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Employment and Maternity Protection: Understanding Poor Coverage of Beneficial Legislation through Content Analysis of Some Judgments

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Abstract

This study is a small part of a larger study undertaken by the Tata Institute of Social Sciences [TISS] along with ILO, New Delhi office, and the Ministry of Labour, to assess the coverage and effectiveness of national efforts to provide quality maternity protection for all. Among the overall objectives listed in the Terms of Reference document of TISS, it is hoped that the study will "bring to light incidences/signs of evasion tactics deployed by employers to avoid paying maternity protection [for example hiring less women, hiring women on casual and contract basis] under the MB and ESI Acts in particular and in other schemes, and assess whether the evasion is aggravated in the case of an employer liability scheme".

An important piece of legislation in post-Independent India is The Maternity Benefit [MB] Act, 1961. Over the years, the Courts have had to deal with several cases from aggrieved women workers who have alleged denial of benefits under this Act despite, according to them, being eligible for the benefits. This study has undertaken a content analysis of a few cases filed for relief under this Act.

We have examined around twenty-seven cases filed under this Act. The cases have been thematically ordered to highlight different aspects as well as the many ways in which the beneficial purpose for which this Act was enacted has been less than what it should have been. Each of the broad heads into which the cases have been grouped themselves highlight several inter-connected issues.

A general but important theme for resolution that emerges from this exercise is the insufficient attention that has been paid all

along to the interface, or rather the lack of it, between the Maternity Benefit Act, 1961, and other laws, Acts, etc, governing conditions of employment. The larger question that this raises is the following: given the importance of the Maternity Benefit Act should not the Legislative Bodies of this country followed up the enactment of this Act with 'rules of operation' clearly specifying how the provisions of this Act needed to be incorporated, even if it required amendments to other laws/Acts, so that the beneficial purpose for which the Maternity Benefit Act, 1961 was passed served that purpose?

Secondly, whether State or the private sector, the attempt always is to pay the woman employee a lesser [than would be admissible under the Maternity Benefit Act, 1961] quantum of benefit, be it leave or money.

Three, while the Maternity Benefit Act, 1961, itself does not state anything on the number of times a woman worker can avail of benefit under the Act, service rules of organizations incorporating GOI's population control policies have taken precedence over the MB Act, 1961, to the detriment of women workers.

Context of the Exercise

The Tata Institute of Social Sciences [TISS] along with ILO, New Delhi office, and the Ministry of Labour, has undertaken a study to assess the coverage and effectiveness of national efforts to provide quality maternity protection for all. TISS is the nodal agency for the project.

Among the overall objectives listed in the Terms of Reference document of TISS, it is hoped that the study will "bring to light incidences/signs of evasion tactics deployed by employers to avoid paying maternity protection [for example hiring less women, hiring women on casual and contract basis] under the MB and ESI Acts in particular and in other schemes, and assess whether the evasion is aggravated in the case of an employer liability scheme".

This, a small part of the above study, has been conceptualized as follows: Post-independence, the country has put in place a number of measures ostensibly to ensure that workers are employed under just and humane conditions and are provided with maternity relief, among others. An important piece of legislation in post-Independent India is The Maternity Benefit [MB] Act, 1961. Over the years, the Courts have had to deal with several cases from aggrieved women workers who have alleged denial of benefits under this Act despite, according to them,

being eligible for the benefits. This study has undertaken a content analysis of a few cases filed for relief under this Act, to help comprehend, among other things:

- Categories of workers who have been denied, or, given less than entitled benefit
- Nature of establishments that deny such benefits
- Reasons cited by establishments for denying benefits
- Reasons for Courts' acceptance or rejection of arguments by employers/petitioners

The larger question on which, we hope, this exercise will throw light on, is in enabling us to evaluate the oft-repeated argument that, this country has the necessary laws but that the problem lies largely in their poor implementation [see Box 1]. Analyzing the arguments of employers [whether private or public] for example, for denying benefits, should, in our opinion, be able to explicate how 'rules of operation' drafted to operationalize benefits under this Act actually work towards rendering workers ineligible for benefits legally due to them. Put differently, the significance of this exercise lies in unraveling policy practices that shift the policy away [in this case the policy as espoused in the Maternity Benefit Act, 1961] from its stated objectives.

