Eastern Railway
(Personnel Department)
17 N. S. Road, Kolkata - 700 001

Serial Circular No.96/2022

No. E.637/0/Pt.V

Kolkata, Dated: 28/07/2022

All Concerned

(as per standard list)

Sub: Writ Petition No. 844/2014 in the High Court of Delhi filed by Ms. Rama Pandey, Teacher, Kendriya Vidyalaya V/s UoI & others - reg.

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A copy of Ministry of Railways (Railway Board)' letter no. E(P&A)I-2022/CPC/LE-2, dated 11/07/2022 (**RBE No. 80/2022**) on the above cited subject is sent herewith along with its enclosures for information and compliance.

DA: As above.

28.7.2022

(Dharmendra Weekey)
Dy. Chief Personnel Officer/HQ
For Pr. Chief Personnel Officer
Phone No. 24106(Rly.)

28/7/22.

Index No. 1046: Grant of Maternity Leave and Child Care Leave to a female government servant who had a child through surrogacy - Orders dated 17/07/2015 of Hon'ble High Court in WP No. 844/2014.

भारत सरकार/GOVERNMENT OF INDIA
रेल मंत्रालय/MINISTRY OF RAILWAYS
(रेलवे बोर्ड/RAILWAY BOARD)

आरबीई सं. 80/2022

सं. ई(पी एंड ए)I-2022/सीपीसी/एलई-2 नई दिल्ली, दिनांक 11.07.2022

महाप्रबंधक/प्रधान वित्त सलाहकार,
सभी भारतीय रेलें एवं
उत्पादन इकाइयां।

विषय: सुश्री रमा पांडे, अध्यापक, केन्द्रीय विद्यालय बनाम भारत संघ एवं अन्य द्वारा दिल्ली के उच्च न्यायालय में फाइल की गई रिट याचिका सं.844/2014 के संबंध में।

कार्मिक एवं प्रशिक्षण विभाग के दिनांक 29.01.2018 के कार्यालय ज्ञापन की प्रतिलिपि सूचना एवं आवश्यक कार्रवाई हेतु संलग्न है जिसके तहत सरोगेसी के माध्यम से बच्चा प्राप्त करने वाली महिला सरकारी कर्मचारी को मातृत्व अवकाश और चाइल्ड केयर लीव प्रदान करने के संबंध में सुश्री रमा पांडे बनाम भारत संघ एवं अन्य द्वारा फाइल की गई रिट याचिका सं. 844/2014 में माननीय दिल्ली उच्च न्यायालय के दिनांक 17.07.2015 के आदेश परिपत्रित किए गए थे।

2. इसे रेल मंत्रालय के वित्त निदेशालय की सहमति से जारी किया जा रहा है।

3. कृपया पावती दें।

संलग्नक: यथोक्त

(एन.पी. सिंह)
संयुक्त निदेशक/ई(पी एंड ए),
रेलवे बोर्ड
टेली नं. 47845124
ई मेल आईडी: nirbhay.singh26@gov.in
चौथा तल, कमरा नं.10

सं. ई(पी एंड ए)I-2022/सीपीसी/एलई-2 नई दिल्ली, दिनांक 11.07.2022

प्रतिलिपि भारत के उप नियंत्रक एवं महालेखा परीक्षक (रेलें), कमरा नं.224, रेल भवन, नई दिल्ली को प्रेषित।

कृते सदस्य (वित्त)/रेलवे बोर्ड

सं. ई(पी एंड ए)I-2022/सीपीसी/एलई-2 नई दिल्ली, दिनांक 11.07.2022

प्रतिलिपि प्रेषित:-

1. जनरल सेक्रेटरी, एआईआरएफ, कमरा सं.253, रेल भवन, नई दिल्ली।
2. जनरल सेक्रेटरी, एनएफआईआर, कमरा सं.256-ई, रेल भवन, नई दिल्ली।
3. राष्ट्रीय परिषद/विभागीय परिषद के सदस्य और सचिव, कर्मचारी पक्ष, राष्ट्रीय परिषद, 13-सी, फिरोजशाह रोड, नई दिल्ली।
4. सेक्रेटरी जनरल, फ्रोआ, कमरा सं.256-ए, रेल भवन, नई दिल्ली।
5. सचिव, आरबीएसएस, ग्रुप 'ए' ऑफिसर एसोसिएशन, कमरा नं. 402, रेल भवन।
6. अध्यक्ष, रेलवे बोर्ड क्लास II ऑफिसर्स एसोसिएशन।
7. सेक्रेटरी जनरल, इरपोफ, कमरा सं.341-सी, रेलवे बोर्ड।
8. अध्यक्ष, इंडियन रेलवे क्लास II ऑफिसर्स एसोसिएशन।
9. सचिव, रेलवे बोर्ड लिपिकवर्गीय कर्मचारी वर्ग एसोसिएशन।
10. सचिव, रेलवे बोर्ड क्लास IV कर्मचारी वर्ग एसोसिएशन।
11. सेक्रेटरी जनरल, एआईआरपीएफ एसोसिएशन।
12. जनरल सेक्रेटरी, ऑल इंडिया एससी/एसटी रेलवे कर्मचारी एसोसिएशन, कमरा नं. 8, भूतल, रेल भवन, नई दिल्ली-110001।
13. ऑल इंडिया ओ.बी.सी. रेलवे कर्मचारी एसोसिएशन।
14. जनरल सेक्रेटरी, सेवानिवृत्त रेल कर्मचारी कल्याण एसोसिएशन (पंजीकृत), कमरा नं. 490 ए/16, गुरुद्वारा रोड, गुरुग्राम।
15. मुख्य रेल संरक्षा आयुक्त, 16 अशोक रोड, लखनऊ।

नवीन

कृते सचिव, रेलवे बोर्ड

भारत सरकार/GOVERNMENT OF INDIA

रेल मंत्रालय /MINISTRY OF RAILWAYS

(रेलवे बोर्ड/RAILWAY BOARD)

RBE No. 80/2022

No. E(P&A)I-2022/CPC/LE-2 New Delhi dated 11 .07.2022

The General Managers/PFAs,
All Indian Railways and
Production Units.

Sub: Writ Petition No. 844/2014 in the High Court of Delhi filed by Ms. Rama Pandey, Teacher, Kendriya Vidyalaya V/s UoI & others –reg.

A copy of DoP&T's OM dated 29.01.2018 circulating orders dated 17.07.2015 of Hon'ble Delhi High Court in WP No. 844/2014 filed by Ms. Rama Pandey Vs UoI & others regarding grant of Maternity Leave and Child Care Leave to a female government servant who had a child through surrogacy, is enclosed herewith for information and necessary action.

