IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

&

THE HONOURABLE MRS. JUSTICE C.S. SUDHA

WEDNESDAY, THE 27TH DAY OF JULY 2022 / 5TH SRAVANA, 1944

WA NO. 1293 OF 2019

AGAINST THE JUDGMENT DATED 28/02/2019 IN WP(C)NO. 34821/2018 OF HIGH COURT OF KERALA

APPELLANT/2ND RESPONDENT :

CENTRE FOR PROFESSIONAL AND ADVANCED STUDIES,
SCHOOL OF MEDICAL EDUCATION,
GANDHI NAGAR, KOTTAYAM-686008,
REPRESENTED BY ITS DIRECTOR.
BY ADV P.C.SASIDHARAN

RESPONDENTS/PETITIONER & RESPONDENTS 1 AND 3:

1 ABHITHA KARUN,
LECTURER ON CONTRACT,
INE, SME, MANIMALAKKUNNU-686664,
RESIDING AT KANDANATTU HOUSE,
NEAR GOVERNMENT MODEL HIGH SCHOOL GROUP,
MUVATTUPUZHA-686661, ERNAKULAM DISTRICT.

2 THE STATE OF KERALA,
REPRESENTED BY THE SECRETARY TO GOVERNMENT HIGH EDUCATION DEPARTMENT,
SECRETARIAT, THIRUVANANTHAPURAM-695001.

3 THE PRINCIPAL,
INSTITUTE OF NURSING EDUCATION,
SCHOOL OF MEDICAL EDUCATION,
MANIMALAKUNNU-686664.

BY ADVS.
SRI.M.R.VENUGOPAL
SMT.DHANYA P.ASHOKAN

THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON 27.07.2022, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

"C.R"

P.B.SURESH KUMAR & C.S.SUDHA, JJ.

Writ.Appeal No. 1293 of 2019

Dated this the 27th day of July, 2022

J U D G M E N T

C.S.Sudha, J.

Are contract employees entitled to the benefit of the Maternity Benefit Act, 1961 (the MB Act)? What does the term 'establishment' in Section 2 of the MB Act mean? Does the Centre for Professional and Advanced Studies, School of Medical Education (CPAS), a Society registered under the provisions of the Travancore Cochin Literary Scientific and Charitable Societies Registration Act, 1955 come within the meaning of the term 'establishment', so as to entitle its employees to claim the benefit of the MB Act? Can special Rules framed by CPAS override the provisions contained in the MB ACT? These are the questions that we are called upon to answer in this intra-court appeal, which is against the judgment dated 28/02/2019 in W.P.(C) No.34821/2018. The appellant is the 2nd respondent and the respondents herein, the petitioner and respondents 1 and 3 respectively in the writ petition.

2. The writ petition was filed by the petitioner challenging the denial of

maternity leave with allowance for a period of 26 weeks (180 days) by CPAS, i.e., the 2nd respondent Society. The 2nd respondent Society has been formed to take over the self financing institutions under the Mahatma Gandhi University. The petitioner alleges that after a due process of selection, she was appointed as Lecturer on contract basis in Pediatric Nursing under the 2nd respondent, a self financing institution directly run by the University with effect from 12/03/2012 for a period of three years as per Ext.P1 order dated 21/04/2012. According to the petitioner, her service conditions except the tenure of appointment and the scale of pay were governed by the provisions of the Mahatma Gandhi University Act and the Statutes. The petitioner was granted maternity leave for a period of 180 days with effect from 03/03/2014 to 29/08/2014 as per Ext.P2 order dated 21/05/2014. The appointment under Ext.P1 appointment order was renewed for a further period of three years with effect from 12/03/2015 as per Ext.P3 order dated 24/08/2015. During the course of the employment under Ext.P3, the petitioner conceived and so as per Ext.P4 application dated 03/10/2017, she applied for maternity leave for a period of 180 days from 03/10/2017 to 31/03/2018. It is further alleged that, at the instance of the Mahatma Gandhi University, the State Government constituted the 2nd respondent Society to take over and administer all the Self-financing Institutions of the University.

