IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

SPECIAL APPEAL No. 736 of 2019

State of Uttarakhand ……....Appellant

Vs.

Smt. Urmila Masih and others. ...Respondents

Sri Paresh Tripathi, learned Chief Standing Counsel and Sri Anil Bisht, learned Standing Counsel for the State of Uttarakhand / appellant.
Sri Sanpreet Singh Ajmani, learned counsel for the respondent-writ petitioner.

Dated: 17th September, 2019

Coram: Hon'ble Ramesh Ranganathan, C.J.
Hon'ble Alok Kumar Verma, J.

Ramesh Ranganathan, C.J. (Oral)

Heard Sri Paresh Tripathi, learned Chief Standing Counsel for the State of Uttarakhand and Sri Sanpreet Singh Ajmani, learned counsel for the respondent-writ petitioner and, with their consent, the Special Appeal is disposed of at the stage of admission.

2. We may at the outset note the submission of Sri Paresh Tripathi, learned Chief Standing Counsel for the State of Uttarakhand, that the appellant is concerned more with the effect of the declaration of law, by the learned Single Judge, to future cases; and they have no intention of recovering whatever benefit the State has already extended to the respondent-writ petitioner.

3. In the light of the submissions, urged on behalf of the State-Government, by Sri Paresh Paresh Tripathi, learned Chief Standing Counsel, we shall proceed to examine the validity of the order under appeal.

4. The first respondent herein filed Writ Petition (S/S) No. 1778 of 2015 seeking a writ of certiorari to quash the letter issued by the second respondent; for a writ of mandamus commanding the respondents to grant maternity leave and benefits to the petitioner as per the Maternity Benefits Act, 1961 (for short the '1961 Act'); and to declare Rule 153 of the U.P. Fundamental Rules, adopted by the State of Uttarakhand, as *ultra vires* and unconstitutional in so far as

it relates to placing restrictions in not granting maternity leave to women having two or more living children.

5. Fundamental Rule 153, which was applicable to the respondent-writ petitioner (a government servant), 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 in this behalf subject to the following:—
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> (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:
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> Provided that such leave shall not be granted for more than three times during the 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 upto 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 Authorised Medical Attendant:
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> Note-(1) Deleted. 5
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> 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. This Rule was subjected to challenge before the learned Single Judge on the ground that it was in violation of Section 27 of the 1961 Act and Article 42 of the Constitution.

7. Section 27 of the 1961 Act reads as under:-

> "27. **Effect of laws and agreements inconsistent with this Act.**— (1) The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law or in the terms of any award, agreement or contract of service, whether made before or after the coming into force of this Act:
>
> Provided that where under any such award, agreement, contract of service or otherwise, a woman is entitled to benefits in respect of any matter which are more favourable to her than those to which she would be entitled under this Act, the woman shall continue to be entitled to the more favourable benefits in respect of that matter, notwithstanding that she is entitled to receive benefits in respect of other matters under this Act.
>
> (2) Nothing contained in this Act shall be construed to preclude a woman from entering into an agreement with her employer for granting her rights or privileges in respect of any matter which are more favourable to her than those to which she would be entitled under this Act."

8. In the order under appeal, the learned Single Judge relied on a Division Bench judgment of the Punjab and Haryana High Court, in **Ruksana vs. State of Haryana & others : 2011 SCC OnLine P&H 4666** and Article 42 of the Constitution of India, to hold that the second proviso to FR 153 was not in conformity with Section 27 of the 1961 Act, and was also against the spirit of Article 42 of the Constitution of India. The second proviso to FR 153 of the U.P. Fundamental Rules, as adopted by the State of Uttarakhand, was declared *ultra vires* and unconstitutional, and was struck down. The State Government was directed to provide maternity leave from

30.06.2015 to 09.12.2015 within six weeks from the date of the order under appeal. Aggrieved thereby, the present appeal.

9. Sri Paresh Tripathi, learned Chief Standing Counsel, would submit that a bare reading of Section 2 of the 1961 Act would show that the said Act has no application to government employees; it is only to cases to which the 1961 Act is applicable, would the question of it prevailing, notwithstanding any other law to the contrary in terms of Section 27 of the said Act, arise for consideration; Article 42 is in Part-IV of the Constitution, which relates to Directive Principles of State Policy; the provisions of Article 42 of the Constitution are not enforceable by a Court; and, in such circumstances, the order of the learned Single Judge necessitates interference, since the law laid-down by the learned Single Judge would apply even to future cases of government servants seeking maternity leave for a third child contrary to the second proviso to FR 153.

10. On the other hand Sri Sanpreet Singh Ajmani, learned counsel for the respondent-writ petitioner, would submit that, besides the judgment of the Punjab and Haryana High Court in **Ruksana vs. State of Haryana & others : 2011 SCC OnLine P&H 4666,** the Madras High Court had also taken a similar view in **J. Sharmila vs. The Secretary to Government Education Department and others : 2010 SCC OnLine Mad 5221**; while Article 42 may not be enforceable, the spirit of the provision must be borne in mind by the Government in matters of governance; and the order under appeal does not, therefore, necessitate interference.

