2008 & 10.11.2008, as leave without allowance, is in violation of the mandatory provisions of the Act and is patently illegal

iv. That the termination of the petitioner's service during the period of maternity leave is in violation of the specific prohibition, which is in the nature of a protection u/s 12 of the Act and the termination of the service of the petitioner is not "termination simplicitor" and hence, is illegal and void-ab-initio.

By relying upon the decision in the case of Municipal Corporation of Delhi Vs. Female Workers (Muster Roll) and Another, , learned counsel contended that, the Act having been enacted by the Parliament as a matter of Public Policy with the object of providing just and humane conditions of work and maternity relief, has general application in the absence of any other Rules, Regulations, Contract etc., applicable to the respondent and in view of Section 27, the Act will have precedence and should prevail over the terms of appointment and hence the petitioner is entitled to the benefits of the Act.

5. Smt. Sumana Baliga. M. learned counsel appearing for the respondent, on the other hand, vehemently contended as follows:

i. The petitioner being well aware of terms of appointment and having joined duty in the respondent-Corporation, is bound by the terms and conditions of the contract, which does not provide for maternity leave benefits.

ii. The petitioner frequently absented from work between 27.06.2008 and 10.11.2008, without any authorization for a period of 106 days and worked for 53 days only and after submission of the representation dated 06.12.2008 to grant maternity leave of 180 days, without a sanction, she remained absent and did not handover the charge and the work of the Corporation suffered adversely, in view of which, petitioner was directed to handover the charge and the files on 17.12.2008. which the petitioner complied on 22.12.2008.

iii. The long absence of the petitioner seriously affected the Corporation, as the post which the petitioner was manning was a crucial post.

iv. The service contract of the petitioner, more particularly Clause 27 provides for termination of appointment by either of the parties by giving not less than one month's notice and accordingly, one months notice as per Annexure-K was given and the petitioner stood relieved from BMRCL w.e.f 23.03.2009 and hence, the

petitioner is not entitled to claim any pay and allowances.

v. The Act is applicable only to an establishment being a Factory, Mine, Plantation or any other Establishment notified under the Act and since the respondent is not notified as required u/s 2 of the Act, the provisions of the Act are not applicable to the respondent.

vi. The 3 years contract period between the petitioner and the respondent ended on 31.08.2010 and hence, the petitioner is not entitled to relief of rejoining duty.

6. Perused the writ petition record.

7. In view of the rival contentions, the points for consideration are:

i. Whether the action of the respondent in not granting maternity leave benefits to the petitioner is arbitrary and illegal?

ii. Is the petitioner entitled to any relief?

8. The respondent has been incorporated under the Companies Act, 1956 with limited shares jointly contributed by the Government of India and Government of Karnataka and is a "Government Company" within the meaning of Section 617 of the Companies Act, 1956. The respondent has been established to operate and maintain a Rapid Rail Transit System by construction of Circular or other types of Railway lines in and around Bangalore City, so as to meet the urban transport needs of Bangalore.

9. The respondent offered appointment to the petitioner for the post of Manager (Finance) on contract basis for a period of 3 years, The appointment was in the pay scale of Rs. 7500-250-12000/- , with basic pay of Rs. 7,500/- and the fringe benefits/allowances, which included dearness pay as per Central Dearness rates. The terms and conditions of appointment entitled the petitioner for leave at the rate of 2 days for each completed calendar month of service, with the facility of leave being carried forward and encashable on termination of the appointment. The petitioner submitted a representation dated 06.12.2008 to the respondent, with regard to she being pregnant, carrying twins and having been told of possibility of pre-mature labor and the advice of a doctor, to take full bed rest. She sought grant of maternity leave from 06.12.2008 for a duration of 180 days. A medical certificate issued by Dr. Vidyamani was submitted. Respondent while acknowledging receipt of the said requisition, while notifying the petitioner that the request will be examined as per the terms of her appointment, observed that, "it was incumbent on her to plan her absence on maternity leave and her conduct is unbecoming of the position she holds and she was advised to handover the charge with a rider that till the date of handing over the charge, the absence will be treated as leave without pay." Noticing that the maternity leave has not been sanctioned and the pay and emoluments for earlier period had not been paid, the petitioner got sent legal notice to the respondent on 05.01.2009, to sanction the maternity leave as per the requisition dated 06.12.2008 for a period of 180 days and ensure that her leave salary for the

period is sanctioned and to disburse her salary for the months from August 2008 to 05.12.2008, by re-fixing the pay and allowances as per the recommendations of VI Pay Commission. The respondent issued an office order dated 28.01.2009 (Annexure-J) regularizing the absence period between 27.06.2008 & 10.11.2008, after adjusting 17 days of leave at credit of the petitioner. The period of absence on various dates between 27.06.2008 & 10.11.2008 was treated as leave without allowances. By a communication dated 20.02.2009, while replying to the notice dated 05.01.2009, the respondent inter alia stated that, the terms of the contract did not provide for sanction of maternity leave applied for and that the provisions of maternity leave of Government of Karnataka (135 days) and Government of India (180 days) are not automatically applicable to the employees of BMRCL. By invoking Clause 27 of terms & conditions of appointment of the petitioner, one month's notice from 20.02.2009 was given, terminating the petitioner's service at the end of one month and she standing relieved from the service of the Corporation w.e.f 23.03.2009.