2.1. Separate Rules pertaining to qualification, method of appointment and service conditions of the 2nd respondent were also framed and approved by the Government vide G.O.(Ms) No.148/2018/H.Edn. dated 26/06/2018. As per the

aforesaid Rules, though maternity leave is provided for 180 days, the maternity leave benefit has been limited to 90 days. The 2nd respondent as per Ext.P5 order dated 21/12/2017 has sanctioned maternity leave to the petitioner as per which though leave for 180 days has been sanctioned, leave with allowance has been limited to 90 days. The said order is in violation of the provisions of the the MB Act and the instructions contained in the circulars issued by the Ministry of Women and Child Health, Government of India. As is evident from Ext.P2 , the petitioner had been granted maternity leave for 180 days during the year 2014. The Rules framed by the 2nd respondent Society has been approved by the Government only on 26/06/2018. The service conditions of the petitioner cannot be altered to her disadvantage during the course of her employment. According to the petitioner, the denial of maternity leave with allowance for 180 days is illegal, arbitrary and violative of the fundamental rights and Constitutional principles. Hence the writ petition was moved seeking a direction to the 2nd respondent to sanction maternity leave with allowance for 180 days; to declare that the petitioner is entitled to maternity leave with allowance for 180 days notwithstanding the taking over of the Self-financing Institutions of the Mahatma Gandhi University by the 2nd respondent Society and to issue a writ of certiorari to the extent of quashing the stipulation in Ext.P5 limiting the allowance to 90 days during the period of the maternity leave granted to the petitioner.

3. In the writ petition, 2nd respondent has filed a counter contending that the petitioner is not entitled to the benefit of the MB Act as claimed by her. The 2nd

respondent Society has been established for the purpose of conducting self-financing courses in its colleges or institutions. The Society has framed its own Rules governing its service conditions. The petitioner working in the erstwhile self-financing Institutions under the Mahatma Gandhi University, exercised her option to be engaged by the 2nd respondent on a contract basis and hence the terms and conditions of her service are governed by the Special Rules framed by the respondent. The 2nd respondent Society is an independent legal entity and the service conditions of the employees in the Mahatma Gandhi University will not govern the service conditions of the employees engaged by the respondent. Though an employee can apply for leave for 180 days, as per the Rules, leave with allowance will be limited to 90 days. This Statutory Clause contained in the Special Rules has not been challenged in the writ petition. The contention of the petitioner that her service has been altered during the course of employment is incorrect. In the light of the Special Rules framed by the 2nd respondent Society, the petitioner is not entitled to the reliefs prayed for, contends the former.

4. The learned Single Judge by the impugned judgment, allowed the writ petition. Aggrieved the 2nd respondent Society has come up in appeal. According to the 2nd respondent Society, contract employees are not entitled to the benefit of the MB Act. In support of this argument, reference has been made to the Division Bench decision of this Court in **Jisha P.Jayan v. Sree Sankaracharya University of Sanskrit, Kalady, 2013 (3) KLT 533.** The impugned judgment has been passed

relying on the decisions in **Mini v. Life Insurance Corporation of India, 2018 (1) KLT 530** and **Rakhi P.V v. State of Kerala, 2018 (2) KLT 251,** which have absolutely no application to the case on hand. Hence, the findings of the learned Judge are liable to be reversed, contends the 2nd respondent Society.

5. Heard Sri.P.C Sasidharan, the learned Standing Counsel for the appellant, Ms.Dhanya P. Asokan, the learned counsel for the first respondent and Sri. A.J.Varghese, the learned Senior Government Pleader.

6. Admittedly, the petitioner as per Ext.P1 was initially appointed on contract basis for a period of three years, that is, from 12/03/2012 to 11/03/2015. This was renewed by Ext.P3 for a period of another three years, that is, from 12/03/2015 to 11/03/2018. The petitioner's first maternity leave application was granted on 21/05/2014 for a period of 180 days, that is, from 03/03/2014 to 29/08/2014. The entire leave period was sanctioned with allowance. However, when the second application, that is, Ext.P4 dated 03/10/2017 for her 2nd confinement for the period from 03/10/2017 to 31/03/2018 was submitted, the 2nd respondent Society as per Ext.P5 granted maternity leave with allowance for only 90 days. Ext.P5 order also states that the maternity leave has been sanctioned subject to the provisions of the Special Rules to be framed and implemented in the 2nd respondent Society. Admittedly, when the petitioner had submitted Ext.P4 application dated 03/10/2017 and when Ext.P5 order dated 21/12/2017 was issued, the Special Rules governing the Society had not come into force. The Rules came into effect as per G.O(Ms)

148/2018/H.Edn dated 26/06/2018.