BOX 1

"… the most common criticisms made by analysts commenting on different sets of policies are: [i] A weak nexus between policy and instruments; [ii] the large degree to which administrative discretion has been retained and used to dilute or defeat policy objectives… On a technical plane, critics of policy have dealt with such inconsistencies as faults or fissures in policy formation. But I would suggest, that the Freudian insight that traces lapses to intention may be highly relevant in understanding policy contradiction. The model of reference could be Freud's treatment of lapses or errors as symptoms of conflicts; that is, as results of the mutual interference of two different intentions, the intention interfered with and the interfering tendency" [Guhan, 1985:259].

Appendix 1 reproduces a Table from an Official document that, among other things, indicates the 'effectiveness' of coverage of workers under different legislations. Specifically, as per this document, as of 1999-2000, the MB Act, 1961, was able to cover only 16% of the total number of workers eligible for coverage under this Act.

We have referred to around twenty judgments among the cases

filed under this Act [Details in Appendix 2]. Several of these cases also refer to other similar cases/judgments by way of precedent in the text of the judgment itself. Such cross-references are crucial since, among other things, they point to the following: notwithstanding the fact that a particular judgment may have dealt with an issue of interpretation of law/Constitutional provision/particular Clause under the MB Act, 1961, this by itself does not preclude filing of similar cases using similar arguments necessitating reinforcing an earlier judgment.

The cases have been thematically ordered to highlight different aspects as well as the many ways in which the beneficial purpose for which this Act was enacted has been less than what it should have been. A point that we will note but not labour because of the very nature of litigation process in this country [and which is not unique to cases filed under the Act under consideration] is the enormous time, patience, not to mention, financial resources, that have been expended, in the quest for justice. Suffice it to mention, in this context, the fact that, even as it takes the aggrieved woman worker almost a decade in getting justice, the interim period was one of unemployment, since, in a few cases the application of the worker for maternal leave with benefit was answered by employers with termination notices. The route that the litigation process has involved, all the way from a local Labour Court/ Industrial Tribunal to the Apex Court of the country, namely, the Supreme Court, has taken upwards of a decade in several cases. Since this exercise is confined to content analysis of judgments, there is no way of ascertaining whether the Apex Court's directives, be it reinstatement of retrenched workers with back wages or any other, have been complied with within the time stipulated.

THEMES COVERED IN THE JUDGMENTS STUDIED

Questioning of Constitutional Validity of Acts enacted for the benefit of workers, a recurring example of an Act constantly under litigation being the Beedi and Cigar Workers [Conditions of Employment] Act, 1966.

Private, Non-State Bodies have time and again raised issues relating to Constitutional validity of imposition of whole Acts and/or parts of Acts. As we have noted in a few of the cases, the Apex Court has had to come to the rescue of workers, however torturous and time-consuming the process of adjudicating on such issues have been. It is significant that in one of the important legislations in this country, namely, the Beedi and Cigar Workers [Conditions of Employment] Act, 1966, the

Apex Court has not only upheld the Constitutional validity of the Act but has also pleaded with the Legislature to amend the act suitably to make it workable.

BOX 2

Additional noting by Justice Alagiriswami in the Supreme Court Judgment dated 31/01/1974 relating to Mangalore Ganesh Beedi Works vs. Union of India

The Act is a compromise between the original intentions of the Government and the modifications they had to make in the proposed measure as a result of concessions intended to bring the home workers within the scope of the Act. The original intention was not to permit beedi rolling in private homes which will involve thousands of labourers in thousands of far-flung homes and the difficulty of applying the provisions of the measures to them. The result is an act that is likely to give rise to many difficulties in its actual working. It is obvious on a reading of the measure that its purpose is to rope in every possible person who could be brought in as an employer. But the result of the definitions of the Act is that everybody would be a principal employer, employer and contractor and every labour will be contract labour…

The difficulty of applying the provisions of the Maternity Benefits Act is… apparent. The very purpose of allowing the home workers to work in their homes being that the work of rolling beedis is light work, which men and women can do in their homes during their spare hours, the provision of the Maternity Benefits Act regarding women not being allowed to do arduous labour for a certain period before and after delivery is not apparent. And how can the provision be applied to women who cannot be said to be, so to say, employed continuously for a certain period before the confinement.

