

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 22.12.2017

CORAM :

THE HONOURABLE MR.JUSTICE N.KIRUBAKARAN

W.P.No.12660 of 2017

and

W.M.P.Nos.22592 to 22594 & 13485 and 13486 of 2017

Dr.U.Ishwarya

...

Petitioner

Vs.

1.The Director of Medical Education,
Directorate of Medical Education,
162, Periyar EVR Salai,
Kilpauk, Chennai 600 100

2.The Selection Committee,
represented by its
Secretary/Additional Director of Medical Education,
Directorate of Medical Education,
162, Periyar EVR Salai,
Kilpauk, Chennai 600 100

3.The Government Kilpauk Medical College,
represented by its Dean, सत्यमेव जयते
Poonamallee High Road,
Kilpauk, Chennai.

4.The Director of Public Health & Preventive Medicine,
Chennai 600 006.

5.The Deputy Director of Health Services,
Sivakasi,
Virudhunagar District.

... Respondents

Prayer: Writ petition is filed under Article 226 of the Constitution of India to issue a writ of Certiorarified Mandamus to call for the records relating to the order of the 4th respondent dated 09.03.2015 in R.No.6064/E5/A3/2015-79 so far as seeking to exclude the maternity leave period of calculating two year service period to permit the candidate to undergo post graduate course and quash the same in so far the petitioner is concerned and consequently permit the petitioner to joint D.G.O. course in the 3rd respondent college in the academic year 2017-2018 as per the allotment order issued by the 2nd respondent dated 10.05.2017 and allow her to attended the class.

For Petitioner : Mr.N.Dilipkumar

For Respondents : Mr.T.M.Pappiah (for R1 to R5)
Special Government Pleader

ORDER

“Delivery gives birth not only to a child, but also a mother as well.”

It is not confined to human kind but applicable to all the creatures in the universe. Motherhood is common for all creatures, as it is evident from the love and affection and care shown by the mother of all creatures to their new born. Not only the new born, but the reborn mother also

requires nurturing care, affection and proper rest, so that she could look after the child very well by feeding the child. There is no substitute for mother's milk in the world and even the so-called "divine nectar" could not be equal to mother's milk. Unless good rest is available to the mother without any worry or pressure and other compulsions, it would not be possible for her to be a "real mother". Anybody could take care of the mother, whereas it is only the mother, who could take proper care of the child. Therefore, it is the duty of the Government or employer, who ever it may be, to grant sufficient and required maternity holidays for women Government employees or workers during pre-delivery period and post delivery period, for the purpose of recuperation.

2. That is the reason why the State Government made it mandatory to grant originally 3 months (90 days) leave as maternity leave and thereafter, as six months (180 days) and further enhanced from six months (180 days) to nine months (270 days) with full pay at the option of women Government Servants. The Central Government provided 90 days originally and it has been enhanced to six months (180 days) by virtue of amendment in CCS Leave Rules 1972 with effect from

01/09/2008. After seven years, now the Ministry of Labour and Employment, Government of India, brought maternity benefit Amendment Act 2017, which has come into force from 01.07.2014 giving paid maternity leave to the women employed in factories, mines, shops or commercial establishments employing 10 or more employees enhancing existing 12 weeks (84 days) to 26 weeks (182 days), which could be availed by women, 8 weeks before the expected delivery date and the remaining 18 weeks post child birth, for the first two child birth.

3. When aforesaid is the position of law brought by the State Government with effect from 16.05.2011 (180 days), then from 07.11.2016 (270 days) and by the Central Government (180 days) with effect from 01.09.2008, it is not understandable as to how the respondents refuse to treat the maternity leave availed by the petitioner herein as period of service which would enable her to complete the two year minimum period service to get post graduate medical admission. This case would throw light as to how the Government officials are acting contrary to the Rules, prejudicing the rights of women Government servants, like the petitioner. It is nothing but an incidence of woman

harassment. Refusing to grant the legal benefit itself is an incidence of harassment of woman or discrimination of woman. The officials who are supposed to take decision need to be sensitized regarding the entitlement of maternity leave of women Government servants.

4.The petitioner who is a Doctor possessing M.B.B.S., degree has come before this Court, challenging a clause in her appointment order dated 09.03.2015, which states that the individual should serve in Government for a period of not less than three years, excluding any period spent on training, leave or higher education and the individual should also abide by the condition that after joining duty, he/she will not be permitted to undergo Post Graduate degree course within the period of two years excluding the period of leave.

5.According to the petitioner, she joined the service at Primary Health Care Centre, Sithurajapuram, Sivakasi Helath Unit District by virtue of order dated 09.03.2015. As she was selected by the Medical Services Recruitment Board as Assistant Surgeon (General), she joined duty on 20.03.2015. While so, the petitioner delivered a baby girl on

04.07.2015 and availed maternity leave from 04.07.2015 to 03.01.2016. The petitioner rejoined duty on 04.01.2016 and has been working till date and has completed two years of Government service as on 19.03.2017.