7. The only point to be considered is whether the petitioner is entitled to the benefit of the MB Act as claimed by her. According to the learned counsel for the 2nd respondent Society, the petitioner is not entitled to the benefit claimed, as the 2nd respondent society has not been brought under the provisions of the MB Act by the State Government issuing a notification under the proviso to Clause (b) of Sub Section (1) to Section 2 of the Act. Reference has been made to the decision reported in **Jisha'**s Case *(Supra)* in which decision it has been held that contractual employees are not entitled to the benefit of maternity leave.

8. *Per contra,* it was submitted on behalf of the petitioner that she is very much entitled to the benefit and reference was made to the decisions reported in **Shah vs. Presiding Officer, Labour Court, 1977 KHC 220** ; **Municipal Corporation of Delhi vs. Female Workers, 2000 KHC 504 ; Manager, Jyothi Nikethan English Medium School vs. Deputy Labour Commissioner, 2015(1) KHC 673** ; **Rakhi P.V. vs. State of Kerala, 2018(2) KHC 251** ; **Maniben Maganbhai Bhariya vs. District Development Officer Dahod, 2022 SCC ONLINE (SC) 507** and G.O. (P)No.2/2021/Fin. dated 04/01/2021 to substantiate the claim.

9. Section 2 of the MB Act reads -

*"**2. Application of Act**. -- (1) It applies, in the first instance, –*

(a) to every establishment being a factory, mine or plantation including any such establishment belonging to Government and to every establishment wherein persons are employed for the exhibition of equestrian, acrobatic and other performances:

(b) to every 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 ten or or more persons are employed, or were employed, on any day of the preceding twelve months :

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.

(2) Save as otherwise provided in [sections 5-A and 5-B], nothing contained in this Act] shall apply to any factory or other establishment to which the provisions of the Employees' State Insurance Act, 1948 (34 of 1948), apply for the time being."

10. According to the petitioner, the notification as contemplated under the Proviso to Clause (b) is not necessary as contended on behalf of the 2nd respondent Society, as the Society is an 'establishment' as contemplated under Clause (b) to sub-section (1) of Section 2 of the MB Act. This is disputed by the learned counsel for the 2nd respondent Society, who argued that the term used in Clause (b) is "shops and establishments" in a State, which means "shops and commercial establishments". As the 2nd respondent is not a commercial establishment, the provisions of the MB Act are not applicable. In answer to this argument advanced, the learned counsel for the petitioner referred to the decisions in **Manager, Jyothi Nikethan English Medium School** (*Supra*) and **Maniben Maganbhai Bhariya** (*Supra*). In **Jyothi Nikethan** *(Supra)* the term 'establishment' as contained in Section 2(c) of the Payment of Subsistence Allowance Act, 1972 (Kerala) was analysed and the meaning elucidated. Section 2(c) of the said Act reads -

> *" 2.(c) 'establishment' means any place where any industry, trade, business, undertaking, manufacture, occupation or service is carried on, but does not include any office or department of any Government or any establishment of any railway, major port, mine or oilfield;"*

The Division Bench held, going by the definition, 'establishment' means any place where, inter alia, any occupation or service is carried on, excluding those specifically excluded by the last limb of that definition.

11. In **Maniben Maganbhai Bhariya** (*Supra*), an identical provision in the Payment of Gratuity Act, 1972, was considered. There the question that arose was whether, Anganwadi workers/helpers would come under the provisions of the Payment of Gratuity Act. Clause (b) of Sub-Section (3) to Section 1 of the Payment of Gratuity Act is *pari materia* with Clause (b) of sub-section (1) to Section 2 of the MB Act. Sub-sections (3) and (3A) of Section 1 of the said Act reads -

> *"(3) It shall apply to -*
> *(a) every factory, mine, oilfield, plantation, port and railway company;*
> *(b)* ***every 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 ten or more persons are employed, or were employed, on any day of the preceding twelve months****;*
> *(c) such other establishments or class of establishments, in which ten or more employees are employed, or were employed, on any day of the preceding twelve months, as the Central Government may, by notification, specify in this behalf.*
> *[(3A) A shop or establishment to which this Act has become applicable shall continue to be governed by this Act, notwithstanding that the number of persons employed therein at any time after it has become so applicable falls below ten."*