I must make it clear that my objection is not to any of the provisions on the ground of their unreasonableness or constitutionality…But good intentions should not result in a legislation which would become ineffective and lead to a lot of fruitless litigation over the years…I think it would be good in the interest of all concerned if the Act is amended as early as possible to remove all the lacunae and the difficulties pointed out above. These difficulties have arisen because of an attempt blindly to apply the provisions, which would be quite workable if they are applied to conditions where the Factories Act would be applicable, where the labour is regular in its attendance - every day as well as over a period, to conditions of work which are vastly different as well as to people who work at home without a conscious attempt to mould them to suit those conditions. The sooner that is done the better for all concerned.

That the apprehensions expressed by Justice Alagiriswami way back in 1974 [see Box 2] are not unfounded is very evident from the subsequent and continuing cases being filed under the Beedi and Cigar Workers [Conditions of Employment] Act, 1966, by women beedi workers denied maternity benefits legitimately due to them under the Act. For example: in a judgment delivered on 24/03/1995 [on a case initially filed before a Labour Court in Maharashtra on 24/10/1986], the Constitutional validity of a particular section of the Beedi and Cigar Workers [Conditions of Employment] Act, 1966, was again called into question. [See Appendix 3

for details]. What needs to be underlined in such cases is that, the employers through their Counsel do not address substantive issues such as non-recognition and/or termination of the women workers [consequent to their application for maternity leave with benefit] that the Asst. Labour Commissioner had pointed out to be bad in law; rather by questioning the authority of the Asst. Labour Commissioner to pass an order, they attempted to convert the case into one of violation of Article 14 of the Constitution. Once again, the Apex Court was called upon to uphold the Constitutional validity of the Beedi Act, 1966, so that the women beedi workers could get their legitimate due.

Notwithstanding the above, the denial of maternity benefits for woman beedi workers under some clause or the other of the Beedi Act, 1966, continues unabated. We will refer to some of these other cases under appropriate heads.

Lack of clarity regarding how the Maternity Benefit Act, 1961, is expected to interface with other Acts and/or Service Rules of different establishments governing conditions of employment

A general but important theme for resolution that emerges from this exercise is the insufficient attention that has been paid all along to the interface, or rather the lack of it, between the Maternity Benefit Act, 1961, and other laws, Acts, etc, governing conditions of employment in particular sectors, industries within sectors, specific establishments, specific modes of employment, etc. The larger question that this raises is the following: given the importance of the Maternity Benefit Act should not the Legislative Bodies of this country have followed up the enactment of this Act with 'rules of operation' clearly specifying how the provisions of this Act needed to be incorporated, even if it required amendments to other laws/Acts, so that the beneficial purpose for which the Maternity Benefit Act, 1961 was passed served that purpose? Unfortunately, while to some extent the Apex Court of this country has performed this task, this redressal has been achieved at great personal cost in terms of time and money to those few tenacious individuals who, along with those who supported them in this endeavour, have been able to withstand the ordeal that has taken almost upwards of a decade. Notwithstanding the landmark pronouncements by the Apex Court on very many issues of law, interpretations of laws, etc, in the course of its examination of the cases and subsequent judgments, the reach of these pronouncements have been minimal given that these pronouncements by themselves have not led to changes/amendments in other Acts/Laws governing conditions of employment as far as women workers' access to maternity benefit is concerned.

Quantum of Benefit: Definition of 'week' and should Sundays be included in calculation of Maternity Leave Wages

A theme that is linked to the issue of non-interface of MB Act, 1961, with other Acts/Laws in operation is the quantum of maternity benefit, be it number of days of leave, before and after delivery, and/or monetary compensation during the period of leave. Whether State or the private sector, the attempt always is to pay the woman employee a lesser [than would have been admissible under the Maternity Benefit Act, 1961] quantum of benefit, be it leave or money. The manner in which lesser quantum of benefit is justified by employers and subsequently dealt with by Courts is revealing. The elaborate discussions relating to what constitutes a 'week', which service rules govern a particular employment and what is admissible under those service rules [even if the latter goes contrary to the provisions of the Maternity Benefit Act, 1961], is the establishment covered by the Act, etc., these are a few of the several themes that have engaged the Courts in deciding eligibility and quantum of benefit [see Box 3].