6. For getting admission to Post Graduate course, the petitioner wrote NEET PG 2017 Examination and obtained 914.3927 marks in the said examination. As per MCI norms, 20% of incentive marks has to be added for in-service candidates and thus, 182.8785 was added with the petitioner's mark, making the petitioner's total mark as 1097.271240. The petitioner was placed at Rank No.776 and she attended the first phase of counselling on 15.05.2017 conducted by the 2nd respondent and she opted for D.G.O course in Government Kilpauk Medical College, Chennai and allotment order was also issued to the petitioner to join Kilpauk Medical College on 10.05.2017. However, the petitioner was not relieved by the 5th respondent stating that the petitioner has not completed two years of continuous service, as she has availed 180 days of maternity leave from 04.07.2015 to 03.01.2016. Therefore, the petitioner has challenged the very clause in the appointment order, which speaks about

serving for a minimum period of two years for joining higher studies.

7. On the other hand, it is contended by the respondents that the petitioner was selected by Medical Services Recruitment Board and she joined duty on 20.03.2015. She availed maternity leave from 04.07.2015 to 03.01.2016 and completed two years of Government service on 19.03.2017. Though the petitioner has been selected for D.G.O course in Kilpauk Medical College and was given allotment order, the 5th respondent refused to relieve the petitioner on the ground that the petitioner had not completed two years of service, which is a service condition as per the appointment order. Further, as per 101 (a) of fundamental rules, approved probationers alone shall be eligible for maternity leave as that of permanent Government servant. Since the petitioner's service has been mentioned as temporary, maternity leave availed by the petitioner could not be taken into account for the purpose of arriving at total period of service (2 years of continuous service) rendered by her. Therefore, the petitioner is short of two years of continuous service at the time of applying for admission to the Post Graduate course during 2017-18 session.

8.Sub-clause 10(a)(i) under clause IV under the caption service category of the prospectus for admission to Post Graduate Degree/Diploma Course 2017-18 session is extracted as follows:

"The following categories of Medical Officers will be treated as Service Candidates for the purpose of allotment of seats (i) Medical Officers selected by the TNPSC/MRB through Competitive written examination/special qualifying examination and appointed in Tamil Nadu Medical Services with minimum of two years of continuous service as on 31.03.2017."

Even based on the aforesaid provision, the petitioner is ineligible for selection to D.G.O course and the same has to be challenged, the respondents would contend.

9.Heard Mr.N.Dilipkumar, learned counsel for the petitioner and Mr.T.M.Pappiah, learned Special Government Pleader, appearing for the respondents.

10. The only point which has to be considered is whether the petitioner, as a temporary probationer, is entitled to maternity leave and if so, whether the period of maternity leave availed by the petitioner would also come under period of service. There is no dispute with regard to the petitioner's date of joining i.e., 20.03.2015 and completion of service on 19.03.2017. In between, the petitioner had availed maternity leave for 180 days from 04.07.2015 to 03.01.2016. If the period of maternity leave is excluded, the petitioner would be short of two years of service. If the period of maternity leave is included, the petitioner is eligible to undergo Post graduate course.

11. A contention has been put forth by the learned Special Government Pleader that as per Rule 101(a) of fundamental rules, the petitioner should have completed two years of service excluding maternity leave and based on Rule 101 (a) of fundamental rules, approved probationers alone are entitled to maternity leave. The rule is extracted as follows:

"101(a) Maternity Leave and Explanation 1 of the Government of Tamil Nadu, Approved probationers in superior

service governed by the Tamil Nadu Leave rules, 1933 shall be eligible for maternity leave as for permanent Government Servants"

However, the nature does not discriminate whether the woman is an approved probationer or an unapproved probationer with regard to the child birth. Whether an approved probationer or an unapproved probationer, she has to carry the child and the said probationer is entitled to all the maternity benefits as that of a permanent Government servant. Any discrimination or different treatment by the Government by virtue of any rule denying the benefits on the ground that the candidate is not an approved probationer itself is unreasonable and violates dignity of a woman and her fundamental rights and human rights. The very purpose of having maternity leave is to avoid hard labour or work at the time of pregnancy as it would be detrimental to the servant/employee and also the health of foetus. Hence, the benefits given under Rule 101(a) of Tamil Nadu Fundamental Rules are equally applicable to the petitioner herein, an unapproved probationer and there cannot be any discrimination. The rule has to be read in such a manner that the maternity benefit including maternity leave available to the Government

employee is equally applicable to other unapproved probationers who are carrying or who are in the family way.

12. Rule 2(3) of Tamil Nadu State and Subordinate Service Rules, which is found in service manual defines “approved probationers” as follows:

“Approved Probationer” in a service, class or category means member of that service, class or category who has satisfactorily completed his probation and awaits appointment as a full member of such service, class or category”

It does not make any difference between the persons who were declared to have completed the probation successfully and who are on probation for availing any leave.

13. The Hon'ble Apex Court in *Rathinasamy v. State of Tamil Nadu* in *SLP.No.9628 of 2006*, dated 08.04.2009 read down Rule 5 of the Tamil Nadu Revenue Subordinate Service Rules to wipe out the discrimination caused to the promoted assistants who are also graduates by holding that it is for the Court to read down a particular rule or clause to save the rule and clause from unconstitutionality. In this case, if the

discrimination given by the learned Special Government Pleader is accepted, it will lead to discrimination between the women servants on the basis of their status.