11.1. The term 'establishment' has been explained in paragraph 79 of the judgment, the relevant portion of which reads -

> *" 79. ..... It is urged for the appellant that the Payment of Wages Act is not an enactment contemplated by Section 1(3)(b) of the Payment of Gratuity Act. The Payment of Wages Act, it is pointed out, is a Central enactment and Section 1(3)(b), it is said, refers to a law enacted by the State Legislature. We are unable to accept the contention. Section 1(3)(b) speaks of "any law for the time being in force in relation to shops and establishments in a State". There can be no dispute that the Payment of Wages Act is in force in the State of Punjab. Then, it is submitted, the Payment of Wages Act is not a law in relation to "shops and establishments". As to that, the Payment of Wages Act is a statute which, while it may not relate to shops, relates to a class of establishments, that is to say, industrial establishments. But it is contended, the law referred to under Section 1(3)(b) must be a law which relates to both shops and establishments, such as the Punjab Shops and Commercial Establishments Act, 1958. It is difficult to accept that contention because there is no warrant for so limiting the meaning of the expression "law" in Section 1(3) (b). The expression is comprehensive in its scope, and can mean a law in relation to shops as well as, separately, a law in relation to establishments, or a law in relation to shops and commercial establishments and a law in relation to noncommercial establishments. Had Section 1(3)(b) intended to refer to a single enactment, surely the appellant would have been able to point to such a statute, that is to say, a statute relating to shops and establishments, both commercial and non-commercial. The Punjab Shops and Commercial Establishments Act does not relate to all kinds of establishments. Besides shops, it relates to commercial establishments alone. Had the intention of Parliament been, when enacting Section 1(3)(b), to refer to a law relating to commercial establishments, it would not have left the expression "establishments" unqualified. We have carefully examined the various provisions of the Payment of Gratuity Act, and we are unable to discern any reason for giving the limited meaning to Section 1(3) (b) urged before us on behalf of the appellant. Section*

1(3)(b) applies to <u>every establishment within the meaning of any law for the time being in force in relation to establishments in a State.</u> ....."
(Emphasis Supplied)

12. Therefore, the term 'establishment' referred to in the MB Act can be any and every establishment within the meaning of any law for the time being in force in the State in relation to establishments. For instance, the Payment of Subsistence Allowance Act, 1972 (Kerala) is a law in force in the State of Kerala which defines 'establishment', as one where service is carried on also as in the case of the establishments of the second respondent. Hence the argument advanced that the 2nd respondent Society is not an establishment, as contemplated under Clause (b) of Sub-section (1) to Section 2 of the MB Act has only to be negatived. The Special Rules of the 2nd respondent Society cannot obviously override the provisions of the MB Act, a Central Act.

13. Further, the MB Act is admittedly a beneficial piece of legislation. As held by the Hon'ble Supreme Court in **Shah** (*Supra*) it has to be borne in mind that in interpreting the provisions of beneficial pieces of legislation, like the one in hand, which is intended to achieve the object of doing social justice to women workers and which squarely fall within the purview of Article 42 of the Constitution of India, the beneficent rule of construction, which would enable the woman worker not only to subsist but also to make up her dissipated energy, nurse her child, preserve her efficiency as a worker and maintain the level of her previous efficiency and output, has to be adopted by the Court.

14. Article 14 of the Constitution of India, provides 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 provides that the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, or place of birth or any of them. 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 minimize the inequalities in income and endeavor to eliminate inequalities in status, facilities and opportunities. Article 39 *inter alia* provides that the State shall, in particular, direct its policy towards securing that the citizens, men and women equally, have the right to an adequate means to livelihood. As per Article 42, the State shall make provision for securing just and humane conditions of work and for maternity relief. Article 43 states that the State shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries on an individual or co-operative basis in rural areas.

15. Dealing with Article 14, *vis-a-vis*, the labour laws, the Apex Court in **Hindustan Antibiotics Ltd vs. Workmen, AIR 1967 SC 948** held that, labour to

whichever sector it may belong in a particular region and in a particular industry, will have to be treated on equal basis. In **Yusuf Abdul Aziz vs. State of Bombay, AIR 1954 SC 321** it has been held that Article 15(3) which says that nothing in this article shall prevent the State from making any special provisions for women and children, applies to both existing and future laws.

