

Madras High Court
Madras High Court
K.Kalaiselvi vs Chennai Port Trust on 4 March, 2013
DATED : 04.03.2013

CORAM

THE HONOURABLE MR.JUSTICE K.CHANDRU

W.P.No.8188 of 2012

and

M.P.Nos.1 and 2 of 2012

K.Kalaiselvi .. Petitioner

Vs.

Chennai Port Trust,

rep by the Chairman,

1,Rajaji Salai,

Chennai-600 001. .. Respondent

This writ petition is preferred under Article 226 of the Constitution of India praying for the issue of a writ of certiorarified mandamus to call for the records of the respondent pertaining to the impugned letter dated 5.12.2011, quash the same and consequently to direct the respondent to grant the petitioner herein maternity leave on equal footing with the leave granted under Rule 3A of the Madras Port Trust (Leave) Regulations, 1987, to adoptive mothers For Petitioner : Mr.Srinath Sridevan

For Respondent : Mr.M.Devendran for Port Trust

ORDER

The short question that arises for consideration in this writ petition is whether a woman employee working in the Chennai Port Trust is entitled to avail maternity leave even in case where she gets the child through arrangement by Surrogate parents?

2.The petitioner is working as an Assistant Superintendent in the Traffic department of the Chennai Port Trust. She had put in 24 years of service. She is married. Her son (Shyam Sundar) aged 20 years died die to road accident on 31.01.2009. After his birth, the petitioner has removed her uterus due to some problem on 30.04.2008. Therefore, she in order to have a child had entered into an arrangement with Prashanth Multispeciality hospital, Chennai to have a baby through surrogate procedure. Finally with the consent of her husband and his cooperation, a female baby was born on 08.02.2011 through a host mother. She had incurred substantial expenditure towards treatment. In order to look after the newly born baby, she had applied for maternity leave. But she was informed that she was not entitled for maternity leave (post delivery) for having a child through surrogate procedure though such a rejection was not possible in case of a person adopting a

child. The petitioner, therefore, requested for sanction of maternity leave to look after the newly born girl child and reimburse the medical expenses and also to issue the FMI Card incorporating the newly born child through her representation, dated 17.6.2011. She sent a reminder on 13.8.2011. However, by proceedings, dated 22.11.2011, she was informed that the Chairman of the Port Trust had granted her two months period leave as a special case, which will be treated as an eligible leave. But the leave granted on 17.9.2011 for a period of 59 days from 08.02.2011 to 07.04.2011 vide medical certificate dated 17.09.2011 was subsequently cancelled. Her request for inclusion of the female child in the FMI card was also rejected. She was informed by a letter dated 05.12.2011 that inclusion of her daughter name G.K.Sharanya in the FMI Card does not arise. The petitioner produced before the respondent Port Trust all documents relating to surrogate arrangement, hospital expenditures incurred by her as well as the birth certificate given by the Corporation of Chennai evidencing that the female child was born on 08.02.2011. The name of the parents are described as the petitioner being the mother and her husband as her father. It is under these circumstances, writ petition came to be filed seeking to set aside the order dated 05.12.2011 and for a consequential direction to the Chennai Port Trust to grant leave to the petitioner on equal footing in terms of Rule 3-A of the Madras Port Trust (Leave) Regulations, 1987, which benefit was granted to adoptive parents.

3. In order to appreciate the contentions, it is necessary to extract Rule 3A, which reads as follows :

"3-A. Leave to female employees on adoption of a child :

A female employee on her adoption a child may be granted leave of the kind and admissible (including commuted leave without production of medical certificate for a period not exceeding 60 days and leave not due) upto one year subject to the following conditions : (i) the facility will not be available to an adoptive mother already having two living children at the time of adoption;

(ii) the maximum admissible period of leave of the kind due and admissible will be regulated as under :

(a) If the age of the adopted child is less than one month, leave upto one year may be allowed.

(b) If the age of the child is six months or more, leave upto six months may be allowed.

(c) If the age of the child is nine months or more leave upto three months may be allowed."

4. When the writ petition came up on 28.03.2012, this court admitted the writ petition and in the two direction applications, notice was ordered. On notice from this court, a counter affidavit has been filed by the respondent, dated 31.5.2012.

