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**Central Administrative Tribunal
Principal Bench**

OA No. 1972/2004

New Delhi, this the 10th day of August, 2005

Hon'ble Mr. Shanker Raju, Member (J)

Mrs. Kiran Bala,
LDC, T.C.P.O. Admin.II,
Ministry of Urban Development,
R/o 109, Munirika,
New Delhi - 110 022.

...Applicant

(By Advocate: Shri Sudarshan Rajan)

-versus-

Union of India through
Secretary,
Ministry of Urban Development,
Nirman Bhawan,
New Delhi - 110 001.

...Respondents

(By Advocate: Shri Madhav Panikar)

1. To be referred to the Reporters or not? *Yes*
2. To be circulated to the outlying Benches or not? *Yes*

S. Raju
(Shanker Raju)
Member (J)

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ORDER (ORAL)

By virtue of the present Original Application a challenge has been made to orders dated 25.5.2004 and 29.7.2004 passed by the respondents rejecting her request for grant of maternity leave. A prayer has also been made for reimbursement of the expenditure for undergoing delivery at G.M.Modi Hospital & Research Centre, Saket.

Factual Matrix:

1. Applicant has been serving as Lower Division Clerk. Prior to her joining the Organization on 10.8.1998, applicant had two sons born in

July, 1994 and March, 1997 respectively. The younger son was duly given in adoption to her sister-in-law in April 2002 with intimation to the respondents. CGHS Card issued to the applicant also does not contain the name of her second son.

2. In January, 2004 when applicant was in the advanced stage of pregnancy, she made a request to the respondents for necessary permission to undergo delivery at G.M. Modi Hospital & Research Centre, Saket (CGHS recognized Hospital). The respondents issued a letter on 20.1.2004 reciting therein that the expenditure for this purpose will be reimbursed in terms of OM dated 7.9.2001.

3. When the applicant gave birth to a baby, she had applied for grant of maternity leave but the said request of the applicant was turned down in consultation with DOP&T on 25.5.2004.

4. A representation preferred on 14.6.2004 has also met the same fate, giving rise to the present Original Application.

5. The important question, which is raised in this case, is whether a female government servant having two children, of whom one has been given in adoption, is still eligible for maternity leave in respect of subsequent delivery?

RULE POSITION:

6. Grant of maternity leave is under rule 43 of the CCS (Leave) Rules, 1972, which is reproduced below:-

"43. Maternity Leave

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- (1) A female Government servant (including an apprentice) with less than two surviving children may be granted maternity leave by an authority competent to grant leave for a period of 135 days from the date of its commencement.
- (2) During such period, she shall be paid leave salary equal to the pay drawn immediately before proceeding on leave.

NOTE:- In the case of a person to whom the Employees' State Insurance Act, 1948 (34 of 1948), applies, the amount of leave salary payable under this rule shall be reduced by the amount of benefit payable under the said Act for the corresponding period.

- (3) Maternity leave not exceeding 45 days may also be granted to a female Government servant (irrespective of the number of surviving children) during the entire service of that female Government servant in case of miscarriage including abortion on production of medical certificate as laid down in Rule 19:

Provided that the maternity leave granted and availed of before the commencement of the CCS (Leave) Amendment Rules, 1995, shall not be taken into account for the purpose of this sub-rule.

- (4) (a) Maternity leave may be combined with leave of any other kind.
- (b) Notwithstanding the requirement of production of medical certificate contained in sub-rule (1) of Rule 30 or sub-rule (1) of Rule 31, leave of the kind due and admissible (including commuted leave for a period not exceeding 60 days and leave not due) up to a maximum of one year may, if applied for, be granted in continuation of maternity leave granted under sub-rule (1).
- (5) Maternity leave shall not be debited against the leave account."

7. DOP&T OM dated 28.04.1986 makes eligible unmarried female government servant for maternity leave as per the following decision:

"(1) Unmarried female Government servants also eligible for maternity leave –
Under Rule 43 of the Central Civil Services (Leave) Rules, 1972, maternity leave may be granted to a female Government servant by an

authority competent to grant leave subject to fulfillment of conditions laid down under the said Rule. In this connection, a reference was received in this Department as to the admissibility of maternity leave to unmarried female Government servants.

(2). The matter has, accordingly, been considered in this Department and it is felt that the word "female" in the CCS (Leave) Rules, 1972, does not specifically refer to the marital status of the female and the word "married" is not prefixed to the word "female". It is, therefore, clarified that, as the rule itself does not make any distinction in this regard, maternity leave as admissible may be granted to an unmarried female Government servant. Further, at the time of grant leave, while due regard may be had to the conditions laid in Rule 43 of the CCS (Leave) Rules, the welfare of the mother and the child, which is of primary concern, shall also be kept in view."