14. In *Balliappa v. Government Branch Press*, reported in *AIR 1979 SC 429*, the Hon'ble Apex Court has held that there cannot be any discrimination between the temporary and permanent class of Government or quasi Government servant in respect of the right available to them under the relevant service rules. While setting aside the stigmatic termination order of the temporary employee, the Hon'ble Apex Court has held that even temporary employee is entitled to protection under Article 14, 16 and 311 of Constitution of India. They cannot be terminated without any opportunity of being heard and enquiry. The same view was reflected in the judgment reported in *2010 (1) SCC 126 [Satwati Deswal v. State of Haryana and Others]*. The constitution bench of the Hon'ble Apex Court in *Central Inland Water Transport case* reported in *AIR 1986 SC 1571* had chosen to strike down the service rule which provides for termination of an employee by giving three months notice as unconstitutional, being opposed to public policy.

Any service rule or clause should satisfy, not only the public policy but also the fundamental right guaranteed under Article 14, 15 and 21 of the Constitution of India. The same view was followed in *Delhi Transport Corporation case* reported in *AIR 1991 SC 101*.

15. Applying the same principle, if we look at the present rule, the argument advanced and the Rule or Government Order relied upon by the learned Special Government Pleader cannot be allowed to stand to the scrutiny of law, in view of the golden principles laid down by the Hon'ble Apex Court in the cases stated supra.

16. Further, the beneficial concession granted in favour of the employee cannot be given a restricted meaning and it has to be interpreted liberally to achieve the object of the legislation. If such legislation is given a strict interpretation on the basis of the words found therein, then the very purpose of the legislation will be defeated. In this case, the writ petitioner is not a temporary employee but an approved probationer who is on probation for getting permanent status. Placing of an employee on probation itself guarantees the right for permanency, unless or otherwise it is proved that his/her service is unsatisfactory

during the probationary period. Only on the ground of dis-satisfactory service, the probationer can loose his or her job and not on no other discriminatory rules can keep the class approved probationer apart.

17.A mere perusal of Rule 2(3) of Tamil Nadu State and Subordinate Service Rules, which define approved probationer, would prove the same. The executive order that the Government now attempts to do away is not only the statutory right but also the fundamental rights guaranteed under Article 14, 16 and 21 of the Constitution of India to the petitioner. Hence, this Court holds that even the unapproved probationers are entitled to avail maternity leave and consequential benefits as that of the permanent employees. In availing the benefits or concession given by the Government, there cannot be any discrimination between the temporary or permanent employees or approved probationers or successful probationers.

18.Hence, this Court read down the said Government Order to save it from vice of unconstitutionality on the ground of hostile discrimination hit by Article 14, 16 and 21 of the Constitution of India and consequently hold that the benefits made available to the permanent employees are

all available to the approved probationers also.

19. Further, the consolidated guidelines issued with regard to maternity leave with full pay to married women Government servants, in accordance with Rule 101(a) of the Fundamental Rule are as follows:

I-Maternity

(i) *Permanent married women Government servants i.e approved probationer in a service, with less than two surviving children, excluding adopted children, may be granted 180 days (6 months) maternity leave by the competent authority, which may be availed between pre-confinement rest to post-confinement recuperation at the option of the Government servant.*

(ii) *Non-permanent married women Government servants ie. Probationer, in a service with less than two surviving children, excluding adopted children, whether appointed under regular capacity through Tamil Nadu Public Service Commission/Uniform Services Recruitment Board/Teachers Recruitment Board/Medical Services*

Recruitment Boards, Employment Exchange, etc., or under emergency provisions of the relevant service rules should take, for maternity purpose, the earned leave at her credit. Maternity leave may be granted for a period of not exceeding 180 days or for the period that falls short of 180 days, after availing the earned leave as the case may be.

(iii) Non-permanent married women Government servants, employed under the emergency provisions ie temporarily, should have completed one year of continuous service, including leave periods, if any, to become eligible for grant of maternity leave of 180 days as above”

The above guidelines also support the view of this Court that a temporary probationer is also entitled to 180 days of maternity leave. By Rule 43 of Central Civil Services (Leave) Rules, 1972, the Central Government grants maternity leave to female government servants including “apprentice”. When the Central Government extends the benefit of maternity leave to women apprentice, the unapproved probationers of State Government

are also entitled to the same benefit and the State Government cannot deny the benefits to unapproved probationers. Therefore, the petitioner is entitled to 180 days of maternity leave from 04.07.2015 to 03.01.2016 and the said period cannot be excluded from the service period and it has to be held that she completed two years of continuous service.

20. Clause 10(b) of the prospectus for admission to Post Graduate Degree/Diploma courses in Tamil Nadu Government Medical Colleges 2017-18 speaks about two years of continuous service as on 31.03.2017 to apply for Post Graduate Degree/Diploma course, which is extracted as follows:

“Those service candidates selected by TNPSC/MRB (through competitive written Examination/Special qualifying examination) who have put in LESS THAN TWO Years of continuous service as on 31.03.2017 either in Tamil Nadu Medical Service or in Local Bodies are not eligible to apply for PG Degree/Diploma Courses. Fractional values of a year will not be counted.”

For the very same reasons given above with regard to fundamental rules

101(a), the petitioner is also qualified even as per clause 10(b) of the prospectus for admission to Post Graduate Degree, as the petitioner completed two years of continuous service as on 31.03.2017.

21. The last but one clause of appointment order dated 09.03.2015, insists upon two years period of service excluding the period of leave to be completed to be eligible to apply for PG course, which reads as follows:

“The individual should serve in Government for a period of not less than three years excluding any period spent on training, leave or higher education. Also the individual should abide by the condition that after joining duty he/she will not be permitted to undergo Post Graduate course within the period of two years excluding the period of leave.”