15.1. The Hon'ble Supreme Court in **Municipal Corporation of Delhi** (*Supra*) considered the question whether female workers (muster roll) engaged by the Municipal Corporation of Delhi could be granted the benefit of maternity leave which was made available only to the regular female workers. Referring to the aforesaid Articles of the Constitution, the Apex Court held that it is in the background of the provisions contained in Article 39, specially in Articles 42 and 43, that the claim of the female workers (muster roll) for maternity leave and the action of the Corporation in denying that benefit to its women employees has to be scrutinised, so as to determine whether the denial of maternity leave by the petitioner is justified in law or not. As 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. In the said case, the Apex Court found that there was no justification for denying the benefit of the Act to casual workers or workers employed on daily wage basis. A reading of the provisions of the MB Act would

indicate that they are wholly in consonance with the Directive Principles of State policy, as set out in Article 39 and in the other Articles, referred to herein above, specially Article 42.

15.2. The object of the MB Act is to see that a woman employee at the time of advanced pregnancy, is not compelled to work as it would be detrimental to her health and also to the health of the foetus. It is for this reason it is provided in the Act that she would be entitled to maternity leave for certain periods prior to and after delivery. After scanning through the various provisions of the MB Act, the Apex Court held that there is nothing contained in the Act by which it can be concluded that it 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.

16. We also refer to the G.O.(P)No.2/2021/Fin. dated 04/01/2021 by which the Government of Kerala has extended the benefit of maternity leave to employees appointed on contract basis irrespective of the tenure. The said G.O. has been issued in the light of the judgment of Single Bench of this Court in **Rakhi**'s case (*Supra*) wherein it has been held that employees appointed on contract basis will also be entitled to maternity leave as is due to women employees under the Service Rules applicable to the State and Central Government servants and to women employees under the MB Act. As per the said G.O, the Government has extended the benefit of maternity leave on full pay as per Rule 100, Part I, of the Kerala Service Rules (KSR) up to a period of 180 days or till the expiry of the existing contract whichever

is earlier, to female officers appointed on contract basis, irrespective of the tenure of contract, subject to the condition that the leave would not be admissible from a date before three weeks from the expected date of confinement certified by the medical officer. Leave on full pay as per Rule 101, Part-I, KSR has been extended to female officers appointed on contract basis, irrespective of the tenure of contract, up to a period of 6 weeks or till the expiry of the existing contract whichever is earlier, subject to the condition that application for the leave is supported by a certificate from the medical officer. It is further stated that no officer shall be entitled to the above benefits unless she has actually worked under the employer for a period of not less than eighty days immediately preceding her expected date of delivery or date of miscarriage.

17. As per Section 5(1) of the MB Act, every woman would 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. Sub-Section (2) says that, 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. Respondents do not have a case that the petitioner has not worked for a period of 80 days as contemplated under Sub-Section (2) to Section 5 of the MB Act.

18. Yet another argument advanced by the learned counsel appearing for the 2nd respondent Society is that, if the petitioner is found entitled to the benefits under the MB Act, then she ought to have resorted to the remedy available to her under Section 17 of the Act as per which she ought to have preferred a complaint to the Inspector before filing the writ petition. An alternate efficacious remedy though available has not been resorted to by the petitioner and hence the writ petition is not maintainable. In this context, it is to be noted that the writ petition was not one instituted on the ground that the provisions of the MB Act would apply to the establishments of the second respondent. Instead, the writ petition was one claiming maternity benefit in tune with the provisions contained in the MB Act on various other grounds. The learned Single judge has upheld the claim in terms of the impugned judgment not on the ground that the provisions of the MB Act would apply to the establishments of the second respondent, but on different other grounds. It is with a view to support the impugned judgment, the petitioner has submitted in this appeal that she is entitled to maternity benefit in terms of the provisions of the MB Act as well. In the said circumstances, according to us, the contention that the petitioner should have invoked Section 17 of the MB Act, instead of approaching this court is only to be repelled, especially when alternative remedy is not a bar in entertaining a writ petition in appropriate cases. That being the position we find that the petitioner is entitled to the benefit of the MB Act as claimed by her.

In these circumstances, we find no infirmity in the impugned judgment calling

for an interference. The writ appeal is found to be without any merits and hence the same is dismissed.

Interlocutory Applications, if any pending, shall stand closed.

Sd/-
P.B.SURESH KUMAR
JUDGE

Sd/-
C.S.SUDHA
JUDGE

Jms/20.7