2. This issues with the concurrence of the Finance Directorate of the Ministry of Railways.

3. Please acknowledge receipt.

DA: As above

(N P Singh)
Joint Director/E(P&A),
Railway Board
Tele No. 47845124
Email Id: nirbhay.singh26@gov.in
4th Floor, Room No.10

No. E(P&A)I-2022/CPC/LE-2 New Delhi dated 11 .07.2022

Copy to the Deputy Comptroller and Auditor General of India (Railways), Room No.224, Rail Bhawan, New Delhi.

for Member Finance/Railway Board

No. E(P&A)I-2022/CPC/LE-2 New Delhi dated 11 .07.2022

Copy forwarded to:-

1. The General Secretary, AIRF, R.No.253, Rail Bhawan, New Delhi.
2. The General Secretary, NFIR, R.No.256-E, Rail Bhawan, New Delhi.
3. The Members of the National Council, Departmental Council and Secretary, Staff Side, National Council, 13-C, Ferozeshah Road, New Delhi.

4. The Secretary General, FROA, R.No.256-A, Rail Bhawan, New Delhi.
5. The Secretary, RBSS, Group 'A' Officer Association, R.No.402, Rail Bhawan.
6. The President, Railway Board Class II Officers' Association.
7. The Secretary General, IRPOF, Room No.341-C, Railway Board.
8. The President, Indian Railway Class II Officer Association.
9. The Secretary, Railway Board Ministerial Staff Association.
10. The Secretary, Railway Board Class IV Staff Association
11. The Secretary General, AIRPF Association.
12. The General Secretary, All India SC/ST Railway Employees Association, R.No.8, Ground Floor, Rail Bhawan, New Delhi-110001.
13. All India O.B.C. Railway Employee's Association.
14. The General Secretary, Retired Railway Employees Welfare Association (Regd.), 490A/16, Gurudwara Raod, Gurgaon.
15. The Chief Commissioner of Railway Safety, 16, Ashok Road, Lucknow.

for Secretary, Railway Board

Copy to : PSOs/Sr. PPSs/PPSs/PSs/PAs to :-

MR, MoSR (J), MoSR (D), CRB & CEO, Member Finance, Member Infra., Member (T&RS), Member (O&BD), Advisor/MR, OSD/MR, OSD/Co-ord/MR, Addl. PS/MR, Addl. PS/MoSR(J), DPG/MoSR(J), Secretary, DG(RHS), DG(RPF), DG(Safety), AM(HR), AM/PU, AM (F), AM/Works, AM/RS, AM/Traffic Transportation, AM(CE), AM(Budget), AM(Mech. Engg.), AM(T&C), AM(Telecom), AM(Plg.), AM/Revenue, AM/Signal, AM/C, AM/L&A, AM/EnHM, AM/RE, AM/Traction, AM/Marketing & Business Development, PED/IR, PED/Chg., PED/TTM, PED/Bridge, PED/Signal, PED/SD, PED/Accounts, PED/EE(RS), PED/Trg.&MPP, PED/Health, PED/Vigilance, PED/Infra, PED/Safety, ED(Plg), ED(A), EDF(BC), EDCE(B&S), EDCE(G), EDCE(Plg), ED(Chg), ED(CC), ED(C&IS), ED(E&R), EDEE(Dev), EDEE(G), EDEE(RS), EDE, ED(EEM), EDE(RRB), EDE(N), EDE(Res), EDF(C), EDF(E), EDF(S), EDF(B), EDF(RM), ED(EEM), EDF(X)I, EDF(X)II, ED(H), ED(LM), ED(MIS), EDE(GC), EDT(MPP), EDME(Chg), EDME(Frt.), EDME(Trg.), EDME(Dev), EDME(W), EDPC-I, EDPC-II, ED(PP), ED(Proj)-DMRC, ED(RE), EDRE(S&T), EDRE(S), ED(Safety), ED(Sig), ED(S&E), EDRS(C), EDRS(P), EDRS(G), EDRS(S), EDRS(W), ED(TD), ED/Track(M), ED/Track(MC), ED/Track(P), ED(T&C), ED(CP), ED(PM), ED(PG), EDT(R), EDTC(FM), EDTT(M), EDTT(S), EDV(A), EDV(E), EDV(S), EDV(T), ED(W), ED (ERP), ED(Innovation), ED/Traffic & Comml. (EnHM), ED/Elec./Transformation, ED(NFR/TC), IG/RPF(HQs), IG/RS, JS, JS(D), JS(E), JS(G), JS(P), DPC-I, DPC-II, DE(N), DF(CCA), DF(A/Cs), DE(G), DE(N), DPR, JDE(G), JDE(D&A), JDE(L), JDE(LL), JDPC-II, JDE(W), JDF(B), JDF(E),JDE(N), JDE(Res), JD(MPP), JDE(GP), DS(G), DS(Parl), US(A), PAO, DDE(D&A), JDE(RRB), DDE(Sports), DDE(N), DDE(LR)I, DDF(E)I, II, & III, DD(H), DDE(LR)I, DDE(LR)II, DDE(W), DDPC-V, DDPC-VII, DDE(Trg.).

(**Authority**: Ministry of Personnel, Public Grievances & Pensions, Deptt. of Personnel & Training's OM No. 13018/6/2013-Estt.(L) dated 29th January, 2018)

No.13018/6/2013 -Estt.(L)
Government of India
Ministry of Personnel, Public Grievances and Pensions
Department of Personnel & Training
***

JNU Old Campus, New Delhi
Dated 29 January, 2018

OFFICE MEMORANDUM

Subject: Writ Petition No.844/2014 in the High Court of Delhi filed by Ms. Rama Pandey, Teacher, Kendriya Vidyalaya V/s UoI & Others – reg.

The undersigned is directed to enclose herewith Hon'ble High Court of Delhi's Order dated 17th July, 2015 in the Writ Petition No.844/2014 in the High Court of Delhi filed by Ms. Rama Pandey, Teacher, Kendriya Vidyalaya V/s UoI & Others.

2. All Ministries/Departments are advised to give wide publicity of its contents to the concerned officers.

3. This issues with the approval of Secretary (P).

(Sandeep Saxena)
Under Secretary to the Govt. of India
011-26164316

As per standard mailing list.

Copy to:-

NIC, DOPT - for uploading on the website.

Delhi High Court
Rama Pandey vs Union Of India & Ors. on 17 July, 2015
Author: Rajiv Shakdher

* IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on: 12.12.2014
% Judgment delivered on: 17.07.2015

\+ WP(C) No. 844/2014

RAMA PANDEY ..... PETITIONER

Versus

UNION OF INDIA & ORS. ..... RESPONDENTS

Advocates who appeared in this case:
For the Petitioner: Mr Sunil Kumar and Mr Rahul Sharma, Advocates
For the Respondents: Mr Jasmeet Singh, CGSC with Ms Kritika Mehra, Adv. for R-1.
Mr S. Rajappa & Dr. Puran Chand, Advs. for R- 2 & 3.

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J
FACTS

1 A synthesis of science and divinity (at least for those who believe in it), led to the culmination of the petitioner's desire for a child. Married, on 18.01.1998, to one Sh. Atul Pandey, the petitioner's, wish to have a child was fulfilled on 09.02.2013, albeit via the surrogacy route. Her bundle of joy comprised of twins, who were born on the aforementioned date, at a city hospital.