10. Part IV of the Constitution of India, contains the Directive Principles of State Policy. 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)* * *

Article 42 provides 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.

Article 42 is with regard to just and humane conditions of work and maternity relief.

11. In the background of Articles 39 & 42 of the Constitution, the claim of the petitioner for maternity benefit and the action of the respondent in not granting the said benefit has to be scrutinized, so as to determine, whether the non-granting of maternity benefit by the respondent to the petitioner is justified in law or not?

12. In AIR India Vs. Nergesh Meerza and Others, , while examining the

constitutional validity of Regulation 46(i)(c) of the Air India Employees' Service Regulations, which provided that the services of the Air Hostesses would stand terminated on first pregnancy, the Apex Court, considering various US Supreme Court judgments regarding pregnant women, has held that, the observations made therein would apply to the domestic cases.

13. In the case of Consumer Education & Research Centre vs. Union of India, reported at 1995 SCC (L & S) 604, the occupational health hazards and diseases to the workmen employed in Asbestos Industries was the subject matter of consideration by way of public interest litigation. It has been held that, in an appropriate case, the Court would give appropriate directions to the employer, be it the State or its undertaking or private employer to make the right to life meaningful; to prevent pollution of workplace; protection of the environment; protection of the health of the workman or to preserve free and unpolluted water for the safety and health of the people and that, the authorities or even private persons or industry are bound by the directions issued under Articles 32 & 142 of the Constitution.

14. In the case of Kirloskar Brothers Ltd. Vs. Employees' State Insurance Corpn., , it has been held as follows:

10. In expanding economic activity in liberalized economy, Part IV of the Constitution enjoins not only the State and its instrumentalities but even private industries to ensure safety to the workman and to provide facilities and opportunities for health and vigor of the workman assured in relevant provisions in Part IV which are integral part of right to equality under Article 14 and right to invigorated life under Article 21 which are fundamental rights to the workman, interpretation of the provisions of the Act, therefore, must be read in the light of not only the objects of the Act but also the constitutional and fundamental and human rights referred to hereinbefore.

15. In Municipal Corporation of Delhi (supra), female workers muster roll), engaged by Municipal Corporation of Delhi (for short "the MCD"), raised a demand for grant of maternity leave, which was denied to them on the ground that their services were not regularized. Their case was espoused by the Workers Union and a reference was made by the Delhi Administration to the Industrial Tribunal for adjudication, as to, whether the female workers working on muster roll should be given any maternity benefit? If so, what directions are necessary in this regard? The MCD in the written statement filed before the Tribunal pleaded that, the provisions of the Act were not applicable to the female workers, engaged on muster roll, as they were all engaged only on daily wages and that, they were also not entitled to any benefit under the Employees' State Insurance Act, 1948 and opposed the demand of female workers for grant of maternity leave. The Tribunal upon adjudication, passed an award and allowed the claim and directed the MCD to extend the benefits under the Act to muster roll female workers. MCD questioned the award by filing a writ petition, which was dismissed and an appeal filed thereafter was also dismissed. Feeling aggrieved, the Apex

Court was approached for relief. Apex Court, after referring to the relevant provisions in the Constitution, the provisions of the Act and the Universal Declaration of Human Rights, adopted by the United Nations on 10-12-1948, which was followed by a series of conventions and the "Convention on the Elimination of all Forms of Discrimination against Women" by the United Nations on 18-12-1979, more particularly Article 11 of the Convention, has held as follows:

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.

16. Undeniably, on 06.12.2008, when the petitioner made the request for maternity leave, as per the medical certificate enclosed, she was in the 7th month of her pregnancy and the expected date of delivery was 21.03.2009. A doctor had certified that the petitioner was carrying twins and is likely to have pre-mature labor, on account of which, the petitioner was advised to take complete bed rest from 06.12.2008. As expected, the petitioner had pre-mature labor and she delivered twins, on 28.01.2009 i.e., about two months prior to the expected date of delivery.