8. Rule 43-B of the Rules *ibid* provides leave to a female government servant on adoption of a child, which is reproduced as under:

"43-B. Leave to a female Government servant on adoption of a child

A female Government servant on adoption of a child, may be granted leave of the kind due and admissible (including leave not due and commuted leave not exceeding 60 days without production of medical certificate) for a period up to one year or till such time the child is one year old, whichever is earlier. However, this facility will not be admissible in case she is already having two surviving children at the time of adoption."

9. The condition precedent for grant of maternity leave to a female government employee is that one should have less than two surviving children at the time when such a request is made.

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10. Learned counsel of the applicant would contend that as per Section 12 of the Hindu Adoption & Maintenance Act, 1956, on adoption, a child is completely removed from his natural family as regards of civil rights and obligations. As such adopted son loses the right in property etc. Accordingly as per law, child ceases to exist with the person who had given him on adoption and it cannot be observed that the child is surviving to the female government servant.

11. In the above conspectus, it is stated that when rules are specific that on adoption child ceases to be the child of his natural parents, it is to be construed that the said child would not be counted in the surviving children of a government female servant. As such, the applicant, who has only one surviving child, is entitled for maternity leave and for reimbursement of the expenditure incurred on delivery.

12. I do not find any definition of family in CCS (Leave) Rules *ibid*. However in SR-2 (8) family has been defined where NOTE-2 provides as under:

"An adopted child shall be considered to be a legitimate child if, under the personal law of the Government servant, adoption is legally recognized as conferring on it the status of a natural child."

13. However, respondents have vehemently opposed the contentions and stated that as per 5th Central Pay Commission's recommendations vide DOP&T OM dated 20.10.1997 in so far as grant of LTC is concerned also talks of limiting two children family.

Vide Ministry of Finance OM dated 17.4.1998 where the restriction of LTC is w.e.f. 1.1.1999 is admissible to a family having only two children.

14. Learned counsel states that DOP&T when consulted had suggested that maternity leave is restricted up to two surviving children and even if one is given in adoption, the factum of having one child earlier cannot be denied and linking up of maternity leave with giving away a child for adoption is incorrect. As such, having two surviving children, the applicant is not entitled for grant of maternity leave as per Rule 43 of the Rules *ibid*.

15. As regards medical reimbursement, no reply has come forth from the respondents.

16. I have carefully considered the rival contentions of the parties and have perused the material available on record.

17. Vires of Rule 43 of the Rules *ibid* has already been gone into by a Division Bench of this Tribunal in ***Ruby K. Varkey vs. General Manager, Telecommunications, Ernakulam & Anr.***, (1993) 23

ATC 128, where following observations have been made:

"6. The learned counsel for the applicant next argued that the impugned rule is against the provision of Article 42 of the Constitution which provides that the State shall make provisions for securing just and human condition of work and for maternity leave. The counsel further argued that right to life enshrined in Article 21 of the Constitution cannot be restricted to a mere animal existence and it means the right to live with dignity. By forcing a woman employee to work during the period when physiologically and biologically she needs rest is against the

guarantee of Article 21 of the Constitution of India. The counsel stressed the Fundamental Rights and Directive Principles of State Policy are to be respected by the Government in making rules and regulations. In this connection the learned counsel invited our attention to the rulings in **V. Markendeya vs. State of A.P.**, (1989) 11 ATC 3; **Francis Coralie Mullin vs. Administrator, U.T. of Delhi**, AIR 1981 SC 746; **Vikram Deo Singh Tomar vs. State of Bihar**, AIR 1988 SC 1782; **State of Kerala vs. N.M. Thomas**, AIR 1976 SC 490 and **Comptroller and Auditor General of India, Gian Prakash, New Delhi v. K.S. Jagannathan**, AIR 1987 SC 537. We have carefully gone through all these rulings cited by the learned counsel, but we find that the facts and circumstances of any of these above quoted rulings do not have any relevance or similarity to the facts and circumstances of this case. We are perfectly in agreement with the learned counsel that a right to live with dignity. We are also convinced that compelling a person to do work when the person physiologically and biologically needs rest is again the provisions of Article 21 of the Constitution. It was taking into consideration of all these circumstances that the provisions regarding maternity leave are incorporated in Rule 43 of the CCS (Leave) Rules. It is true that, as per Rule 43 of the CCS (Leave) Rules the benefit of maternity leave has been restricted to women employees who do not have two or more living children. The Maternity Benefits Act is not applicable to the officials of the Government of India. It is to extend the maternity benefits to the women employees under the Government of India that Rule 43 has been incorporated in the CCS (Leave) Rules. In Rule 43 of the CCS (Leave) Rules provision has been made for grant of maternity leave to women employees as long as they do not have more than 2 living children. This is in conformity with the policy of the Government to check the growth of population which as stated by us earlier is necessary in the prevailing circumstances in national interest. If any woman employees having 2 children still wants to have more children, there is no prohibition in the service rules, but she may have to avail herself of other eligible leave. We are of the view that the restriction placed in Rule 43 of the CCS (Leave) Rules is perfectly justified in the present state of our economic condition."