BOX 3

The Apex Court judgment delivered on 12/10/1977 relating to 'week' and wageless holidays for calculation of maternity leave wages

[Thus] we are of the opinion that computation of maternity benefit has to be made for all the days including Sundays and rest days which may be wageless holidays comprised in the actual period of absence of the woman extending up to six weeks preceding and including the day of delivery as also for all the days falling within the six weeks immediately following the day of delivery thereby ensuring that the woman worker gets for the said period not only the amount equaling 100% of the wages which she was previously earning in terms of section 3[n] of the Act but also the benefit of the wages for all the Sundays and rest days falling within the aforesaid two periods which would ultimately be conducive to the interests of both the woman worker and her employer.

[1978 AIR 12 1978 SCR [1] 701

Provisions of MB Act, 1961 vis-à-vis Service Rules of Establishments: How many Births qualify for Maternity Protection?

It is interesting to note that, while the MB Act, 1961, itself 'does not fix any ceiling on the number of deliveries made by a female worker' as ruled by the learned Judge of the Madras High Court in a judgment delivered on 09/06/2008 [see Box 4] there are several cases where Service Rules of Establishments, including those of certain state governments explicitly deny maternity benefit beyond two living children citing GOI's population control policy.

BOX 4

In writ petitions filed by two owners of beedi establishments, against the Deputy Commissioner of Labour [Inspection, Beedi and Cigar Establishments] Chief Inspector, Appellate Authority under the Maternity Benefit Act, 1961 [Respondent 1], Inspector of Labour [Women], Under Maternity Benefit Act, 1961, Tirunelveli, [Respondent 2], and Ms. Bhadrakali and Ms. Santhammal, both beedi workers and Respondents 3, *'the short question that arises in these two writ petitions is whether the third respondent in each of the writ petitions are entitled to get maternity benefit in respect of the maternity leave availed by them for delivering their third child'*.

Learned counsel for Bhadrakali and Santhammal, the third respondents in both the writ petitions submitted that… **the M B Act does not provide any restriction on the benefit to be received by a woman worker if she delivers more than two times. He also submitted that the policy of the Government in having a two-child norm cannot be read in to the Act and whatever applies to a Govt servant need not be made applicable to the Beedi workers, who are governed by the provisions of M B Act. To show the difference between government servants and other workers, he also submitted that in respect of government servants, no Maternity Leave will be given if marriage does not precede delivery but whereas in the case of workers governed by the M B Act, even an unmarried female worker is entitled for the maternity benefit if she delivers a child… The allegations made by the third respondents before the appellate authority that undertakings have been taken from female workers that they will not claim any maternity benefit beyond two deliveries, is a serious allegation, and if proved, the petitioners are liable for prosecution under the provisions of the MB Act, 1961, read with Beedi and Cigar Act 1996.** [Emphasis added]

What needs to be emphasized at this juncture is the following: In the absence of an Apex Court ruling on the important point, namely, whether provisions of the Maternity Benefit Act, 1961, over rule service conditions of establishments that may contradict or be at variance with the provisions of the MB Act, 1961, judgments of High Courts dealing with similar issues have been contradictory, some upholding the supremacy of the provisions of the MB Act, 1961, over service rules of individual establishments [whether public or private], while a few judgments have ruled that as long as service rules have not been amended, the provisions of the MB Act, 1961 cannot be deemed to be automatically applicable.

For example, in the case of Parkasho Devi vs. Uttar Haryana Bijli Vitran Nigam Limited and Others delivered at the Punjab High Court on 9/5/2008, it was averred that, since the Service Rules of the establishment expressly denied provision of maternity benefit beyond two living children, the same was being upheld by the High Court of Punjab and Haryana.

What is not clear to us, however, is why the judgment in Box 4 did not also deal with the theme of allegation referred to above, wherein, the women beedi workers were made to give an undertaking that they will not claim any maternity benefit beyond two deliveries.

Status of Employment Impinging on Eligibility to avail of Maternity Leave and Benefit

In a landmark judgment [delivered on 08/03/2000] that touched the core of the nature of employment of large numbers of women in this country, the Supreme Court ruled that the Maternity Benefit Act, 1961, was applicable to daily wage earners and women employed, temporarily, casually and/or on contract. [See Box 5]. Once again, while the process of achieving justice through this judgment has been arduous and time consuming, this judgment by no less a Body than the Apex Court itself has not put paid to further litigation arising out of linking woman's nature of employment to her being eligible for maternity leave/benefit.

