

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL
Writ Petition No. (S/S) 826 of 2012

Smt. Indu JoshiPetitioner

Versus

State of Uttarakhand and another ...Respondents

Present: Mr. Alok Dalakoti, Advocate for the petitioner.
Mr. N. P. Sah, Standing Counsel for the State of Uttarakhand.

Hon'ble Sudhanshu Dhulia, J. (Oral)

1. The petitioner is a woman, presently employed in a Government Medical College at Haldwani, Nainital known as "Dr. Shushila Tewari Government Medical College. She has been continuing in service since the year 2006 in the said hospital, though on a contractual basis. Her contract period is for one year and since 2006 it is being renewed every year. It may also be necessary to mention here that earlier the said medical college was being run by a trust and on 30.4.2010 the Government of Uttarakhand has taken over the said medical college and it is now being run as a government medical college.

2. For the first time in her service, the petitioner went on maternity leave from 17.5.2012 to 12.11.2012. Subsequently, petitioner has joined her services and is presently serving at said medical college. The petitioner claims maternity leave for the said period, which was denied to her on the grounds that the petitioner is only a contractual worker and such benefit of maternity leave is only given to a permanent government employee. It is this stand of the State Government, which is presently under challenge before this Court, as the petitioner claims that she is liable to be given maternity benefit including maternity leave as she is employed in a government

hospital and merely because her employment is on a contractual basis, she cannot be denied such benefit including maternity leave.

3. Learned counsel for the petitioner has urged that such benefit including maternity leave benefit was given to the contractual employee when they were in service of the trust. However, this is a paradox that once the institute has become a government institute the same benefits are being denied to them. Primarily, petitioner challenges violation of her rights under Articles 14, 19 and 21 of the Constitution of India. Moreover, petitioner submits that under Article 15 Clause (3) of the Constitution of India nothing can prevent the State from making any special provision for women or children and it is for that the Parliament has enacted beneficiary legislation for women, inter alia, including Maternity Benefit Act, 1961 to which we will refer shortly.

4. Counsel for the petitioner further relied upon Section 5 of the Maternity Benefit Act which was enacted by the Parliament in the year 1961. Section 5 of the said Act reads 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 subsection, 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 rate of wage 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:

Provided that the qualifying period of [eighty days] aforesaid shall not apply to a woman who has immigrated into the State of Assam and was pregnant at the time of the immigration.

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:]

Provided that where a woman dies during this period, the maternity benefit shall be payable only for the days up to and including the day of her death:

[Provided further that where a woman, having been delivered of a child, dies during her delivery or during the period immediately following the date of her delivery for which she is entitled for the maternity benefit, leaving behind in either case the child, the employer shall be liable for the maternity benefit for that entire period but if the child also dies during the said period, then, for the days up to and including the date of the death of the child.]”

5. Apart from this, there are certain fundamental rights such as rule 153 of the U.P. Fundamental Rules applicable to government servants in State of Uttar Pradesh, which have been adopted and are presently in force in Uttarakhand as well. Rule 153 of the U.P. Fundamental Rules 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 to 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 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.

(2) In cases of miscarriage, including abortion, the period of maternity leave may extend up to a total period of six weeks on each occasion, irrespective of the number of surviving children of the female Government servant concerned, provided that the application for leave is supported by a certificate from the Authorized Medical Attendant :

Note -(1) Deleted.

Note- (2) In the case of a person to whom the provisions of Employees' State Insurance Act, 1948, apply, leave salary payable under this rule shall be reduced by the amount of benefit admissible under the said Act for the corresponding period.

Note- (3) Abortion induced under the Medical Termination of Pregnancy Act, 1971, should also be considered as a case of 'abortion' for the purpose of granting 'Maternity leave' under this rule."

6. Learned counsel for the petitioner has urged that the Maternity Benefit Act makes no difference between the permanent employee, temporary employee and contractual employee and the maternity leave is applicable to all. Moreover, under the said rules whereas the maximum maternity leave which could have 135 days the State vide its memo no. 250/xxvii/(7)/2009 dated 24.8.2009 (Annexure 5 to the counter affidavit) has increased it from 135 days to 180 days. The fact that whether the maternity benefit, as envisaged under the Maternity Benefit Act and the maternity leave which would be a part of the maternity benefit is applicable to the petitioner being a contractual employee is an issue before this Court.

7. The Hon'ble Apex Court in the case of **Municipal Corporation of Delhi v. Female Workers (Muster Roll) and Another** reported in **(2000) 3 SCC 224** has held that the Maternity Benefit Act makes no difference between the permanent, temporary and contractual employees and such benefits as envisaged are applicable to all. Moreover, counsel for the petitioner has taken this Court to Section 5(2) of the Act which says that maternity benefit is applicable for a worker, who has worked for 80 days in an establishment of the employer. The petitioner has been working since 2006 although on contractual basis. As held by the Hon'ble Apex

Court in **Municipal Corporation (Supra)** the Act makes no distinction between permanent, temporary and contractual employee. This Court is of the view that the benefits under the Act as well as under the Rules, all orders which prevent, are equally applicable to all the employees. Therefore, the writ petition is liable to be allowed and is hereby allowed.