11. As noted hereinabove, Section 27 of the 1961 Act relates to effect of laws and agreements inconsistent with the 1961 Act, and, in the light of the non-obstante clause in Section 27(1), the 1961 Act shall have effect notwithstanding anything inconsistent therewith contained in any other law whether made after or before the coming into force of the 1961 Act. Any law inconsistent with the 1961 Act

would cease to apply in view of the non-obstante clause in Section 27 of the 1961 Act. It is only if the 1961 Act is applicable, would the question of inconsistency between the said Act and the second proviso to FR 153 arise for consideration.

12. Section 2 of the 1961 Act relates to application of the Act, and reads as under:-

> "27. **Application of the Act**-
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> (1) It applies, in the first instance,--
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> (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;
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> (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 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.
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> (2) Save as otherwise provided in sections 5A and 5B, 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.

13. Section 3(e) of the 1961 Act defines "establishment" to 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; (iv) 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.

14. Reference to an establishment belonging to Government in Section 2(1)(a) of the 1961 Act must be read in conjunction with Section 3(e) thereof, and, when so read, it would only mean that a

factory, a mine, a plantation of the Government, would alone fall within the ambit of Section 2(1)(a) of the 1961 Act.

15. The respondent-writ petitioner is, admittedly, a government servant. Government servants are not employed in Government factories, mines and plantations, and would not therefore fall within the ambit of Section 2(1)(a) of the 1961 Act, as the Act itself is inapplicable to Government servants. The question of the second proviso to FR 153, being contrary to the provisions of 1961 Act, does not therefore arise. The applicability of 1961 Act to government servants was not in issue before the Punjab and Haryana High Court in **Ruksana vs. State of Haryana & others : 2011 SCC OnLine P&H 4666.** Likewise, this question did not arise for consideration even before the Madras High Court in **J. Sharmila vs. The Secretary to Government Education Department and others : 2010 SCC OnLine Mad 5221.**

16. The decision of a High Court will have the force of a binding precedent only in the State or territories over which the Court has jurisdiction. In other States or outside the territorial jurisdiction of that High Court, it may, at best, have persuasive effect. The doctrine of stare decisis cannot be so stretched as to give the judgments of one High Court the status of a binding precedent so far as the other High Courts are concerned. [**Geoffrey Manners & Co. Ltd. Vs. CIT : Vol. 89 1996 Taxman. 287 (Bom. HC DB; CIT Vs. Thana Electricity Supply Co. Ltd. : (1994) 206 ITR 727 (Bom);** and **Consolidated Pneumatic Tool Co. Vs. CIT : (1994) 209 ITR 277 (Bom)]**. This doctrine is applicable only to different benches of the same High Court. The ratio of the decisions of other High Courts cannot be exalted to the status of a binding precedent nor can the ratio decidendi of those decisions be perpetuated by invoking the doctrine of stare decisis. [**Valliama Champaka Pillai Vs. Sivathanu Pillai : (1979) 4 SCC 429; CIT Vs. Thana Electricity Supply Co. Ltd. : (1994) 206 ITR 727 (Bom)**].

17. Even otherwise, the decision of a Court is only an authority for what it actually decides. What is of the essence in a decision is its ratio, and not every observation found therein nor what logically follows from the various observations made in it. (**State of Orissa v. Sudhansu Sekhar Mistra and others : AIR 1968 SC 647; Quinn v. Leathem : 1901 AC 495**).

18. Since the 1961 Act is, itself, inapplicable to government servants, the question, of the second proviso to FR 153 being inconsistent with the provisions of the 1961 Act, does not arise. Section 27 of the 1961 Act cannot, therefore, form the basis of declaring the second proviso to FR 153 *ultra vires* the provisions of the 1961 Act.

19. While it is, no doubt, true that Article 42 in Part-IV of the Constitution requires the State Government to make provisions for securing just and humane conditions of work and maternity relief, Article 37, in Part-IV of the Constitution, makes it clear that the provisions contained in Part-IV shall not be enforceable by any Court, but the principles therein laid-down are nevertheless fundamental in the governance of the country; and it shall be the duty of the State to apply these principles in making laws.

20. In the absence of any law being made by the State of Uttarakhand, providing for maternity benefits to government servants having a third child, and as Article 42 of the Constitution of India, which though fundamental in the governance of the country, is not enforceable in proceedings before any Court, reliance placed on Article 42 of the Constitution, to strike down the second proviso to FR 153, is wholly unjustified.

21. We are satisfied, therefore, that the learned Single Judge has erred in striking down the second proviso to FR 153, both on the ground that it is inconsistent with the provisions of the Maternity Benefits Act, 1961, and that it is contrary to the spirit of Article 42 of the Constitution of India.

22. The Special Appeal is allowed. However, in the circumstances, without costs.

(Alok Kumar Verma, J.) **(Ramesh Ranganathan, C.J.)**
17.09.2019 17.09.2019

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