Subsequent to the Supreme Court ruling in the Delhi Muster Roll case, several judgments thereafter reinforced the point that status of employment cannot be made the basis for denial of maternity benefit [See, for example, Anima Goel vs. Haryana State Marketing Board judgment delivered on 17.11.2006 by the Punjab and Haryana Court, Mrs. Bharti Gupta vs. Rail India Technical and Economical Services Ltd. [RITES] and Others judgment delivered on 09/08/2005, etc.

Circumventing Application of Beneficiary legislation through enactment of Government Resolutions:

The case of Bhartiben Babulal Joshi vs. Administrative Officer [judgment delivered on 23/12/2003] reveals how Government Resolutions aiding ad hoc and temporary appointments become handy for even government establishments to deny maternity benefit to personnel thus appointed. Bharatiben Joshi was appointed as Vidya Sahayak {Assistant Teacher} and it was contended by her employer that while she could take maternity leave it would be without pay. Learned Assistant Govt. Pleader appearing for the respondents submitted that according to the Govt. Resolution, Vidya Sahayaks who are not regularly appointed are not entitled for such benefit and therefore the respondents were right in not granting such benefit to the petitioner.

However the Judge ruled thus: Considering the provisions of the MB Act, 1961, and also considering the observations made by the Apex Court in the Delhi Muster Roll case and also considering the facts of the present petition, according to my opinion, the ratio of the decision of

BOX 5

Municipal Corporation of Delhi vs. Female Workers [Muster Roll]: Judgment delivered on 08/03/2000 [Summary of Case and Judgment]

Female workers [muster roll] engaged by the MCD [Corporation] raised a demand for grant of maternity leave which was made available only to regular female workers but was denied to them on the ground that their services were not regularized and, therefore they were not entitled to any maternity leave. Their case was espoused by the Delhi Municipal Workers Union and consequently the following question was referred by the Secretary [Labour] Delhi Administration to the Industrial Tribunal for adjudication: Whether the female workers working on Muster Roll should be given any maternity benefit? If so, what directions are necessary in this regard?

The Industrial Tribunal, which has given an award in favour of the women employees, has noticed that women employees have been engaged by the Corporation on muster roll, that is to say on daily wage basis for doing various works in projects like construction of buildings, digging of trenches, making of roads, etc., but have been denied the benefit of maternity leave. The Tribunal has found that though the women employees were on muster roll and had been working for the Corporation for more than 10 years, they were not regularized. The Tribunal, however came to the conclusion that the provisions of the Maternity Benefit Act had not been applied to the Corporation and, therefore, it felt that there was a lacuna in the Act. It further felt that having regard to the activities of the Corporation, which had employed more than a thousand women employees, it should have been brought within the purview of the Act so that the maternity benefits contemplated by the Act could be extended to the women employees of the Corporation. It felt that this lacuna could be removed by the State Govt. by issuing the necessary notification under the Proviso to Section 2 of the Act… It consequently issued a direction to the management of the Municipal Corporation, Delhi to extend the benefits of the Maternity benefit Act, 1961, to such muster roll female employees who were in continuous service of the management for three years or more and who fulfilled the conditions set out in Section 5 of the Act…

Learned Counsel for the Corporation contended that since the provisions of the Act have not been applied to the Corporation, such a direction could not have been issued by the Tribunal.

The Apex Court however felt that, "This is a narrow way of looking at the problem which is human in nature and anyone acquainted with the working of the Constitution, which aims at providing social and economic justice to the citizens of this country, would out rightly reject the contention"…

Next, it was contended that therefore the benefits contemplated by the MB Act, 1961 can be extended only to workmen in an 'industry' and not to muster roll employees of the Corporation.