5. The facts alleged by the petitioner regarding her marital status and the fact of her son died in a road accident was admitted. The birth of a child through surrogate arrangement was also admitted by the respondent. However, it was informed that on the petitioner sending a proposal, the matter was referred to the Ministry of Shipping and Surface Transport for clarification and guidelines. The Ministry in their letter dated 20.9.2011 informed the Port Trust that there was no provision / guidelines available in the CCS (Leave) Rules for the grant of maternity leave to a female Government employee for looking after her baby obtained through surrogate procedure. It was based upon the advice given by the Ministry, the leave given to her was cancelled and it was treated as eligible leave. Her further request to include the child in the FMI card was also rejected and it was informed that it cannot be considered. It was further stated that it was a peculiar case. In our Country getting a child through surrogate procedure is at a nascent stage. There are no rules or guidelines available. There are no provision in the Chennai Port Trust (Leave) Regulations, 1987 granting maternity leave to an employee who underwent surrogate procedure. No inspiration can be drawn from the Maternity Benefit Act, 1961. Apart from referring to the practice in the Australia where surrogacy was never treated as legal and in U.K., where surrogacy arrangement was legal, but advertising and other aspects of commercial surrogacy was prohibited under the Surrogacy Arrangements Act, 1985. Strangely the respondent in

paragraph 18 made the following averments : "18.It is submitted that apart from legal, other issues such as moral, ethical, psychological and religious are involved in surrogacy procedure. Hence, in India a comprehensive legislation is very much the need of the hour to address the complex legal issues related to surrogacy."

6.The question of becoming parents through surrogacy came to be considered by the Supreme Court in a judgment in Baby Manji Yamada v. Union of India reported in (2008) 13 SCC 518. Though in that case, there was a dispute between biological parents and host, the matter was directed to be taken to the Commission for Protection of Child Rights Act, 2005. But, however various forms of surrogacy was discussed in the said judgment from paragraph 8 to 16 and it was stated as follows : "8.Surrogacy is a well-known method of reproduction whereby a woman agrees to become pregnant for the purpose of gestating and giving birth to a child she will not raise but hand over to a contracted party. She may be the child's genetic mother (the more traditional form for surrogacy) or she may be, as a gestational carrier, carry the pregnancy to delivery after having been implanted with an embryo. In some cases surrogacy is the only available option for parents who wish to have a child that is biologically related to them.

9.The word surrogate , from Latin subrogare , means appointed to act in the place of . The intended parent(s) is the individual or couple who intends to rear the child after its birth.

10.In traditional surrogacy (also known as the Straight method) the surrogate is pregnant with her own biological child, but this child was conceived with the intention of relinquishing the child to be raised by others; by the biological father and possibly his spouse or partner, either male or female. The child may be conceived via home artificial insemination using fresh or frozen sperm or impregnated via IUI (intrauterine insemination), or ICI (intracervical insemination) which is performed at a fertility clinic.

11.In gestational surrogacy (also known as the Host method) the surrogate becomes pregnant via embryo transfer with a child of which she is not the biological mother. She may have made an arrangement to relinquish it to the biological mother or father to raise, or to a parent who is themselves unrelated to the child (e.g. because the child was conceived using egg donation, germ donation or is the result of a donated embryo). The surrogate mother may be called the gestational carrier.

12.Altruistic surrogacy is a situation where the surrogate receives no financial reward for her pregnancy or the relinquishment of the child (although usually all expenses related to the pregnancy and birth are paid by the intended parents such as medical expenses, maternity clothing, and other related expenses).

13.Commercial surrogacy is a form of surrogacy in which a gestational carrier is paid to carry a child to maturity in her womb and is usually resorted to by well-off infertile couples who can afford the cost involved or people who save and borrow in order to complete their dream of being parents. This medical procedure is legal in several countries including in India where due to excellent medical infrastructure, high international demand and ready availability of poor surrogates it is reaching industry proportions. Commercial surrogacy is sometimes referred to by the emotionally charged and potentially offensive terms wombs for rent , outsourced pregnancies or baby farms .

14.Intended parents may arrange a surrogate pregnancy because a woman who intends to parent is infertile in such a way that she cannot carry a pregnancy to term. Examples include a woman who has had a hysterectomy, has a uterine malformation, has had recurrent pregnancy loss or has a health condition that makes it dangerous for her to be pregnant. A female intending parent may also be fertile and healthy, but unwilling to undergo pregnancy.