1.1 To effectuate the aforesaid purpose, the petitioner had entered into an arrangement with, one, Ms Aarti, wife of Mr Surya Narayan (hereafter referred to as the surrogate mother). The arrangement required the surrogate mother to bear a child by employing the In-Vitro Fertilization (IVF) methodology. The methodology used and agreed upon required the genetic father to fertilize, In-Vitro, the ovum supplied by a designated donor The resultant embryo was then required to be transferred and implanted in the surrogate mother. This arrangement, along with other terms and conditions, which included rights and obligations of the commissioning parents, as also those of the surrogate mother, were reduced to a written agreement dated 08.08.2012 (in short the surrogacy agreement).

2. The fact that the surrogacy agreement reached fruition, is exemplified by the birth of twins, as indicated above, on 09.02.2013. This far, the petitioner was happy; her unhappiness, however, commenced with rejection of her application dated 06.06.2013, for grant of maternity and Child Care Leave (CCL). By this application, the petitioner sought 180 days maternity leave and 3 months CCL. This application was addressed to respondent no.3, with a copy to respondent no.2.

2.1 Respondent no.3 vide a covering letter of even date, i.e., 06.06.2013, forwarded the petitioner's application to respondent no.2, along with the requisite documents i.e. the surrogacy agreement and the birth certificate of the children. Respondent no.3, sought clarification with regard to the request made by the petitioner for sanctioning the maternity leave. A perusal of the covering letter would show that the leave sought for the purposes of child care was not being objected to. A doubt, was raised only qua maternity leave.

2.2 Evidently, vide communication dated 10.10.2013, petitioner's request was rejected by respondent no.3, based on, inputs received from respondent no.2 vide two communications dated 04.09.2013 and 19.09.2013. The first communication appears to have been sent by Kendriya Vidyalaya Sangathan (KVS), [Headquarters], while the second was, evidently, sent by KVS (D.R.). These communications, though, are not on record 2.3 In sum, it was conveyed to the petitioner that there was no provision for grant of maternity leave in cases where the surrogacy route is adopted. The petitioner was, however, informed that the CCL could be sanctioned, in her favour, under Rule 43-A, which was applicable to "female government servants". It now transpires that reference ought to have been made to Rule 43 and not Rule 43-A; a fact which was confirmed by the counsel for respondent no.2 and 3.

2.4 In the background of the aforesaid stand, the petitioner was requested to submit an application for CCL, in case she was desirous of availing leave on that account.

3. The petitioner being aggrieved, approached this court by way of the instant petition, filed, under Article 226 of the Constitution. Notice on this limited aspect was issued in the writ petition on 05.02.2014. Though counsels for parties were asked to file written submissions; except for respondent no. 2 none of the other parties filed written submissions in the matter. Counsels for respondents have not filed any counter affidavit in the matter. The reason for that, perhaps would be, that the facts in the matter are not in dispute. The issue raised in the writ petition is, a pure question of law.

4. I may only note that on 10.02.2015, respondents placed before this court an office memorandum dated 09.02.2015, issued by the Ministry of Personnel, Public Grievances, Pensions, Department of Personnel and Training (DoPT), Govt. of India which, in turn, relied upon the office memorandum dated 09.01.2015, issued by the Ministry of Human Resources and Development.

4.1 The stand taken, based on the said office memorandums, was that, there was no provision for grant of maternity leave to female employees, who took recourse to the surrogacy route for procreating a child. Furthermore, it was indicated that for grant of "adoption leave", a valid adoption had to be in place.

4.2 Having said so, the DoPT recommended grant of maternity/ adoption leave to the petitioner keeping in mind the welfare of the child and, on consideration of the fact that the child was in her custody. The recommendation made was, that, not only should the petitioner be allowed 180 days of leave as was permissible in situations dealing with maternity leave / adoption leave but that she, should also be allowed, CCL, in case, an application was made for the said purpose. It was further

indicated that the said two sets of leave would not be adjusted from the petitioner's leave account. The said recommendation was, however, made without prejudice to the policy, rules and/or instructions that the government may frame in that behalf in due course.

4.3 In the light of the aforesaid development, the counsel for both parties indicated that since the answer to the issue of law remains unarticulated (though the grievance of the petitioner may have been redressed), this court ought to deliberate upon the same and pronounce its judgment in the matter. 4.4 It is based on the stand taken by the counsels for the parties, I proceed to decide the issues raised, in the matter.

SUBMISSIONS OF COUNSELS

5. The counsel for the petitioner has equated the position of a commissioning mother to that of a biological mother who bears and carries the child till delivery. It is the submission of the learned counsel for the petitioner, that more often than not, as in this case, the commissioning parents have a huge emotional interest in the well-being of both the surrogate mother and the child, which the surrogate mother carries, albeit under a contractual arrangement. The well-being of the child and the surrogate mother can best be addressed by the commissioning parents, in particular, the commissioning mother. This object, according to the learned counsel, can only be effectuated, if maternity leave is granted to the commissioning mother.

5.1 The fact that a commissioning mother has been judicially recognized as one who is similarly circumstanced, as an adoptive mother, was sought to be established by placing reliance on the judgement of the Madras High Court in the case of : K. Kalaiselvi vs Chennai Port Trust, dated 04.03.2013, passed in WP(C) No. 8188/2012.

6. Counsels for the respondents, on the other hand, while being sympathetic to the cause of the petitioner, expressed their disagreement with the submission that maternity leave could be extended to the petitioner or female employees who are similarly circumstanced.

6.1 Mr Rajappa, who appeared for respondent no. 2 and 3, in particular, made submissions, which can be, broadly, paraphrased as follows:

(i) There is no provision under the extant rules for granting maternity leave to women who become mothers via the surrogacy route. Therefore, in law, no entitlement to maternity leave, in these circumstances, inhered in the petitioner.

(ii) The prime objective for grant of maternity leave is to protect the health and to provide safety to pregnant women in workplace, both during pregnancy and after delivery. Lactating mothers, who need to breast-feed their children, fall within a "specific risk group", and hence, are given maternity leave, based on factors which are relatable to safety and health parameters.

(iii) A woman, who gives birth to a child, undergoes mental and physical fatigue and stress and, is often, subjected to confinement both during and after pregnancy. These circumstances do not

impact the commissioning mother, who takes recourse to the surrogacy route. Therefore, there is no justification for according maternity leave in such like cases.

(iv) If leave is granted to the commissioning mother, it could set a precedent for grant of leave in future to a single male or female parent or to same sex parents as well, who may take recourse to the surrogacy route.

(iv)(a). Therefore, the legislature would be the best forum for the enactment of necessary rules/ regulations to deal with such like situations, including the situation which arose in the present case.