Again the Apex Court felt that "This is too stale an argument to be heard. Learned Counsel also forgets that Municipal Corporation was treated to be an 'industry' and, therefore, a reference was made to the Industrial Tribunal, which answered the reference against the Corporation, and it is this matter which is being agitated before us… Now it is to be remembered that the Municipal Corporations or Boards have already been held to be 'industry' within the meaning of 'Industrial Disputes Act'…

We conclude our discussion by providing that the direction issued by the Industrial Tribunal shall be complied with by the MCD by approaching the State Govt. as also the Central Govt. for issuing necessary Notification under the Proviso to Sub-section [1] of Section 2 of the MB Act 1961, if it has not already been issued. In the meantime, the benefits under the Act shall be provided to the women [muster roll] employees of the Corporation who have been working with them on daily wages.

the apex court would also apply to the facts of the present case because here also, benefit of maternity leave has been in substance denied to the petitioner only on the ground that she is not regularly appointed on the post of Vidya Sahayak and therefore, she is not entitled for such benefit on the basis of the GR, though maternity leave has been sanctioned by the respondents but without wages… I am therefore of the opinion that the petitioner is entitled for the maternity leave…

Truncating Quantum of Maternity Leave and Terminating Service

Seema Gupta vs. Guru Nanak Institute of Management [judgment delivered on 20/11/2006]. This judgment is interesting in that the Judge, among other things, widens the scope of discussion on implications of denial of maternity leave by establishments on the plea of 'exigencies of service' [see Box 6].

Addressing Dismissal and Stigma along with Denial of Maternity Protection

The judgment in the case relating to Yamini J. Dave vs The Director, IUCAA and Another delivered on 06.04.2004, brings out the many connected issues that had to be dealt with along with securing justice on the issue of maternity benefits. [See Appendix 4 for details].

The several interlinked issues raised by this case and judgment are worth recapitulating: one, the initial appointment on probation was arbitrarily closed after a year and employee placed on year by year extension - a provision not indicated in advertisement for the post; two, despite employee having given due notice and thereafter proceeded on maternity leave, she was issued with termination order; three, termination order was premised on a committee's allegation of misconduct by employee; four, management's acceptance of committee's recommendation of dismissal of employee with no chance for employee to present her case; five, dismissal order issued during maternity leave period, which itself is illegal.

Above all, the tortuous process of litigation, that began in 1994 and ended in 2004, also brings to the fore a crucial legal aspect of the trajectory of the case; namely, the fact that Yamini Dave's initial petition challenging her termination was dismissed by a Single Judge, which forced her to approach the Apex Court. Before the Apex Court went into the merits of the case, it had to deal with 'preliminary objection' raised by IUCAA, the respondents; the latter argued that the Dave's petition was not maintainable since IUCAA is not State/other authority within the meaning of Article 12 of the Constitution. Only after taking a decision

BOX 6

Summary of Case and Judgment, Seema Gupta vs. Guru Nanak, 20/11/2006

The petitioner [Seema Gupta] was appointed as commerce lecturer in response to an advertisement by the respondent college. She joined the College on 1st May 2001. The appointee was to be on probation for one year which could be extended for another year… The petitioner was blessed with a child on 28.12.2003 and was sanctioned maternity leave for 135 days w.e.f. 29.12.2003. She had requested for maternity leave of 180 days as per the Guru Nanak Dev University Rules [GNDU Rules] which, it is averred, allowed maternity leave for that period. The Petitioner was informed that as the Central Civil Service Rules were applicable to her service the provisions of GNDU were inapplicable… By letter dated 15.09.2004 Seema Gupta referred to Rule 43[4][b] of CCS Leave Rules whereby she was entitled to continuation of maternity leave up to a maximum period of one year and requested for extension of maternity leave. It is stated that despite the request, petitioner was terminated on the basis of unauthorized leave/absence, on 14th Oct 2004 that is within two months of the extended maternity leave.

It is alleged that undisputedly the CCS Leave Rules were applicable to the petitioner and those Rules clearly stipulate that maternity leave can be extended up to one year. In case of maternity leave even the requirement of producing medical certificate has been waived off…

According to the Judge: This is not a traditional case of an employee seeking enforcement of her contract of service, but her lament that in spite of protective provisions, relating to maternity, and in spite of her request for extended leave, which was permissible, the employer in disdain of those norms, terminated her from service. I am also not impressed with the submission that the petitioner was an employee with lesser rights, since she was on ad-hoc basis. As per the version of the respondent, she was entitled to benefits under Rule 43.