15.Alternatively, the intended parent may be a single male or a male homosexual couple.

16.Surrogates may be relatives, friends, or previous strangers. Many surrogate arrangements are made through agencies that help match up intended parents with women who want to be surrogates for a fee. The agencies often help manage the complex medical and legal aspects involved. Surrogacy arrangements can also be made independently. In compensated surrogacies the amount a surrogate receives varies widely from almost nothing above expenses to over \$30,000. Careful screening is needed to assure their health as the gestational carrier incurs potential obstetrical risks."

7.Mr.Srinath Sridevan, learned counsel for the petitioner also referred to a judgment of the Supreme Court of California in a case relating to Anna Johnson Vs. Mark Calvert et al., reported in 5 Cal 4th 84, wherein the court affirmed the judgment of the lower court that genetic parents were the natural parents of child gestated through surrogate. He also drew attention of this court to the Universal Declaration of Human Rights evolved by the United Nations and adopted by the General Assembly on 10.12.1948. He placed reliance upon Article 25(2) which reads as follows: "(2)Motherhood and childhood are entitled to special care and assistance. All children whether born in or out of wedlock, shall enjoy the same social protection."

8.He also referred to the Beijing Declaration and Platform for Action Fourth World Conference on Women, dated 15.09.1995, wherein the right of all women to control all aspects of their health, in particular their own fertility is basic to their empowerment was reaffirmed. Articles 17 and 33 reads as follows : "17.The explicit recognition and reaffirmation of the right of all women to control all aspects of their health, in particular their own fertility, is basic to their empowerment;

33.Ensure respect for international law, including humanitarian law, in order to protect women and girls in particular;"

9.He further referred to the Convention on the Rights of the Child by United Nations General Assembly by a resolution on 20.11.1989, wherein Article 6 reads as follows :

"Article 6.

1.States Parties recognize that every child has the inherent right to life. 2.States Parties shall ensure to the maximum extent possible the survival and development of the child."

10.In the light of this, he submitted that the petitioner is undoubtedly the mother of a minor girl child and she is entitled to develop a bondage with the child obtained through surrogate agreement and there is no moral issue involved in this matter. In the interest of the child, the petitioner is entitled to have the leave granted in her favour and in future also she is entitled to have the name included as her daughter in the FMI card as she is the legitimate daughter of the petitioner. He further contended that even if the rule do not contemplate the surrogate arrangement, at the time of enacting of Maternity Benefit Act, 1961, such a practice was not there. What was not recognised by the law, at some point of time need not be the same in the light of the changed situation.

11.He referred to a judgment of the Supreme Court in Laxmi Video Theatres v. State of Haryana reported in (1993) 3 SCC 715, wherein the Supreme court read within the term Cinematograph showing of a film under the Video cassette recorder. Though at the time of enacting of Cinematograph Act in the year 1952 such a method was never available, but still took note of the subsequent scientific development in the field. He referred to the following passage found in paragraphs 7 and 8, which reads as follows : "7.We are in agreement with this view. The definition o the expression 'cinematograph' contained in Section 2(c) of the Cinematograph Act, 1952 and Section 2(a) of the Act is an inclusive definition which includes any apparatus for representation of moving pictures or series of pictures. The said definition cannot be confined in its application to an apparatus for representation of moving pictures or series of pictures which was known on the date of the enactment of the said provision. It must be given a meaning which takes into account the subsequent scientific developments in the field in accordance with principle of statutory construction laid

down in The Senior Electric Inspector v. Laxmi Naryana Chopra and Ors. MANU/SC/0221/1961 : [1962] 3 SCR 146. In that case it has been held-In a modern progressive society it would be unreasonable to confine the intention of a Legislature to the meaning attributable to the word used at the time the law was made, for a modern Legislature making laws to govern a society which is fast moving must be presumed to be aware of an enlarged meaning the same concept might attract with the march of time and with the revolutionary changes brought about in social, economic, political and scientific and other fields of human activity. Indeed, unless a contrary intention appears, an interpretation should be given to the words used to take in new facts and situations, if the words are capable of comprehending them. (pp.156-157)

8.The VCR/VCP were developed in 1970s and achieve the same purpose as the traditional media for exhibition of moving pictures. There is nothing in the Act which excludes the applicability of the Act to VCR/VCP."