(v) In the K. Kalaiselvi's case, the Madras High Court was interpreting Rule 3-A of the Madras Port Trust (Leave) Regulations, 1987, pertaining to leave, made available, to female employees on adoption of a child. The court, in that case, equated the circumstances which arise in the case of the adoptive mother with those which emerge in the case of a female employee, who takes recourse to a surrogacy route. Accordingly, Rule 3-A of the aforementioned regulations was interpreted to include a female employee who ventured to have a child via a surrogate arrangement. Such parity, in principle, was erroneous for the following reasons : Firstly, in the absence of a valid adoption, the relevant Rule, in the instant case, does not get triggered. Secondly, such an interpretation would involve re-writing of the Rules by reading adoptive parent as the Commissioning Parent. REASONS

7. I have heard the learned counsels for the parties. According to me, what needs to be borne in mind, is this : there are two stages to pregnancy, the pre-natal and post-natal stage. Biologically pregnancy takes place upon union of an ovum with spermatozoon. This union results in development of an embryo or a foetus in the body of the female. A typical pregnancy has a duration of 266 days from conception to delivery. The pregnancy brings about physiological changes in the female body which, inter alia, includes, nausea (morning sickness), enlargement of the abdomen etc1. 7.1 Pregnancy brings about restriction in the movement of the female carrying the child as it progresses through the term. In case complications arise, during the term, movement of the pregnant female may get restricted even prior to the pregnancy reaching full term. It is for these reasons, that maternity leave of 180 days is accorded to pregnant female employees. 7.2 Those amongst pregnant female employees, who are constitutionally strong and do not face medical complications, more often than not, avail of a substantial part of their maternity leave in the period commencing after delivery. Rules and regulations framed in this regard by most organizations, including those applicable to respondent no.3, do not provide for bifurcation of maternity leave, that is, division of leave between pre-natal and post-natal stages.

7.3 The reason, perhaps, why substantial part of the leave is availed of by the female employees (depending on their well-being), post delivery, is that, the challenging part, of bringing a new life into the world, begins thereafter, that is, in the post-natal period. There are other factors as well, which play a part in a pregnant women postponing a substantial part of her maternity leave till after delivery, such as, family circumstances (including the fact she is part of a nuclear family) or, the health of the child or, even the fact that she already has had successful deliveries; albeit without sufficient time lag between them.

8. Thus, it is evident that except for the physiological changes and Dorland's Illustrated Medical Dictionary, 30th Edition, Saunders Publication difficulties, all other challenges of child rearing are common to all female employees, irrespective of the manner, she chooses, to bring a child into this world.

9. But the law, as it stands today, and therefore, the rules and regulations as framed by most organisations do not envisage attainment of parenthood via the surrogacy route.

9.1 It is not unknown, and there are several such examples that legislatures, usually, in most situations, act ex-post facto. Advancement in science and change in societal attitudes, often raise issues, which require courts to infuse fresh insight into existing law. This legal technique, if you like, is often alluded to as the "updating principle". Simply put, the court by using this principle, updates the construction of a statute bearing in mind, inter alia, the current norms, changes in social attitudes or, even advancement in science and technology. The principle of updating resembles another principle which the courts have referred to as the "dynamic processing of an enactment". The former is described in Bennion on Statutory Interpretation at page 890 in the following manner :-

> "..An updating construction of an enactment may be defined as a construction which takes account of relevant changes which have occurred since the enactment was originally framed but does not alter the meaning of its wording in ways which do not fall within the principles originally envisaged by that wording. Updating construction resembles so-called dynamic interpretation, but insists that the updating is structured rather than at large. This structuring is directed to ascertaining the legal meaning of the enactment at the time with respect to which it falls to be applied. The structuring is framed by reference to specific factors developed by the courts which are related to changes which have occurred (1) in the mischief to which the enactment is directed, (2) in the surrounding law, (3) in social conditions, (4) in technology and medical science, or (5) in the meaning of words..."

9.2 The updating principle on account of development of medical science and technique was applied in the following case : R vs. Ireland, [1998] AC

147. 9.3 Similarly, change in social conditions have persuaded courts to apply the updating construction principle to inject contemporary meaning to the words and expressions used in the existing statute. See : Williams and Glyn's Bank Vs. Boland, [1981] AC 487 at page 511 placetum 'D' and R Vs. D, [1984] AC 778.

9.4 In respect of dynamic processing, the following observations in Bennnion on Statutory Interpretation, 5th Edition, at page 502, being apposite, are extracted hereinafter :-

> "..Few Acts remain for very long in pristine condition. They are quickly subjected to a host of processes. Learned commentators dissect them. Officials in administering them develop their meaning in practical terms. Courts pronounce on them.

Donaldson J described the role of the courts thus :

'The duty of the Courts is to ascertain and give effect to the will of Parliament as expressed in its enactments. In the performance of this duty the Judges do not act as computers into which are fed the statutes and the rules for the construction of statutes and from whom issue forth the mathematically correct answer. The interpretation of statutes is a craft as much as a science and the judges as craftsmen, select and apply the appropriate rules as the tools of their trade. They are not legislators, but finishers, refiners and polishers of legislation which comes to them in a state requiring varying degrees of further processing. When practitioners come to advise upon the legal meaning, they need to take account of all this. The Act is no longer as Parliament enacted it; it has been processed.."

(emphasis is mine) 9.5 The fact that this is a legitimate interpretative tool, available to courts, is quite evident upon perusal of the ratio of the following judgements.

9.6 A classic example of application of the updating of construction principle, is the judgement, in the case of Fitzpatrick vs Sterling Housing Association Ltd, 1999 (4) All E.R. 705, where the word 'family' was read to include two persons of same sex who were cohabitating and living together for a long period of time with a mutual degree of inter-dependence. 9.7 This is an interesting case where the court while applying the afore- stated principle interpreted the meaning of the word, 'family', by having regard to the prevalent social habits and attitudes. In this case, the plaintiff, who was the appellant before the House of Lords, had approached the court for protection from eviction on the ground that he had lived in a stable relationship with the original tenant of the same sex, who had since then died. The defendant / respondent (i.e. landlord) declined to recognize him as a tenant as he was neither the wife nor the husband of the original tenant. The courts below had accepted the plea of the respondent/defendant (i.e. the landlord). The House of Lords while allowing the appeal by a majority of 3:2 made the following apposite observations. The discussion thus veered around whether the appellant/plaintiff was the spouse of the original tenant.

"...It is not an answer to the problem to assume (as I accept may be correct) that if in 1920 people had been asked whether one person was a member of another same-sex person's family the answer would have been "No". That is not the right question. The first question is what were the characteristics of a family in the 1920 Act and the second whether two same-sex partners can satisfy those characteristics so as today to fall within the period "family". An alternative question is whether the word "family" in the 1920 Act has to be updated so as to be capable of including persons who today would be regarded as being of each other's family, whatever might have been said in 1920. See : R v Ireland [1998] AC 147, 158, per Lord Steyn; Bennion, Statutory Interpretation, 3rd ed (1997), p 686 and Halsbury's Laws of England, 4th ed reissue, vol 44 (1) (1995), p 904, para 1473...

..It seems to be suggested that the result which I have so far indicated would be cataclysmic. In relation to this Act it is plainly not so. The onus on one person

claiming that he or she was a member of the same-sex original tenant's family will involve that person establishing rather than merely asserting the necessary indicia of the relationship. A transient superficial relationship will not do even if it is intimate. Mere cohabitation by friends as a matter of convenience will not do. There is, in any event, a minimum residence qualification; the succession is limited to that of the original tenant. Far from being cataclysmic it is, as both the judge in the country court and the Court of Appeal appear to recognise, and as I consider, in accordance with contemporary notions of social justice. In other statutes, in other contexts, the same meaning may or not be the right one. If a narrower meaning is required, so be it. It seems also to be suggested that such a result in this statute undermines the traditional (whether religious or social) concepts of marriage and the family. It does nothing of the sort. It merely recognises that, for the purposes of this Act, two people of the same sex can be regarded as having established membership of a family, one of the most significant of human relationships which both gives benefits and imposes obligations.."