18. If one has regard to the above, the basic object of maternity leave is the welfare of the mother and child, which is of primary concern. Two children family norm is also a step taken by the government to promote a limited family according incentives and benefits have been shelved from those government servants, who are having a family beyond this norm.

19. Now I have to examine as to whether implication of adoption of a child would bring out the child from the ambit of surviving child as to entitle the applicant for maternity leave. Hindu Adoption & Maintenance Act, 1956 deals with adoption, which is only available among Hindus. Apart from other convenient objects, spiritual object is prime. Section 12 of the Act ibid provides as under:-

"12. Effects of adoption. - An adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption and from such date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family:

Provided that ---

- (a) the child cannot marry any person whom he or she could not have married if he or she had continued in the family of his or her birth;
- (b) any property which vested in the adopted child before the adoption shall continue to vest in such person subject to the obligations, if any, attaching to the ownership of such property, including the obligation to maintain relatives in the family of his or her birth;

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- (c) the adopted child shall not divest any person of any estate which vested in him or her before the adoption."

20. If one has regard to the above, on adoption an adopted child shall be termed to be the child of adoptive family for all purposes except marrying within blood and encroaching upon the ownership of the property and obligations and also divesting any person of any estate which vested in him or her before the adoption, as the adoption affects from the date of its execution.

21. Apex Court in **Vijayalakshamma & Anr. Vs. B.T. Shankar**, (2001) 4 SCC 558, while dealing with Hindu Adoption & Maintenance Act, 1956, held as under:-

"21. The nature, object and purpose of the Act in question has already been noticed supra. Parliament has consciously and deliberately effected certain vital and substantial changes in the personal law of the Hindus in several branches including the law relating to adoptions. The Statement of Objects and Reasons, so far as it pertains to the law on adoption reads as follows:-

"This part of the Hindu Code deals with the subject of adoptions and maintenance among Hindus.

2. With the passing of the Hindu Succession Act, 1956, which treats sons and daughters equally in the matter of succession, it has now become possible to simplify the law of adoption among Hindus. The Bill provides for the adoption of boys as well as girls. There is no longer any justification for allowing a husband to prevent his wife from taking a child in adoption after his death. The adoption made by a Hindu widow will hereafter be in her own right. No person need be divested of any property which has vested in him by reason only of the fact that subsequent to such vesting an adoption has been made. This rule of divesting has been

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the cause of many ruinous litigation."
(Emphasis supplied).

22. This Court also endorsed the said position in the decision reported in **G.Appaswami Chettair vs. R. Sarangapani Chettiar**, [(1978) 3 SCC 55] AIR vide para 13. The extent to which and the areas and aspect or facets of old Hindu law which required modernization, modification and alteration are matters of policy and merely because a particular change has been brought into effect in respect of one facet of law in force and a provision has been made specifically only to that limited extent, the courts can neither by means of an interpretative process nor under the guise of ensuring parity in what it may seem to the court would be desirable to achieve uniformity (an area once again exclusively pertaining to policy of legislation) add to or alter the language, structure and content of a provision by reading into it what was not specifically intended or what perhaps was deliberately and consciously avoided by Parliament itself. Section 7 bears the caption "Capacity of a male Hindu to take in adoption" in the same manner the immediately following Section 8 bears the heading "Capacity of a female Hindu to take in adoption". When Parliament resolved to provide for and insist upon the obtaining of the consent of the wife or if there are more than one living wife the consent of all of them, unless they or any one of them suffered any of the enumerated infirmities rendering such consent unnecessary, the conscious and positive as well as deliberate omission to provide for a female Hindu seeking or obtaining any such consent from a co-or junior widow is a definite pointer to indicate that the legislative intent and determination was not to impose any such clog on the power specifically conferred upon the female Hindu - may be for the obvious reason that under the Scheme of the Act the Hindu female has been enabled and empowered to adopt not only to herself but also to her husband, and also in tune with the changed and modern concept of equality of women and their capabilities to decide independently statutorily recognized, and the very reason for insisting upon such an authority or consent from the husband or the sapindas under the old Hindu law having lost its basis and thereby ceased to be of any relevance or valid purpose whatsoever. In such circumstances, acceding to the submission to read into Section 8 the stipulation in this proviso to Section 7 with the Explanation thereto would amount to legislation by

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courts on the lines as to what in its view the law should be, which is wholly impermissible for courts, de hors any justification or necessity for such a provision. In our view, there is no necessity even for such a provision in the context of the changed circumstances brought about by the various alterations and amendments to the Hindu Code regulating hitherto the personal law of the Hindus."