12.He further referred to a judgment of an another judgment in The Senior Electric Inspector and others Vs. Laxmi Narayan Chopra reported in AIR 1962 SC 159. In that case, the Supreme Court held that the term telegraph line found in the Indian Electricity Act, 1910 will take within itself the wire used for the purpose of an apparatus of the post and telegraph wireless section though legislature in the year 1885 could not have dreamt of a future discovery of wireless telegraphy. Therefore, he wanted the Maternity Benefit Act to be interpreted so as to grant maternity leave even for parents who gets child through surrogacy agreement.

13.Alternatively, he contended that if law can provide child care leave in case of adoptive parents as in the case of Rule 3-A of the Madras Port Trust (Leave) Regulations, 1987, then they should also apply to parents like the petitioner who obtained child through surrogate agreement since the object of such leave is to take care of the child and developing good bond between the child and the parents.

14.However, the learned counsel for the Port Trust contended that in the absence of any specific legal provision, the question of this court granting leave will not arise.

15.In the light of these rival contentions, it has to be seen whether the petitioner is entitled for a leave similar to that of the leave provided under Rule 3-A and whether her child's name is to be included in the FMI Card for availing future benefits?

16.This court do not find anything immoral and unethical about the petitioner having obtained a child through surrogate arrangement. For all practical purpose, the petitioner is the mother of the girl child G.K.Sharanya and her husband is the father of the said child. When once it is admitted that the said minor child is the daughter of the petitioner and at the time of the application, she was only one day old, she is entitled for leave akin to persons who are granted leave in terms of Rule 3-A of the Leave Regulations. The purpose of the said rule is for proper bonding between the child and parents. Even in the case of adoption, the adoptive mother does not give birth to the child, but yet the necessity of bonding of the mother with the adoptive child has been recognised by the Central Government. Therefore, the petitioner is entitled for leave in terms of Rule 3-A. Any other interpretation will do violence to various international obligations referred to by the learned counsel for the petitioner. Further, it is unnecessary to rely upon the provisions of the Maternity Benefit Act for the purpose of grant of leave, since that act deals with actual child birth and it is mother centric. The Act do not deal with leave for taking care of the child beyond 6 weeks, i.e., the post natal period. The right for child care leave has to be found elsewhere. However, this court is inclined to interpret Rule 3-A of the Madras Port Trust (Leave) Regulations, 1987 also to include a person who obtain child through surrogate arrangement.

17.It will not be unnecessary if a reference is made to the All India Services (Leave) Rules, 1955, wherein the Central Government had recognised even paternity leave to be granted. Rule 18(D) was introduced with effect from 21.09.2011. The child care leave is given to a female member of the service. Rule 18(D) reads as follows : "18(D)Child Care Leave to a female member of the Service--(1)A female member of the Service

having minor children below the age of eighteen years may be granted child care leave by the competent authority for a maximum of 730 days during her entire service for taking care of upto two children. (2)During the period of child care leave, such member shall be paid leave salary equal to the pay drawn immediately before proceeding on leave.

(3)Child care leave may be combined with leave of the kind due and admissible.

(4)Notwithstanding the requirement of production of medical certificates contained in sub-rule (1) of rule 13 or rule 14, leave of the kind due and admissible (including commuted leave not exceeding 60 days and leave not due) up to a maximum of one year, if applied for, be granted in continuation of child care leave granted under sub-rule(1). (5)Child care leave may be availed in more than one spell.

(6)Child care leave shall not be debited against the leave account of the member of the Service."

18.In the result, the writ petition will stand allowed. The respondent Chennai Port Trust is directed to grant leave to the petitioner in terms of Rule 3-A recognising the child obtained surrogate procedure. Further a direction is issued to the respondent to include the name of the child G.K.Sharanya, as a member of the petitioner's family and also include her name in the FMI card forthwith. With reference to the expenditures incurred, since such a procedure has not been contemplated for the purpose of reimbursement, this court is not inclined to give any direction with reference to reimbursement of the amounts involved in such procedure. No costs. Consequently, connected miscellaneous petitions stand closed. 04.03.2013

Index : Yes

Internet : Yes

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To

The Chairman,

Chennai Port Trust,

1,Rajaji Salai,

Chennai-600 001.

K.CHANDRU, J.

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W.P.No.8188 of 2012

04.03.2013