[Also see : Ghaidan v. Mendoza, 2002 (4) All E.R. 1162; Goodwin vs U.K., (2002) 2 FCR 577; Bellinger vs Bellinger, (2002) 1 All E.R. 311 (dissenting judgment of Thorpe LJ at page 335) and A. vs West Yorkshire Police, 2004 (3) All E.R. 145].

9.8 A constitution bench of our Supreme Court in the case of State (through CBI) Vs. S.J. Choudhary, (1996) 2 SCC 428 applied the updating construction principle when it was faced with an issue whether the opinion of a typewriter expert would be admissible in evidence in view of the language employed in Section 45 of the Indian Evidence Act, 1872 (in short the Indian Evidence Act). The objection taken by the accused in a criminal proceeding, which was sustained right up to the High Court was based upon observations in an earlier judgment of the Supreme Court in Hanumant Vs. State of Madhya Pradesh, 1952 SCR 1091 that the opinion of a typewriting expert was not admissible. The Constitution Bench of the Supreme Court ruled otherwise and while doing so, adverted to the updating construction principle by reading into the word, 'science' which appeared alongside the expression, 'handwriting' to include a person who was an expert in typewriters. The following observations of the Supreme Court being apposite are extracted hereinafter :-

"..10. Statutory Interpretation by Francis Bennion, Second edition, Section 288 with the heading "Presumption that updating construction to be given" states one of the rules thus: " xxx xxx xxx It is presumed that Parliament intends the court to apply to an ongoing Act a construction that continuously updates its wording to allow for changes since the Act was initially framed (an updating construction). While it remains law, it is to be treated as always speaking. This means that in its application on any date, the language of the Act, though necessarily embedded in its own time, is nevertheless to be construed in accordance with the need to treat it as current law.

xxx xxx xxx In the comments that follow it is pointed out that an ongoing Act is taken to be always speaking. It is also, further, stated thus:

"In construing an ongoing Act, the interpreter is to presume that Parliament intended the Act to be applied at any future time in such a way as to give effect to the true original intention. Accordingly the interpreter is to make allowances for any relevant changes that have occurred, since the Act's passing, in law, social conditions, technology, the meaning of words, and other matters. Just as the US Constitution is regarded as 'a living Constitution', so an ongoing British Act is regarded as 'a living Act'. That today's construction involves the supposition that Parliament was catering long ago for a state of affairs that did not then exist is no argument against that construction. Parliament, in the wording of an enactment, is expected to anticipate temporal developments. The drafter will try to foresee the future, and allow for it in the wording. xxx xxx xxx An enactment of former days is thus to be read today, in the light of dynamic processing received over the years, with such modification of the current meaning of its language as will now give effect to the original legislative intention. The reality and effect of dynamic processing provides the gradual adjustment. It is constituted by judicial interpretation, year in and year out. It also comprises processing by executive officials."

11. There cannot be any doubt that the Indian Evidence Act, 1872 is, by its very nature, an 'ongoing Act.'

12. It appears that it was only in 1874 that the first practical typewriter made its appearance and was marketed in that year by the E. Remington and Sons Company which later became the Remington typewriter - Obviously, in the Indian Evidence Act enacted in 1872 typewriting could not be specifically mentioned as a means of writing in Section 45 of the Evidence Act. Ever since then, technology has made great strides and so also the technology of manufacture of typewriters resulting in common use of typewriters as a prevalent mode of writing. This has given rise to development of the branch of science relating to examination of questioned typewriting...."

(emphasis is mine) 9.9 Similarly, the Supreme Court in two other cases recognised the progress of science and technology by bringing in line, the scope and meaning of the words and expressions used in existing statutes, with current norms and usage. The first case is the judgment delivered in Senior Electric Inspector vs Laxminarayan Chopra, (1962) 3 SCR 146, where it held, that the expression 'telegraph line' in the Indian Telegraph Act, 1885 would include a wireless telegraph having regard to the change in technology.

10. The second case is the judgment in M/s. Laxmi Video Theatres and Ors. Vs. State of Haryana and Ors., (1993) 3 SCC 715. In this case, the definition of the word 'cinematograph' as contained in Section 2(c) of the Cinematograph Act, 1952 was held to cover video cassette recorders and players for representation of motion pictures on television screen. 10.1 Also See State of Maharashtra Vs. Dr. Praful B. Desai, (2003) 4 SCC 601.

11. With the advent of New Reproductive Technologies (NRT) or what are also known as Assisted Reproductive Technologies (ART), (after the birth of the first test-tube baby Louise Joy Brown, in 1978), there has been a veritable explosion of possibilities for achieving and bringing to term a pregnancy. It appears that in future one would have three kinds of mothers:

(i) a genetic mother, who donates or sells her eggs;

(ii) a surrogate or natal mother, who carries the baby; and
(iii) a social mother, who raises the child.2

11.1 India's first test-tube baby Kanupriya alias Durga, brought to fore the use of similar technology in India. The reproduction of children by NRTs or ARTs, raises several moral, legal and ethical issues. One such legal issue arises in the instant case.

11.2 Though the science proceeded in this direction in the late 1970, the practice of having children via surrogacy is, a more recent phenomena. The relevant leave rules were first framed in 1972; to which amendments have been made from time to time. While notions have changed vis-a-vis parenthood (which is why provisions have been incorporated for paternity leave; an aspect which I will shortly advert to), there appears to be an inertia in recognising that motherhood can be attained even via surrogacy. 11.3 Rule 43 implicitly recognises that there are two principal reasons why maternity leave is accorded. First, that with pregnancy, biological changes See: Feminist Perspectives on Law, Chapter 4 : Facilitating Motherhood, pages 121-123 occur. Second, post childbirth "multiple burdens" follow. (See : C-366/99 Griesmar, [2001] ECR 1-9383) 11.4 Therefore, if one were to recognise even the latter reason the commissioning mother, to my mind, ought to be entitled to maternity leave. 11.5 It is clearly foreseeable that a commissioning mother needs to bond with the child and at times take over the role of a breast-feeding mother, immediately after the delivery of the child.

11.6 In sum, the commissioning mother would become the principal care giver upon the birth of child; notwithstanding the fact that child in a given situation is bottle-fed.

11.7 It follows thus, to my mind, that the commissioning mother's entitlement to maternity leave cannot be denied only on the ground that she did not bear the child. This is dehors the fact that a commissioning mother may require to be at the bed side of the surrogate mother, in a given situation, even at the pre-natal stage; an aspect I have elaborated upon in the latter part of my judgment.

11.8 The circumstances obtaining in the present case, however, indicate that the genetic father made use of a donor egg, which then, was implanted in the surrogate mother.

11.9 The surrogate mother in this case had no genetic connection with the children she gave birth to. The surrogate mother however, carried the pregnancy to term.