The above clause is also complied with by the Petitioner as the petitioner completed two years of continuous service as this Court already held supra, the petitioner is entitled to six months maternity leave, which should be treated as service period.

22. No act or clause or rule/condition would take away the

fundamental and human right of a lady to conceive and give birth to a child and the consequential benefits like maternity leave, if she is an employed woman. If any such condition has been prescribed by the respondents, it has to be declared null and void.

23. The Hon'ble Supreme Court in *Municipal Corporation of Delhi Vs. Female workers (Muster Roll)*, reported in (2000) 3 SCC 224, declared that women who are employed as casual labour under Municipal Corporation at Delhi cannot be denied the benefits of maternity, merely because they are casual employees of the Corporation. While dealing with that case, the Hon'ble Supreme Court relied upon the Universal Declaration of Human Rights adopted by United Nations on 10.12.1948. Article 12(2)(a) of "Convention on the Elimination of Forms on Discrimination against women" prohibits discrimination against women on the ground of marriage or maternity to ensure their effective right work, the State shall take appropriate measures. In the *State of U.P. and Others Vs. Jaya Quddusi (Smt)*, reported in 1994 Supp 2 SCC 35, the question that fell for consideration is whether a probationary officer is entitled to be regularized on completion of three years of service

including her maternity leave from 15.02.1983 to 15.06.1983. The Hon'ble Supreme Court held that the officer is entitled to be regularized, even though she was on maternity.

24.As already stated, it is not only the fundamental right of the lady to give birth to a child and also necessary for existence of mankind and without a lady, a child could not be born in the world. Even nature requires a child birth through a lady. When that is the position, the petitioner cannot be denied the maternity leave and the period of maternity leave, which the petitioner availed should not be kept apart or excluded from two years of service. Even in their two years of service, if maternity leave is sanctioned, the maternity leave period should be deemed to be the service period. Any rule or regulation which goes against the same is null and void. The rules are contrary to the decision of the Apex Court in **2000 (3) SCC 224** and **1994 Supp (2) SCC 35**.

25.If the petitioner's maternity leave is taken into consideration as service period, then the petitioner would be completing her two years period on 19.03.2017, as the petitioner joined duty on 20.03.2017.

Hence, the petitioner is entitled to apply for P.G. course, which she has been already permitted to do so and also entitled to join, after getting relieving order from the 5th respondent. As already stated, the petitioner is deemed to have completed two years of service on 19.03.2017 and the maternity leave period cannot be excluded from the service period. The petitioner, who is an Assistant Surgeon (General) under category II of clause I of Tamil Nadu Medical Services is also entitled to the benefit of maternity leave and the maternity leave period has to be taken as service period. Therefore, she had completed her service of two years on 19.03.2017.

26. It is evident that the petitioner though entitled to get admission and did get admission, was subsequently canceled alleging that she did not complete two years of continuous service to enable her to apply for PG medical course on the ground that the petitioner took maternity leave from 04.07.2015 to 03.01.2016, within two years of service, which according to the respondent has to be excluded from service. Because of the wrong interpretation given by the respondents, the petitioner's admission into PG medical course was canceled, even before she could

join the Course. There was no fault on the part of the petitioner in cancellation of the PG admission allotment order by the respondents for the academic year 2017-18, and it is the wrong act of the respondents based on wrong interpretation regarding maternity leave in canceling the allotment order. Therefore, cancellation of petitioner's PG admission is invalid. This Court holds that the petitioner is entitled to maternity leave which is part of her service and she has completed two years of continuous service to enable her to get admission in PG course. The petitioner should not suffer for no fault of her. If the petitioner was relieved in time and the allotment order was not canceled, the petitioner would have joined the course in Government Kilpauk Medical College on 15.05.2017 itself. However, as per the order of the Hon'ble Apex Court, the last date for joining the PG course ended on 31.05.2017. The cancellation of allotment order and consequent denial of admission into PG diploma course would definitely violate the right of the petitioner to continue her education, even though she is qualified and entitled to.

27. When this Court for the reasons stated above holds that the

cancellation order is invalid, the petitioner cannot be denied the seat which she is otherwise entitled to, merely on the ground that the time limit fixed for joining the PG medical course was already over. The facts of the case would exhibit that there was nothing wrong on the part of the petitioner and it was only the respondents who took wrong decision and because of the said wrong, the petitioner should not suffer. But for the time limit fixed by the Hon'ble Supreme Court, the petitioner is entitled to join the PG diploma course in this academic year itself viz., 2017-18.

28. The right to get admission in PG diploma in Gynecology remains with the petitioner and the right should also be available for the next academic year 2018-19. The right once accrued cannot be very lightly interfered with based on the wrong interpretation or wrong order passed by the respondents.