22. It is the function of the court to interpret the statute or a rule to ascertain its legislative intent. In that process what is permissible is only to expound the law as held by the Apex Court in ***District Mining Officer vs. TISCO***, 2001(7) SCC, 358. When a provision is made on a welfare and beneficial legislation while interpreting the rule if the result thereof would be addition/substitution or alteration of words and if the provision is capable of giving only one meaning and there is no ambiguity, no interpretation is required but in case of a doubt, the court is not precluded from applying rule of beneficent construction in order to advance the object of the Act as held by the Apex Court in ***Shyam Sunder vs. Ram Kumar***, (2001) 8 SCC 24.

23. In so far as contextual construction is concerned, the principle has been laid down in ***Union of India vs. Elphinstone Spg. And Wvg. Co. Ltd.***, (2001) 4 SCC 139, by the Constitution Bench of the Apex Court with the following observations:

"When the question arises as to the meaning of a certain provision in a statute it is not only legitimate but proper to read that provision in its context. The context means the statute as a whole, the previous state of law, other statutes in pari material, the general scope of the statute and the mischief that it was intended to remedy.

Although the court would be justified to some extent in examining the materials for finding out the true legislative intent engrafted in a statute, but the

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same would be done only when the statute itself is ambiguous or a particular meaning given to a particular provision of the statute would make the statute unworkable or the very purpose of enacting the statute would get frustrated. But it is not open for a court to expand even the language used in the Preamble to extract the meaning of the statute or to find out the latent intention of the legislature in enacting the statute."

24. Having regard to the principle of interpretation in mind, maternity leave accorded to a female government servant is a beneficial legislation with foremost object of welfare of the mother and the child, which is of primary concern and the same is even laid down in DO&T OM 28.4.1986 *ibid*.

25. The word "**surviving children**" in the context of maternity leave advances the object of the Government of India contained in Ministry of Finance's OM dated 17.04.1998 where to interpret adoption of small family norms by Central Government employees, even traveling allowances have been restricted to a family having more than two surviving children.

26. Chambers 20th Century Dictionary, 1983 Edition, defines "**survivor**" as an existing one or living.

27. A surviving child is a child who is not otherwise dead and lives longer and remains alive if the others are dead as per doctrine of survivorship in Mitakshara Law. While interpreting a rule, legal interpretation should not be forbidden. Though a female government servant has given birth to a child yet on adoption the child is for all practical purposes and in its legal generic term is *non-existent, i.e.*, adoption as per Section 12 of the Adoption Act *ibid* the child becomes

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part of the adoptive family and severs all his/her legal and other relations with the family which had given him in adoption except few constraints of not marrying anyone from the original family and not to divest from the estate which already vested before adoption are basically designed to ensure that medical deformities would not occur in blood group marriages and one should not be deprived of rights already accrued. Otherwise as per the Apex Court's decision in **Dani Raiji vs. Chandra Prabha**, 1971 (Gujarat) SC 784, expression "**effects of adoption**" refers to all the legal consequences flowing from adoption.

28. In my considered view, if a child born to a female government servant, is given in adoption, the child legally cannot be stated to be surviving one and would not be reckoned for the purpose of accord of maternity leave. Sometimes logic overrides strict rules as well and when this logic has a reasonable nexus with the object sought to be achieved, the interpretation can be accorded to such a provision on external aids also.

29. Rule 43-B of the Rules *ibid* provides that a female government who takes a child in adoption and if there are two surviving children at the time of adoption, maternity leave would not be accorded. Accordingly, when an adopted child for the adoptive family counts for computing surviving children vice versa the same should also follow in the case of the female from whom the child has severed his relationship being mother who had given him in adoption. Otherwise, if for both the families, the adoptive child is to be reckoned as a surviving child, the same would not pass the test of logic and

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reasonableness on severance of legal relationship and a treatment of child in the natural family to be adoptive, parents severe relationship with the person who has given the child in adoption and for any purpose whatsoever treating this child merely on the basis of birth as a surviving child to the female government servant would not only offends Section 12 of the Act *ibid* but would also be contrary to the decision of the Apex Court (*supra*) where any interpretation in conflict with the provision of Adoption Act, the later shall override the effect of any other rule, statutory instructions etc.

30. In the present case, applicant has only one son surviving per law, accordingly refusal of maternity leave for the newly born on account of giving birth to a child is not reasonable and is not sustainable in law as well.

31. In the result, for the foregoing reasons, the Original Application is allowed. The impugned orders are set aside. Respondents are directed to accord maternity leave to the applicant and also to reimburse the expenditure incurred on delivery as per extent rules, within a period of two months from the date of receipt of a certified copy of this order. No costs.

/na/

S. Raju
(Shanker Raju)
Membr (J)
10/8/2005.