12. Undoubtedly, the fact that the surrogate mother carried the pregnancy to full term, involved physiological changes to her body, which were not experienced by the commissioning mother but,

from this, could one possibly conclude that her emotional involvement was any less if, not more, than the surrogate mother?

12.1 Therefore, while the submission advanced by Mr Rajappa that maternity leave is given to a female employee who is pregnant, to deal with biological changes, which come about with pregnancy, and to ensure the health and safety, both of the mother and the child, while it is in her womb, is correct; it is, I am afraid, an uni-dimensional argument, offered to explain the meaning of the term "maternity", as found incorporated in the extant rules.

12.2 The rules as framed do not restrict the grant of leave to only those female employees, who are themselves pregnant as would be evident from the discussion and reasons set forth hereafter. For this purpose, in the first instance, I intend to examine the scope and effect of the Rules to the extent relevant for the purposes of issues raised in the writ petition. 12.3 The word 'maternity' has not been defined in the Central Civil Services (Leave) Rules, 1972 (in short the Leave Rules), which respondents say are applicable to the petitioner.

12.4 Rule 43, which makes provision for maternity, for the sake of convenience, is extracted hereinbelow:

> "...43. Maternity Leave :
>
> (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 (180 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 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 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..."

12.5 A perusal of Rule 43 would show that a female employee including an apprentice with less than two surviving children, can avail of maternity leave for 180 days from the date of its commencement. Sub-rule (3) of Rule 43 is indicative of the fact that where the female employee has suffered a miscarriage, including abortion, she can avail of maternity leave not exceeding 45 days. Importantly, clause (a) of sub-rule (4) of Rule 43, states that maternity leave can be combined with leave of any other kind. Furthermore, under clause (b) of sub-rule (4) such a female employee is entitled to leave of the kind referred to in Rule 31(1) notwithstanding the requirement to produce a medical certificate, subject to a maximum of two years, if applied for, in continuation of maternity leave granted to her. Sub- rule (5) of Rule 43 states that, maternity leave shall not be debited against leave account.

13. There are three other Rules to which I would like to refer to. These are Rules 43-A, 43-AA and 43-B.

13.1 Rule 43-A3 deals with paternity leave available to a male employee for the defined period, where " his wife" is confined on account of child birth. The said Rule allows a male employee, including an apprentice, with less than two surviving children, to avail of 15 days leave during the confinement of his wife for child birth, that is, up to 15 days "before" or "up to 6 months" from the date of delivery of the child.

13.2 Sub-rule (4) of Rule 43-A makes it clear that if paternity leave is not availed of within the period specified above, such leave shall be treated as lapsed.

13.3 Like in the case of a female employee, paternity leave can be combined with leave of any other kind, and the said leave is not debited against the male employee's leave account. This position emanates upon reading of sub-rule (3) and sub-rule (4) of Rule 43-A above. 13.4 Rule 43-AA4 deals with paternity leave made available, to a male 43-A. Paternity leave:

(1) A male Government servant (including an apprentice) with less than two surviving children, may be granted Paternity Leave by an authority competent to grant leave for a period of 15 days, during the confinement of his wife for childbirth, i.e., up to 15 days before, or up to six months from the date of delivery of the child.

(2) During such period of 15 days, he shall be paid leave salary equal to the pay drawn immediately before proceeding on leave.

(3) The paternity Leave may be combined with leave of any other kind. (4) The paternity leave shall not be debited against the leave account. (5) If Paternity Leave is not availed of within the period specified in sub-rule (1), such leave shall be treated as lapsed.

NOTE:- The Paternity Leave shall not normally be refused under any circumstances.] 43-AA. Paternity Leave for Child Adoption. -

(1) A male Government servant (including an apprentice) with less than two surviving children, on valid adoption of a child below the age of one year, may be granted Paternity Leave for a period of 15 days within a period of six months from the date of valid adoption. (2) During such period of 15 days, he shall be paid leave salary equal to the pay drawn immediately before proceeding on leave.

(3) The paternity leave may be combined with leave of any other kind. (4) The Paternity Leave shall not be debited against the leave account.

employee, for the defined period, albeit from the date of "valid adoption". 13.5 The aforementioned rule is pari materia with Rule 43-A, in all other aspects; the only difference being that the paternity leave of 15 days available to the male employee should be availed of within 6 months from the date of a valid adoption.

13.6 Under the Leave Rules, a female employee is also entitled to leave if she were to adopt a child as against taking recourse to the surrogacy route. In other words, there is a provision in the Leave Rules for Child Adoption Leave. The relevant provision in this behalf is made in Rule 43-B5.

(5) If Paternity leave is not availed of within the period specified in sub-rule (1) such leave shall be treated as lapsed.

[Note 1]: - The Paternity Leave shall not normally be refused under any circumstances.] [Note 2]: - "Child" for the purpose of this rule will include a child taken as ward by the Government servant, under the Guardians and Wards Act, 1890 or the personal law applicable to that Government servant, provided such a ward lives with the Government servant and is treated as a member of the family and provided such Government servant has, through a special will, conferred upon that ward the same status as that of a natural born child.] 43-B. Leave to a female Government servant on adoption of a child: (1) A female Government servant, with fewer than two surviving children, on valid adoption of a child below the age of one year may be granted child adoption leave, by an authority competent to grant leave, for a period of [180 days] immediately after the date of valid adoption. (2) During the period of child adoption leave, she shall be paid leave salary equal to the pay drawn immediately before proceeding on leave.

(3) (a) Child adoption leave may be combined with leave of any other kind.

(b) In continuation of the child adoption leave granted under sub-rule (1), a female Government servant on valid adoption of a child may also be granted, if applied for, 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 upto one year reduced by the age of the adopted child on the date of valid adoption, without taking into account child adoption leave.

Provided that this facility shall not be admissible in case she is already having two surviving children at the time of adoption.

(4) Child adoption leave shall not be debited against the leave account.] [Note: - "Child" for the purpose of this rule will include a child taken as ward by the Government servant, under the Guardians and Wards Act, 1890 or the personal Law applicable to that Government servant, provided such a ward lives with the Government servant and is treated as a member of the family and provided such Government servant has, through a special will, conferred upon that ward the same status as that of a natural born child.] The said Rule was substituted by notification dated 31.03.2006 and was published in the gazette of India on 27.04.2006; to take effect from 31.03.2006.

It appears that prior to the insertion of Rule 43-B, the said rule was numbered as 43-A and was inserted vide notification dated 22.10.1990, which was published in the gazette of India, on 26.01.1991. The said notification was, however, substituted by another notification dated 04.03.1992, which in turn was published in the gazette of India on 14.03.1992.

13.7 Rule 43-B, which enables the female employee with fewer than two surviving children, to avail of child adoption leave for a period of 180 days affixes, inter alia, a condition that there should be in place a "valid adoption" of a child below the age of one year. The period of 180 days commences immediately after the date of valid adoption. [See sub-rule (1) of Rule 43-B] 13.8 Clause (a) of sub-rule (3) of Rule 43-B enables a female employee to combine child adoption leave with leave of any other kind. Clause (b) of sub-rule (3) of Rule 43-B, entitles a female employee in continuation of child adoption leave granted under sub-rule (1), on valid adoption of a child to apply for leave of the kind due and admissible (including leave not due and commuted leave not exceeding 60 days without production of medical certificates) for a period up to one year, albeit reduced by the age of adopted child on the date of "valid adoption". In other words, this sub-rule allows a female employee to apply for any other leave which is due and admissible in addition to child adoption leave. There is, however, a proviso added to the said sub-rule which prevents a female employee to avail of such leave if she already has two surviving children at the time of adoption. 13.9 As in the other rules, child adoption leave is not to be debited against the leave account.