29. The Hon'ble Apex Court in the case of *Asha v. PT.B.D.Sharma University of Health Sciences and Others* reported in (2012) 7 SCC 389 held that the appellant therein who was denied admission in MBBS course during the academic year 2011-12, because of the illegal and irregular

admission process adopted by the authorities was subsequently directed to be given MBBS seat in the next academic year 2012-13. Paragraphs 37 and 41 of the said decision is usefully extracted here under:

“37. From the above data, it is clear that the appellant has miserably failed to pursue her BDS course in accordance with Rules and, thus, she has not fulfilled even the pre-requisites for MBBS course, assuming that the BDS and MBBS courses are similar for the first six months. In these circumstances and finding that the appellant is at fault to this limited extent, we are of the considered view that the only relief the appellant can be granted in the present appeal is a direction to the respondents to give the appellant admission to the MBBS course not in the academic year 2011-12 but in the current academic year i.e. 2012-2013, that too, subject to the condition that she will pursue her MBBS course right from the beginning without any advantage of her course in the BDS. If any examinations have been held in the meanwhile, it shall be deemed that she had not appeared in those examinations and be treated as such for all intent and purpose. While giving her admission to the MBBS course, preferably and if it is permissible, admission of none of the other candidates to the MBBS course may be disturbed. If for whatever reasons, it is not possible to do so, in that event, the candidate last in the merit who has been granted admission to the MBBS course shall be transferred to the BDS course and appellant shall be admitted to the MBBS course. We also direct that such candidate would not be required to commence her/his BDS

course from the beginning provided the candidate has satisfied the attendance requirements of the Dental Council of India.

.....

....

41. For the reasons afore-recorded and with the directions as mentioned above, we direct the respondents to grant admission to the appellant to the MBBS course in the current academic year subject to the condition that she will pursue her MBBS course right from its beginning and to the conditions afore-noticed. However, in the facts and circumstances of the case, we award no costs.”

In the said decision, the Hon'ble Apex Court has further held that though the last date for admission is 15th September of the relevant academic year, in terms of the decision of the Hon'ble Apex Court in ***Priya Gupta v. State of Chandigarh*** reported in **(2012) 7 SCC 433**, in very rare and exceptional cases of unequivocal discrimination or arbitrariness or pressing emergency, admission may be permissible even after the deadline, but such power may preferably be exercised by the Courts, in order of meet the ends of justice. Paragraph 38.2 of the decision is usefully extracted here under:

“38.2.30th September is undoubtedly the last date by

which the admitted students should report to their respective colleges without fail. In the normal course, the admissions must close by holding of second counseling by 15th September of the relevant academic year [in terms of the decision of this Court in Priya Gupta (supra)]. Thereafter, only in very rare and exceptional cases of unequivocal discrimination or arbitrariness or pressing emergency, admission may be permissible but such power may preferably be exercised by the courts. Further, it will be in the rarest of rare cases and where the ends of justice would be subverted or the process of law would stand frustrated that the courts would exercise their extra-ordinary jurisdiction of admitting candidates to the courses after the deadline of 30th September of the current academic year. This, however, can only be done if the conditions stated by this Court in the case of Priya Gupta (supra) and this judgment are found to be unexceptionally satisfied and the reasons therefor are recorded by the court of competent jurisdiction.”

30. Similarly, in the case of **S.Krishna Sradha v. State of Andhra Pradesh and Others** reported in (2017) 5 SCC 516, the dictum laid down in the case of **Asha v. PT.B.D.Sharma University of Health Sciences and Others** reported in (2012) 7 SCC 389 has been followed and differed with the dictum laid down in another judgment of the Hon'ble Apex Court in the case of **Chandigarh Administration v. Jasmine Kaur** reported in

(2014) 10 SCC 521. In *Krishna Sradha* case, it has been held that if the grievance of the party pertains to fundamental rights, it is the duty of the Court to address and redress it and grant of compensation as the only measure would defeat the basic purpose of fundamental right. The said decision has been referred to the larger bench for reconsideration of *Chandigarh Administration* case wherein it was held that there cannot be any telescoping of unfilled seats of one year with the permitted seats of the subsequent year i.e., carry forward of seats cannot be permitted, even for a meritorious students deserving admission and it is to the student who failed to get admission in a particular academic year to re-apply for admission in the next academic year. While dealing with the matter, the Hon'ble Apex Court in *Krishna Sradha* case categorically held that giving of compensation alone to meritorious student who was denied the admission would defeat ends of justice. Paragraphs 27, 28 and 32 of the decision is usefully extracted here under:

“27.As is seen, stress has always been laid on the merit in the matters of all admissions as meritorious students should not face any impediment to get admission for some fault on the part of the institution or the persons involved with it. He/She has no other remedy but to approach the Court for getting redressal of his/her grievances. It is a

grievance that pertains to fundamental right. It has to be remembered that a right is conferred on a person by rule of law and if he seeks remedy through the process meant for establishing rule of law and it is denied to him, it would never subserve the cause of real justice. When a lis of this nature comes in a constitutional court, it becomes the duty of the court to address whether the authority had acted within the powers conferred on it or deviated from the same as a consequence of which injustice has been caused to the grieved person. The redressal of a fundamental right, if one deserves to have, cannot be weighed in terms of grant of compensation only. Grant of compensation may be an additional relief. Confining it to grant of compensation as the only measure would defeat the basic purpose of the fundamental rights which the Constitution has conferred so that the said rights are sustained. It would be inapposite to recognize the right, record a finding that there is a violation of the right and deny the requisite relief.