8. The respondents are hereby directed to give all the benefits of the Act as applicable to the petitioner irrespective of the fact that she has been presently working on contractual basis. It is further directed that the leave which she has undergone (from 17.5.2012 to 12.11.2012) i.e. 180 days shall be taken as maternity leave and continuity in service shall be maintained and should not be treated as break in service. The petitioner shall also be paid monitory benefits for the said leave within one month from the date a certified copy of this order is produced.

9. No order as to costs.

(Sudhanshu Dhulia, J)

8.7.2013

Kuldeep

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

Writ Petition (S/S) No. 1546 of 2016

Smt. Kavita Pant

... Petitioner

Vs

State of Uttarakhand & others

... Respondents

Mr. M.C. Pant, learned counsel for the petitioner.

Mr. N.P. Sah, Standing Counsel, present for the State of Uttarakhand/respondent Nos. 1 to 3.

Mr. Naresh Pant, Advocate, present for respondent Nos. 4 and 6.

Mr. Neeraj Garg, Advocate, present for respondent Nos. 5 and 7.

Hon'ble Sudhanshu Dhulia, J. (Oral)

1. The petitioner is a woman employee working as Data Entry Operator on contractual basis with Uttarakhand Power Corporation Ltd. through outsourcing agency called 'Uttarakhand Purva Sainik Kalyan Nigam Ltd.' (*in short 'UPNL'*). Since the petitioner was on her family way, therefore, she applied for maternity leave on 06.02.2016 from 08.02.2016 onwards and claims all maternity benefits, as provided under the Maternity Benefit Act, 1961, which have been denied to the petitioner on the ground that such benefits are not applicable in case of a contractual employee. Hence, she was constrained to file the present writ petition before this Court.

2. The Uttarakhand Power Corporation has filed its counter affidavit in this case, wherein the stand of the Power Corporation is that the salary cannot be given to the petitioner, since the bills have not been forwarded by the outsourcing agency UPNL to it. On the other hand, learned counsel for the UPNL – Mr. Neeraj Garg says that they are governed by Order dated 21.07.2014 by which such benefits are not given to a contractual employee.

3. Learned counsel for the petitioner would argue that this Court has already decided this controversy in ***Smt. Indu Joshi Vs State of Uttarakhand & another*** (in WPSS No. 826 of 2013, decided on 08.07.2013) wherein it has held that maternity leave is liable to be given to the contractual

employees as well. This Court while disposing of the said matter relied upon a decision of Hon'ble Apex Court in ***Municipal Corporation of Delhi Vs Female Workers (Muster Roll) & another*** reported in ***(2003) 3 SCC 224***.

4. Apart from the above, learned counsel for the petitioner has also relied upon Section 3(o) of the Maternity Benefit Act in which definition of 'woman' has been defined, which reads as under:-

“3. Definitions (o) “woman” means employed, whether directly or through any agency, for wages in any establishment.”

(Emphasis supplied)

5. He further draw the attention of this Court to Section 3(e) of the Act in which definition of 'establishment' has been mentioned, which reads as under:-

““establishment” means –

- (i) a factory;
- (ii) a mine;
- (iii) a plantation;
- (iv) an establishment wherein persons are employed for the exhibition of equestrian, acrobatic and other performances;
- (iva) a shop or establishment; or
- (v) an establishment to which the provisions of this Act have been declared under sub-section (1) of Section 2 to be applicable.”

6. Learned counsel for the petitioner submits that in view of the above provision of the Act, Uttarakhand Power Corporation would definitely come under the definition of 'establishment'. He further draws the attention of this Court to Clause (4) of Section 21 of the Contract Labour (Regulation and Abolition) Act, 1970, which reads as under:-

“21. Responsibility for payment of wages – (1) A contractor shall be responsible for payment of wages to each worker employed by him as contract labour and such wages shall be paid before the expiry of such period as may be prescribed.

(2) Every principal employer shall nominate a representative duly authorized by him to be present at the time of disbursement of wages by the contractor and it shall be the duty of each representative to certify the amounts paid as wages in such manner as may be prescribed.

(3) It shall be the duty of the contractor to ensure the disbursement of wages in the presence of the authorized representative of the principal employer.

(4) In case the contractor fails to make payment of wages within the prescribed period or makes short payment, then the principal employer shall be liable to make payment of wages in full or the unpaid balance due, as the case may be, to the contract labour employed by the contractor and recover the amount so paid from the contractor either by deduction from any amount payable to the contractor under any contract or as a debt payable by the contractor.”

7. On the basis of the above provision, not only the woman is an ‘employee’ through a contractual agency is covered under the benefit of the above Act, but in a given contingency, where these benefits are not being given by the agent or contractual agency, the same are also liable to be paid by the principal employer, which in the present case is Uttarakhand Power Corporation.

8. At the fag end of the arguments, learned counsel for the UPNL has brought a Government Order dated 12.09.2016 before this Court, which is now part of the record as Annexure

- 'A', which clearly says that the benefits of maternity leave, as provided under the Benefit of Maternity Act, will also be applicable in the case of contractual employee.

9. In view thereof, this Court is also of the considered view that maternity leave is liable to be given to the present petitioner as well. The writ petition is allowed accordingly.

10. Let all the benefits of maternity leave, including salary benefit, be given to the petitioner forthwith, but definitely within a period of three weeks from the date of production of a certified copy of this order.

11. Let the certified copy of this order be supplied to the petitioner within a period of 48 hours on the payment of usual charges.

(Sudhanshu Dhulia, J.)

04.10.2016

Aswal