17. In terms of the provisions of the Act, a woman is prohibited from working in an establishment during the period of six weeks from immediately following the day of her delivery, miscarriage or medical termination of pregnancy. She, even if a request is made by her in this behalf, would not be asked to work for the period specified in sub-section (4) of Section 4. Apart from the right to payment of maternity benefits, she would be entitled to the benefits under Sections 6 & 9 of the Act. Any Rule or Regulation being subordinate legislation, is subject to provisions of the Parliamentary Act. Though the appointment order along with the terms & conditions appended thereto issued to the petitioner did not provide for grant of maternity leave and other benefits to which a woman employee would be entitled to, the respondent has an obligation to provide the benefits in view of the provisions contained in the Act as well as the Directive Principles of State Policy enshrined in Article 42 of the Constitution of India.

18. The Act effectuates the Directive Principles of the constitution. It is a beneficial piece of legislation, intended to achieve the object of doing social justice to women workers employed in Factories, Mines, Plantations, Shop or

Establishment, within the meaning of any law for the time being in force, in relation to Shops and Establishments in a State, in which 10 or more persons are employed. In interpreting provisions of the Act which falls within the purview of Article 42 of the Constitution, the beneficent rule of construction which would enable the woman employee not only to subsist but also to make up her dissipated energy, nurse her child, preserve her efficiency as a employee and maintain the level of her previous efficiency and output has to be adopted by the Court, as held in the case of B. Shah Vs. Presiding Officer, Labour Court, Coimbatore and Others, . In not extending the benefits of the Act to the petitioner, the respondent has acted most arbitrarily and illegally. When the nation is moving forward to achieve the constitutional guarantee of equal rights for women and the empowerment of the women, unfortunately, the respondent seems to be not adopting such a course.

19. In terms of Sections 4 & 5 of the Act, the women employee is entitled to 6 weeks maternity leave prior to delivery and 6 weeks thereafter. The petitioner applied for maternity leave on 06.12.2008 and had premature labor and delivered twins, on 28.01.2009. As per Sections 4 & 5 of the Act, the petitioner has the right to claim maternity leave 6 weeks before 28.01.2009 i.e., from 14.12.2008 to 28.01.2009 and 6 weeks thereafter i.e., from 29.01.2009 to 12.03.2009. The respondent gave notice of termination on 20.02.2009, which was to take effect on 23.03.2009. The absence of the petitioner from duty on the dates shown in the office order of the respondent dated 28.01.2009 (Annexure-J) and after 06.12.2008 till her service was terminated by invoking Clause 27 of the terms & conditions of the contract agreement, is due to the reasons of her pregnancy and the state of affairs in which she was placed. In the circumstances, the respondent ought to have examined the request keeping in view the humane conditions of work, women's dignity and the provisions of the Act The action taken being otherwise, cannot be upheld.

20. Petitioner does not dispute the fact that, as on the date the office order at Annexure-J was passed by the respondent, she had only 17 days of leave at credit and that, she absented from duty for 106 days, on health grounds. Since the petitioner was a contract employee and did not have the leave at her credit, the respondent is right in treating the period as leave without allowances i.e., for the absence period, in excess of the leave at the credit of the petitioner. Since the petitioner claimed maternity leave 6 weeks continuously prior to the expected date of delivery, i.e., by excluding the period covered under Annexure-J, the grievance of the petitioner against the office order as at Annexure-J, is not sound and acceptable- In the circumstances, the respondent's action in passing the order at Annexure -J, cannot be found fault with.

21. The period of appointment of the petitioner being 3 years, stood expired on 31.08.2010. One month's notice of termination was given on 20.02.2009, to be effective from 23.03.2009. Hence the petitioner's prayer to permit her to resume duty in the respondent-Corporation is not tenable, since the appointment was

purely on contract basis, which the petitioner agreed, before joining duty on 31.08.2007. When this position was pointed out to Sri D. Leelakrishnan, learned counsel, rightly and fairly conceded that, the petitioner has no right to rejoin duty in the respondent-Corporation, on account of expiry of the contract period. The prayer of the petitioner to permit her to rejoin duty is untenable and stands rejected.

22. However, the petitioner is entitled to all the benefits, flowing from the terms of appointment, for the period from 14.12.2008 to 12.03.2009 and thereafter for a period of one month, being the notice period, commencing from 13.03.2009 i.e., upto 12.04.2009. In the said view of the matter, it is unnecessary to quash the communication of the respondent, as at Annexure-K.

In the result, the writ petition is allowed in part.

The respondent is directed to pay to the petitioner, within a period of one month from today, the monetary benefits, flowing from the findings recorded supra.

The petitioner is also entitled to costs and the counsel fee is assessed at Rs. 5,000/- .