28.A young student should not feel that his entire industry to get himself qualified in the examination becomes meaningless because of some fault or dramatic design of certain authorities and they can get away by giving some amount as compensation. It may not only be agonizing but may amount to grant of premium either to laxity or evil design or incurable greed of the authorities. We are disposed to think, in such a situation, justice may be farther away and the knocking at the doors of a constitutional court, a

sisyphean endeavour, an exercise in futility. It is well known that the law intends not anything impossible; “lex non intendit aliquid impossibile”. But when it is in the realm of possibility; and denial of relief hurts the “majesty of justice”, it should not be denied. On the contrary, every effort has to be made to grant the relief. Needless to say, to get the relief, conditions precedent are to be satisfied; and that is what has precisely been stated in Asha (supra) and Harshali (supra).

.....

.....

32. In view of the aforesaid, we think the decision in Chandigarh administration (supra) requires re-consideration by a larger Bench. Papers be placed before Hon'ble the Chief Justice of India for constitution of the appropriate larger Bench.”

31. The aforesaid judgments would only support the case of the petitioner. The petitioner though was selected for admission into PG diploma course in Gynaecology and Obstetrics, her selection was erroneously canceled and thereafter, she has promptly approached this Court without any delay. Therefore, the merit of the petitioner has to be respected. The petitioner is already frustrated as she has been made to run from pillar to post for no fault of her and the right of admission accrued to the petitioner should not be vitiated merely because the time

limit for admission stipulated by the Hon'ble Apex Court is already over. In the middle of the academic year, if the petitioner is to be admitted in the course, it would not only be against the interest of the petitioner but also the society, as the clinical training and study which the petitioner would have got from 1st October to till date could not be gained by her. Hence, the petitioner could not be admitted during the academic year 2017-18. Interest of justice requires only admission of the petitioner in PG Diploma course in the next academic year 2018-19.

32. In view of the above circumstances, this Court has to necessarily direct the authorities to give admission to the petitioner in PG diploma in Gynaecology and Obstetrics in the next academic year 2018-19, without reapplying for admission and process like NEET examination 2018 etc., The merit of the petitioner was already proved by her by scoring 914.3927 marks in NEET PG 2017 along with incentive mark of 182.8785 totaling to 1097.271240 marks. But for the cancellation order, the petitioner would have got admission and she would have already undergone first year course by this time. It has to be remembered that the petitioner had lost her one year precious time.

33. Therefore, by moulding the prayer sought for by the petitioner, this Court,

1. holds that the admission granted by the respondents to the petitioner in Diploma in Gynaecology and Obstetrics for the academic year 2017-18 would be valid for the next academic year 2018-19.
2. directs the respondents to admit the petitioner in Diploma in Gynaecology and Obstetrics for the next academic year 2018-19, without the necessity of applying and writing the NEET examination 2018
3. directs the 5th respondent to relieve the petitioner immediately, once she is allotted a seat in Diploma in Gynaecology and Obstetrics during the counseling for the year 2018-19, which she is entitled to, by virtue of this order.

WEB COPY

34. With the above directions, the relief sought for by the petitioner is granted. However, the main writ petition is kept pending for considering the general issue regarding the entitlement of a lady to

conceive or procreate, avail maternity leave, which shall be considered as service period irrespective of her status/position in the service and the right of new born to mother's feeding exclusively for six months and upto two years along with substitutes.

35. The facts of the case would display the discrimination of a woman affecting her dignity and right to continue her PG medical course to achieve excellence and therefore, to avoid discrimination in future, especially, with regard to maternity benefits, general directions have to be issued in the interest of future mothers and particularly, working women. Hence, this Court suo motu impleads,

- (1) The Union of India, Represented by Ministry of Law, New Delhi;
- (2) The Union of India, Represented by its Secretary, Ministry of Women and Child Welfare, New Delhi;
- (3) Commission for Women Development, Represented by its Chairman, New Delhi;
- (4) The State of Tamil Nadu, Represented by its Secretary, Law Department, St. George Fort, Chennai;
- (5) The State of Tamil Nadu, Represented by its Secretary, Health and

Family Welfare Department, St. George Fort, Chennai;

as party respondents in this Writ Petition. Mr.Rabu Manohar, learned standing counsel, takes notice for the Central Government and Mr.T.M.Pappiah, learned Special Government Pleader, takes notice for the State Government.

36.It is disheartening to note that inspite of the womens' right to conceive a child, they are denied the benefits which they are entitled to under law by the Patriarchal society. Having a law is of no use, unless the benefit is extended to deserving persons by the law. The Maternity Benefits Act, 1961 has been enacted for the benefit of women employed in factories, mines, shops, commercial establishments, employing 50 or more employees. Rule 101(a) of Tamil Nadu Fundamental Rules confers rights to women Government servants to have the maternity benefits including distinct period of maternity leave. Originally, by virtue of G.O.(Ms).No.237, dated 29.06.1993, 90 days maternity leave was granted. Subsequently, by G.O.(Ms).No.51, dated 16.05.2011, the maternity leave was made as 180 days and enhanced to 270 days as per G.O.Ms.No.105, dated 07.11.2016. Similarly, the Central Government by

virtue of Rule 43 of Central Civil Services (Leave) Rules, 1972 grants maternity leave to the female Government servants including an apprentice, a period of 180 days from 01.09.2008. Even under Employees State Insurance Act, the women employees are entitled to maternity leave. One important fact is that the Central Government has been granting 180 days maternity leave with effect from 01.09.2008, whereas after lapse of almost 3 years only, Tamil Nadu Government increased the said leave from 90 days to 180 days with effect from 16.05.2011. It would only show that all the State Governments are not increasing maternity leave soon after the decision of the Central Government prejudicing the rights of State Government Women employees and there is no uniformity in this regard. Hence, steps have to be taken to have uniform policy.