The respondent, in my considered opinion treated the request for extension of leave by five months as a normal request, without applying its mind to the peculiarities of the case. It has not furnished any reasons or justification as to why the right to claim the extended period of one years' leave, a valuable one at that, had to be rejected. Exigencies of service bind all employers; that reason would be available in all cases where a request for extended maternity leave is sought. If such reasons given in a routine manner are to be upheld, the right for extended maternity leave of up to one year, would be meaningless, as every employer can cite that as a ground for denial. The special nature of the right then would exist only on paper, in negation.

For the foregoing reasons, the impugned termination letter cannot be sustained; it is illegal and is hereby quashed. The respondent is directed to reinstate the petitioner to her post; the petitioner shall also be entitled to full arrears of salary…

on the maintainability of the petition did the Apex Court go into the details of the case. These procedural aspects speak volumes about the near impossibility of accessing beneficial legislation even when employed by a State authority.

Using Mode of Payment of Salary as a factor to deny Maternity Benefits

In his judgment delivered on 29/01/2008 in the case of Dr. Hemlata Saraswat vs. State of Rajasthan, the Judge has come down very heavily on the Government of Rajasthan and its Department of Medical and Health Services in particular on several counts, not least being the State's doublespeak on gender justice, where, on the one hand, as the Judge put it, "The government at all forums is speaking about gender equality, gender justice and betterment of status of women" and, on the other hand, "it is denying the benefit of maternity leave to its own employees under the guise that appointment is not under the regular rules, forgetting that appointment in the first place was given after due selection by following regular process of selection". The annoyance of the Judge is also very palpable in the directions it has issued to the State to recover costs "from person/persons responsible for this unnecessary litigation". We reproduce in some detail the judgment on this case [see Box 7] to reveal the continued manner in which government bureaucracies collude to make such appointment orders that denial of benefits appears as legitimate and as per law!

By Way of Conclusion

This study of judgments relating to cases under the Maternity Benefit Act, 1961, has been an eye-opener in more ways than one. To some extent it throws light on why the coverage of the Act has been abysmal including and even in the government sector; in fact the latter has time and again proved itself to be the worst employer as far as record of women workers being able to access beneficial legislation is concerned. Each of the themes into which the cases have been grouped themselves highlight several inter-connected issues. Suffice it to reiterate some of the more important themes that this exercise has thrown up for the tremendous implications for policy that they contain.

What the judgments also bring out starkly is the poor record of State as Employer. The manner in which women employed by State have been excluded from provisions of the Maternity Benefit Act, 1961, have been several and varied: one, contrary to all norms of justice, the State has employed women workers but used nomenclatures such as daily, ad

BOX 7

Dr. Smt. Hemlata Saraswat vs. State of Rajasthan and Others on 29/01/2008

In her writ petition, Dr. Hemlata Saraswat has questioned a communication dated 27.04.2006 denying her maternity leave on the ground that she is working as Medical Officer on consolidated salary and there is no provision in the Rules for granting her maternity leave.

The petitioner has averred that on the recommendations of the Selection Committee, she came to be appointed on the post of Medical Officer on a consolidated salary of Rs. 8000/ per month with issuance of appointment order on 15.09.2003 putting her engagement on contract basis… According to the petitioner, she proceeded on medical leave on 29.08.2005 by submitting a leave application, and after delivering a male child, resumed duties on 11.01.2006 with fitness certificate.

The petitioner's grievance is that, though entitled, she has been denied maternity leave by the impugned communication dated 27.04.2006 on the ground that under the service rules, there was no provision for allowing maternity leave to persons working on consolidated salary; and she has not been allowed maternity leave despite submitting a representation on 17.02.2006 and serving a notice through lawyer on 17.04.2006.