14. Thus, a reading of Rule 43 would show that while it is indicated in sub-rule (1) as to when the period of leave is to commence, that is, from the date of maternity; the expression 'maternity' by itself has not been defined. As a matter of fact, sub-rule (3) of Rule 43 shows that if the pregnancy is not carried to full term on account of miscarriage, which may include abortion, a female employee is entitled to leave not exceeding 45 days.

15. There are two ways of looking at Rule 43. One, that the word, 'maternity' should be given the same meaning, which one may argue inheres in it, on a reading of sub-rule (3) of Rule 43; which is the notion of child bearing. The other, that the word "maternity", as appearing in sub-rule (1) of Rule 43, with advancement of science and technology, should be given a meaning, which includes within it, the concept of motherhood attained via the surrogacy route. The latter appears to be more logical if, the language of Rule 43-A, which deals with paternity leave, is contrasted with sub-rule (1) of Rule 43. Rule 43-A makes it clear that a male employee would get 15 days of leave "during the

confinement of his wife for child birth", either 15 days prior to the event, or thereafter, i.e. after child birth, subject to the said leave being availed of within 6 months of the delivery of the child. 15.1 There is no express stipulation in sub-rule (1) of Rule 43 to the effect that the female employee (applying for leave) should also be one who is carrying the child. The said aspect while being implicit in sub-rule (1) of Rule 43, does not exclude attainment of motherhood via surrogacy. The attributes such as "confinement" of the female employee during child birth or the conditionality of division of leave into periods before and after child birth do not find mention in Rule 43(1).

15.2 Having regard to the aforesaid position emanating upon reading of the Rules, one is required to examine the tenability of the objections raised by the respondents.

16. The argument of the respondents, in sum, boils down to this: that the word 'maternity' can be attributed to only those female employees, who conceive and carry the child during pregnancy. In my view, the argument is partially correct, for the reason that the word 'maternity' pertains to the 'character, condition, relation or state of a mother'6. In my opinion, where a Black's Law Dictionary , 6th Edition at page 977 surrogacy arrangement is in place, the commissioning mother continues to remain the legal mother of the child, both during and after the pregnancy. To cite an example : suppose on account of a disagreement between the surrogate mother and the commissioning parents, the surrogate mother takes a unilateral decision to terminate the pregnancy, albeit within the period permissible in law for termination of pregnancy - quite clearly, to my mind, the commissioning parents would have a legal right to restrain the surrogate mother from taking any such action which may be detrimental to the interest of the child. The legal basis for the court to entertain such a plea would, in my view, be, amongst others, the fact that the commissioning mother is the legal mother of the child. The basis for reaching such a conclusion is that, surrogacy, is recognized as a lawful agreement in the eyes of law in this country. [See Baby Manji Yamada v. Union of India, (2008) 13 SCC 518]. In some jurisdictions though, a formal parental order is required after child birth.

16.1 Therefore, according to me, maternity is established vis-a-vis the commissioning mother, once the child is conceived, albeit in a womb, other than that of the commissioning mother.

16.2 It is to be appreciated that Maternity, in law and / or on facts can be established in any one of the three situations : First, where a female employee herself conceives and carries the child. Second, where a female employee engages the services of another female to conceive a child with or without the genetic material being supplied by her and / or her male partner. Third, where female employee adopts a child.

16.3 In so far as the third circumstance is concerned, a specific rule is available for availing leave, which as indicated above, is provided for in Rule 43-B. In so far as the first situation is concerned, it is covered under sub-rule (1) of Rule 43. However, as regards the second situation, it would necessarily have to be read into sub-rule (1) of Rule 43. 16.4 To confine sub-rule (1) of Rule 43 to only to that situation, where the female employee herself carries a child, would be turning a blind eye to the advancement that science has made in the meanwhile. On the other hand, if a truncated meaning is given to the word 'maternity', it would result in depriving a large number of women of

their right to avail of a vital service benefit, only on account of the choice that they would have exercised in respect of child birth.

17. The argument of the respondents that the underlying rationale, for according maternity leave (which is to secure the health and safety of pregnant female employee), would be rendered nugatory - to my mind, loses sight of the following:

(i) First, that entitlement to leave is an aspect different from the right to avail leave.

(ii) Second, the argument centres, substantially, around, the interest of the carrier, and in a sense, gives, in relative terms, lesser weight to the best interest of the child.

17.1 In a surrogacy arrangement, the concern of the commissioning parents, in particular, the commissioning mother is to a large extent, focused on the child carried by the gestational mother. There may be myriad situations in which the interest of the child, while still in the womb of the gestational mother, may require to be safeguarded by the commissioning mother. To cite an example, a situation may arise where a commissioning mother may need to attend to the surrogate/ gestational mother during the term of pregnancy; because the latter may be bereft of the necessary wherewithal. The lack of wherewithal could be of : financial nature (the arrangement in place may not suffice for whatever reasons), physical condition or emotional support or even a combination of one or more factors stated above. In such like circumstances, the commissioning mother can function effectively, as a care-giver, only if, she is in a position to exercise the right to take maternity leave. To my mind, to curtail the commissioning mother's entitlement to leave, on the ground that she has not conceived the child, would work, both to her detriment, as well as, that of the child.

18. The likelihood of such right, if accorded to the commissioning mother, being misused can always be curtailed by the competent leave sanctioning authority.

18.1 At the time of sanctioning leave the competent authority can always seek information with regard to circumstances which obtain in a given case, where application for grant of maternity leave is made. The competent authority's scrutiny, to my mind, would be keener and perhaps more detailed, where leave is sought by the commissioning mother at the pre-natal stage, as against post-natal stage. If conditions do not commend that leave be given at the pre-natal stage, then the same can be declined. 18.2 In so far as post-natal stage is concerned, ordinarily, leave cannot be declined as, under most surrogacy arrangements, once the child is born, its custody is immediately handed over to the commissioning parents. The commissioning mother, post the birth of the child, would, in all probability, have to play a very crucial role in rearing the child.

18.3 However, these are aspects which are relatable to the time and the period for which maternity leave ought to be granted. The entitlement to leave cannot be denied, to my mind, on this ground.

19. In this context, I may only refer to a judgement of the Labour Court of South Africa, in Durban in MIA v. State Information Technology Agency (Pty) Ltd., (D312/2012) [2015] ZALCD20 (dated: 26 March 2015). The applicant before the court, who was a male employee, challenged the refusal by

his employer to grant him maternity leave on the ground that he was not the biological mother of the child under the surrogacy agreement. 19.1 The principal ground of challenge was that such refusal constituted unfair discrimination on the grounds of gender, sex, family responsibility and sexual orientation, as provided in Section 61 of the Employment Equity Act (Act 55 of 1998).