37. The grant of maternity leave is to safeguard the interest of both the expectant mother and foetus. The benefits are in consonance with the Article 39 of the Constitution of India, which is extracted as follows:

*“39. Certain principles of policy to be followed by the State:
The State shall, in particular, direct its policy towards
securing*

- (a) that the citizens, men and women equally, have the right to an adequate means to livelihood;
- (b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;
- (c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;
- (d) that there is equal pay for equal work for both men and women;
- (e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;
- (f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment”

Similarly, Article 42, in particular deals with the maternity relief and the said Article is extracted as follows:

“42. Provision for just and humane conditions of work and maternity relief:- The State shall make provision for securing just and humane conditions of work and for maternity relief.”

The above articles speak about maternity benefits for a woman.

38. The international treaties, to prevent the discrimination of women like “Convention on Elimination of all Forms of Discrimination against Women” (CEDAW); “International convention on Economic, Social and Cultural Rights” (ICESCR) and “Convention on the Rights of the Child” recognize the rights of women including entitlement of maternity leave. The Union Government is a signatory to recognize all these conventions and it is bound to implement the said conventions, as per Article 253 viz., Legislation for giving effect to International agreements.

39. The maternity leave has many inclusive components like

- (a) To avoid hard work.
- (b) To have rest without any work pressure.
- (c) To deliver the baby.
- (d) To give mother feeding to the new born.
- (e) To give nurturing care and affection to the new born.

Therefore, the issue of “maternity leave” has to be dealt with keeping the above in mind.

40. That apart, Breast feeding is important for the babies to keep them healthy and also the feeding mothers. A recent study done by University of California, Los Angeles states that one third of beneficial bacteria in baby's intestinal tract comes directly from mother's milk. WHO recommends that women should breast feed infants till the age of two. However, "national data sources" are said to have reported that 44% babies - that is 12 million out of 26 million - begin breast feeding within one hour of their birth and most of the Children are given formula milk. National Family Health Survey (NFHS) - 4, released in 2016 though showed significant improvements in breast feeding practices, among both rural and urban Indian woman, compared globally, it is low. It is reported that the **Global Breast feeding collective**, led by UNICEF and World Health Organization released a 2017 report has termed breast feeding the "best investment in global health" generating \$35 in global return for every dollar invested. A "**Global Breast Feeding Score Board 2017**" released by the collective shows that India spends an abysmal \$0.15 (less than Rs.10/-) per child to ensure that meets the breast feeding guidelines. The report suggests that as of now, India is poised to lose an

estimated \$14 billion in its economy or 0.70% of its Gross National Income, due to high level of child mortality and growing number of deaths in women from cancers and type II diabetes, directly attributable to inadequate breast feeding. India is a signatory to the target set by World Health Assembly to increase rate of exclusive breast feeding in the first six months upto 50% by 2025. Exclusive breast feeding in India increased from 46.4% in 2006 to 54.9% in 2016. Still, a recent report by the United Nations states that about 99,499 children die every year due to diseases which could be easily prevented by mother's feeding. Greater awareness and measures to improve breast feeding practices have to be taken. "Breast milk works like a baby's first vaccine, protecting infants from potentially deadly diseases and giving them all the nourishment they need to survive and thrive" said Dr. Tedros Adhanom Ghebreyesus, Director General of WHO.

41. The Maternal Mortality Rate (MMR) statistics given by the Central Government would show that there is a decline of National Maternal Mortality rate from 215 death per 1 lakh live births in 2010 to 174 deaths per 1 lakh live births in 2015 and the Governments have to be

appreciated for their effective steps in this regard. National Health Mission found that apart from anemia, hyper tension in pregnant women, heart diseases, sepsis are top contributors for maternal deaths. Therefore, the doctors and officials associated with health department have to accordingly, sensitize and increase awareness among the pregnant women for checking, testing and proper follow up during pre-delivery and post-delivery period. Though MMR rate declined nationwide, Tamil Nadu recorded a 19% increase in Maternal Mortality Rate in five years.

42. The women's right to procreate, the maternity benefit including maternity leave and the incidental issues like mother's feeding and increasing the number of holidays for maternity are to be dealt with in this case and therefore the following queries are raised:

- i. Why not the Central Government enhance the maternity leave from 180 days to 270 days (9 months) as done by the Government of Tamil Nadu by virtue of G.O.Ms.No.105, dated 07.11.2016?
- ii. Why not Central Government direct the states which have not increased maternity leave as 180 days on parity with Central

Government Women employees, to do so within one year?

- iii. Why not the Central Government invoke Article 249 viz., Power of parliament to legislate in respect of matter in the State list in the national interest to treat maternity benefits including maternity leave and the right of the child to have breast feeding as issues of national interest?
- iv. Why not this Court declare right of newborn to mother's feeding upto six months exclusively and upto 2 years along with substitution's as fundamental right guaranteed under Article 21 of the Constitution and as human right as per international treaties?
- v. Whether "Creche facility" is provided in the interest of women Government employees and their young children to have easy access to child and to feed during office hours in the Central as well as State Governments offices, where more women Government employees are serving?
- vi. Why not the Governments come out with special insurance coverage for all women covering maternity risk by making one time deduction of a specific amount from the salary of the women employees in the first month of pregnancy and the Government

itself pay insurance premium for non-working women?