19.2 The provision pertaining to maternity leave, as adverted to in the judgement, was contained in Section 25 of the Basic Conditions of Employment Act (Act 75 of 1997). The relevant part, as extracted in the judgement, is set out hereineblow:

> "..(1). An employee is entitled to at least four consecutive months maternity leave.
>
> (2). An employee may commence maternity leave - a. at any time from four weeks before the expected date of birth, unless otherwise agreed; or b. x x x x "

19.3 The common case between the parties was that the respondent- employer's policy was similar to the provisions of the Basic Conditions of the Employment Act. The respondent-employer policy provided "paid maternity leave of a maximum of four months", and that, the said leave was to be taken "four weeks prior to the expected date of birth or at an earlier date".

19.4 In defence, the argument of the respondent-employer was that, its policy was not discriminatory, and therefore, it was argued that the word 'maternity' defined the character of the leave viz. that it was a right which was to be enjoyed only by female employees. In the pleadings, the respondent-employer averred that its maternity leave policy was specifically designed to cater to the following:

> "...to cater for employees who give birth .... based on an understanding that pregnancy and childbirth create an undeniable physiological effect that prevents biological mothers from working during portions of the pregnancy and during the post-partum period.
>
> Thus at least 10 weeks of maternity leave benefits have been introduced to protect birth mothers from an earning interaction due to the physical incapacity to work immediately before and after childbirth.."

19.5 The ruling of the Court sheds some light, in my view, on the issue at hand. The observations made in the judgment being relevant, are extracted hereinbelow.

> "...[13] This approach ignores the fact that the right to maternity leave as created in the Basic Conditions of Employment Act in the current circumstances is an entitlement not linked solely to the welfare and health of the child's mother but must of necessity be interpreted to and take into account the best interests of the child. Not to do so would be to ignore the Bill of Rights in the Constitution of the Republic of South Africa and the Children's Act. Section 28 of the Constitution provides:

28 Children :

(1) every child has a right-

a....

b. To family care or parental care ...

[14] The Children's Act specifically records not only that the act is an extension of the rights contained in Section 28 but specifically provides:

Best interests of child [is] paramount In all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance must be applied.

[15] Surrogacy agreements are regulated by the Children's Act.

[16] The surrogacy agreement specifically provides that the newly born child is immediately handed to the commissioning parents. During his evidence the applicant explained that for various reasons that he and his spouse had decided that he, the applicant, would perform the role usually performed by the birthmother by taking immediate responsibility for the child and accordingly he would apply for maternity leave. The applicant explained that the child was taken straight from the surrogate and given to him and that the surrogate did not even have sight of the child. Only one commissioning parent was permitted to be present at the birth and he had accepted this role.

[17] Given these circumstances there is no reason why an employee in the position of the applicant should not be entitled to "maternity leave" and equally no reason why such maternity leave should not be for the same duration as the maternity leave to which a natural mother is entitled..."

(emphasis is mine)

20. In our Constitution, under Article 39(f), which falls in part IV, under the heading Directive Principles of the States policy, the state is obliged to, inter alia, ensure that the children are given opportunities and facilities to develop in a healthy manner. Similarly, under Article 45, State has an obligation to provide early childhood care.

20.1 Non-provision of leave to a commissioning mother, who is a employee, would, to my mind, be in derogation of the stated Directive Principles of State Policy as contained in the Constitution.

21. In this context, regard may also be had to Article 6 of the United Nations Convention on Rights of Child (UNCRC).

21.1 Article 6 of the UNCRC provides that the States, which are party to the Convention, shall recognize that every child has the inherent right to life. A State-party is thus obliged to ensure, to the maximum extent possible, the survival and development of the child. Undoubtedly, India is a signatory to the UNCRC.

21.2 There is no municipal law, which is in conflict with the provisions of Article 6 of the UNCRC. The State, therefore, is obliged to act in a manner which ensures that it discharges its obligations under the said Article of the UNCRC. [See Jolly George Varghese v. Bank of Cochin, (1980) 2 SCC 360; Vishaka v. State of Rajasthan, (1997) 6 SCC 241 and National Legal Services Authority Vs. Union of India, (2014) 5 SCC 438 at para 484 to 487 / para 51 to 60].

22. The Madras High Court in K. Kalaiselvi's case equated the position of an adoptive parent to that of a parent who obtains a child via a surrogacy arrangement. The observations of the court, to that effect, are found in the following paragraphs of the judgement.

> "..13. Alternatively, he contended that if law can provide child care leave in case of adoptive parents as in the case of Rule 3-

A7 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 Rule 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.

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..."

22.1 The ratio of the judgement, to my mind, is that, an adoptive parent is no different from a commissioning parent, which seeks to obtain a child via a surrogacy arrangement. The Madras High Court thus interpreted Rule 3-A of the Madras Port Trust Regulation to include a female employee who seeks to obtain a child via a surrogacy arrangement.

23. In the instant case, in so far as Rule 43-B obtains, the situation is somewhat similar to that which prevailed in K. Kalaiselvi's case. 23.1 Having said so, in my opinion, the impediment perhaps in applying the ratio set forth in K. Kalaiselvi's case would be, if at all, on account of the presence of the expression, 'valid adoption', in Rule 43-B; which is also one of the objections taken by the respondents to the entitlement to leave by a commissioning mother under the said Rule.

23.2 For the sake of completeness I must refer to the judgement of the Kerala High Court on somewhat similar issue in the matter of P. Geetha vs The Kerela Livestock Development Board Ltd. 2015 (1) KLJ 494. However, the gamut of rules that this court is called upon to examine are not, in their entirety, similar to the ones that were before the Kerala High Court. To cite an example in P. Geetha's case the rules framed by the Kerala Livestock Development Board did not provide for paternity leave. 23.3 Therefore, in my view, in such like situations, the appropriate course would be to allow commissioning mothers to apply for leave under Rule 43(1).

24. In view of the discussion above, the conclusion that I have reached is as follows :-

(i). A female employee, who is the commissioning mother, would be entitled to apply for maternity leave under sub-rule (1) of Rule 43.

(ii). The competent authority based on material placed before it would decide on the timing and the period for which maternity leave ought to be granted to a commissioning mother who adopts the surrogacy route.

(iii). The scrutiny would be keener and detailed, when leave is sought by a female employee, who is the commissioning mother, at the pre-natal stage. In case maternity leave is declined at the pre-natal stage, the competent authority would pass a reasoned order having regard to the material, if any, placed before it, by the female employee, who seeks to avail maternity leave. In a situation where both the commissioning mother and the surrogate mother are employees, who are otherwise eligible for leave (one on the ground that she is a commissioning mother and the other on the ground that she is the pregnant women), a suitable adjustment would be made by the competent authority.

(iv). In so far as grant of leave qua post-natal period is concerned, the competent authority would ordinarily grant such leave except where there are substantial reasons for declining a request made in that behalf. In this case as well, the competent authority will pass a reasoned order.

25. The writ petition is disposed of, in the aforementioned terms.

26. Parties shall, however, bear their own costs.

RAJIV SHAKDHER, J.

JULY 17, 2015 kk/yg