- vii. Why not the Government make it mandatory to get undertaking from the women employees to give maternity benefits including maternity leave, not to have more than two children, as a measure of population control, taking into consideration the enormous increase in population in India, which is the second most populous country in the world?
- viii. Why not the State and Central Governments insert penal provisions to punish the officials who are not granting maternity leave to the Women Government servants in time, when they are pregnant?
- ix. Why not the Government make it obligatory on the part of the women Government servants availing maternity benefits to give breast feed exclusively to the child atleast during the said maternity leave period as the medical experts opine that mother's feeding is not only healthy for the child but also for the mother as research would reveal that it would bring down incidence of breast cancer, as the Central and State Governments are extending benefits of maternity leave?

- x. Why not both the Central and State Governments sensitize the masses especially employed women about the importance of the mother's feeding in the interest of the children, who are going to be the future generation, through media roping in celebrities like actors, cricketers etc., as well as have seminars and discussions in the Government offices, also through medical counselors?
- xi. Why not Central Government bring an act making obligatory on the part of Women to breast feed as has been done by UAE Government by having mandatory breast feeding clause in the new UAE Child Rights law?
- xii. Whether the provisions of "Infant milk substitutes, Feeding Bottles and Infant Foods (Regulation of Production Supply and Distribution) Act, 1992 are properly implemented including banning infant foods through advertisements and breast feeding is promoted?
- xiii. Whether Central Government and State Governments could bring a new law to provide breast feeding rooms/spaces in public places like bus stand, railway stations, malls and work places like Government offices, factories etc., in the interest of feeding mothers?

xiv. Why not the Governments spend more amount per child, as Global breast feeding score board, 2017 released by Global breast feeding collective states that India only spends a negligible amount less than Rs.10/- per child?

xv. Why not the Governments further improve maternal health services to further reduce Maternal Mortality Rate, even though recent world bank data puts Maternal Mortality Rate for 174 per 1,00,000 live births in 2015 which is a decline from 215 per 1 lakh in 2010?

The newly impleaded respondents are directed to file their response for the above queries. Call the matter on 22.01.2018, through 'video conferencing'.

22.12.2017

sai/pgp

Note: Issue order copy on 05.01.2018.

To

1. The Director of Medical Education,
Directorate of Medical Education,
162, Periyar EVR Salai,
Kilpauk, Chennai 600 100

WEB COPY

N.KIRUBAKARAN, J

sai/pgp

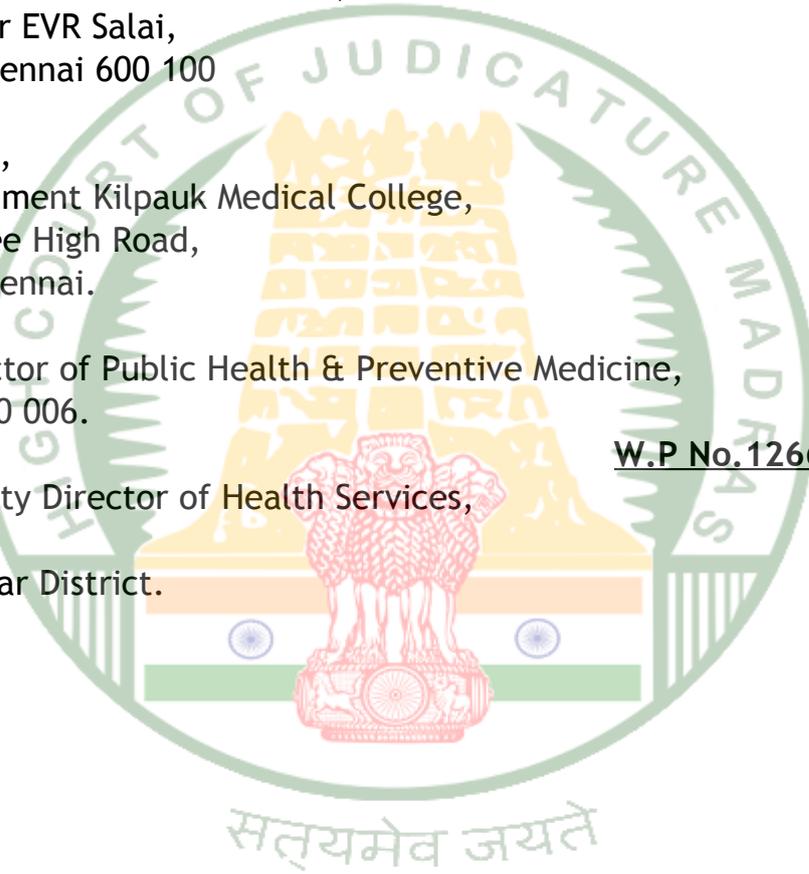
2.The Secretary/Additional Director of Medical Education,
The Selection Committee,
Directorate of Medical Education,
162, Periyar EVR Salai,
Kilpauk, Chennai 600 100

3.The Dean,
The Government Kilpauk Medical College,
Poonamallee High Road,
Kilpauk, Chennai.

4.The Director of Public Health & Preventive Medicine,
Chennai 600 006.

W.P No.12660 of 2017

5.The Deputy Director of Health Services,
Sivakasi,
Virudhunagar District.



WEB COPY

Dated : 22.12.2017