The petitioner has referred to the decisions rendered in Neetu Choudhary vs. State of Rajasthan and others. 2005 [2] DNJ [Raj] 676; and Smt. Sumitra Choudhary and Others vs, State of Rajasthan and Others, SB Civil Writ petition No. 3295/2005 decided on 19.09.2005 wherein this Court has directed grant of benefit of maternity leave to temporary workers. It is contended that there is no rationale behind refusal of maternity leave to some of the female employees while granting the same to the others. No reply to the writ petition has been filed; and the core and essential facts as stated by the petitioner in her writ petition have not been denied…

Having heard learned Counsel for the parties and having perused the material placed on record with reference to the law applicable to the case, this court is clearly of opinion that the communication dated 27.04.2006 emanating from the Directorate of Medical and Health Services, Rajasthan denying maternity leave to the petitioner with cryptic observation that the rules do not mention about grant of such leave to the Medical Officer working on consolidated salary cannot be said to be justified nor appears bona fide, particularly for having been issued even after the decisions of this Court in the case of Neetu Chowdhary [decided on 19.04.2005] and Smt. Sumitra Chowdhary [decided on 19.09.2005]; and this writ petition deserves to be allowed with costs.

The present one was clearly an avoidable litigation if the authorities concerned would have dealt with the matter with due regard to their constitutional duties and sadly enough they have chosen to proceed in utter disregard of their duties, without regard to the requirements of the rules and even in disregard to the decisions rendered by this Court. The petition thus deserves to be allowed with costs.

This petition for writ is therefore allowed and the impugned communication dated 27.04.2006 stands quashed. The respondents shall take up for consideration sanctioning of maternity leave to the petitioner as applied; and all consequential benefits thereto shall be accorded within a period of 30 days from today. The petitioner shall be accorded within a period of 30 days from today. The petitioner shall also be entitled to costs quantified at Rs. 5,500. It shall be permissible for the respondents, if so desired, but only after making payment to the petitioner, to recover the amount of costs, strictly in accordance with law, from the person/persons responsible for this unnecessary litigation.

hoc, casual, etc., and then justified denial of maternity benefit on the ground that even the amended Maternity Benefit Act, 1961, applies only to regular and temporary workers, not casual, daily or ad hoc. Two, while recruitments have followed a set procedure, appointment letters have been arbitrarily changed to render the woman employee ineligible for any benefit, maternity or otherwise. Three, when the Apex Court has come down heavily on state governments for denying maternity benefits to women employees kept for years on contract or daily basis, the bureaucracy has come up with other ways of making woman employees ineligible, namely, by citing, for example, that women employees on consolidated mode of payment of salary are not eligible for benefit under the MB Act, 1961. The Government's own Resolutions have become handy for other establishments to deny maternity benefit altogether and/or allow maternity leave but without any monetary benefit. To top it all, in a few of the cases, application for maternity leave has been answered with termination notices, an aspect that the Apex Court has specifically underlined as being illegal and bad in law.

From a feminist perspective, this exercise has been a learning exercise in several ways. An important learning is the realization that mere enactments of more laws to address specific feminist demands need to be backed by 'rules of operation' that also specify how binding these provisions are and whether existing laws governing establishments need to be amended in the light of these new women-friendly laws. The few cases dealt with above relating to operation of the Maternity Benefit Act, 1961, has revealed how and why the coverage of the Act even in the organized sector remains abysmal. Hence, while struggle for extending the coverage of the Act to establishments and women workers outside the purview of the Act needs to be strengthened, equally important is the need to struggle to unravel ways and means by which organized sector women workers get excluded from provisions of such beneficial legislation. Further, despite feminist opposition to population control policies, service rules of organizations, including some state governments, deny maternity benefit to women who already have two living children. While the Maternity Benefit Act, 1961, itself does not state anything on the number of times a woman worker can avail of benefit under the rule, service rules of organizations incorporating GOI's population control policies have taken precedence over the MB Act, 1961, to the detriment of women workers.

In short, this exercise, taking the operation of the Maternity Benefit Act 1961, has revealed how institutional arrangements have contributed

to making the Act largely dysfunctional. Viewing the theme from a feminist perspective and 'Asking the Woman Question' [a la Bartlett, 1991] reveals how the position of women workers reflects the organization of workplaces rather than the inherent characteristics of women as workers. This exposition of the effects of laws, such as the MB Act, 1961, has enabled us to demonstrate how structures, social and legal, embody norms that inherently render women workers different so that legislations directly aimed at facilitating woman worker's maternity role instead become instruments not only for their subordination but also for their dismissal from work.

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References

1. Guhan, S. 1985. "Towards a Policy for Analysis" in R. S. Ganapathy, S. R. Ganesh, Rushikesh M. Maru, Samuel Paul and Ram Mohan Rao [eds.] Public Policy and Policy Analysis in India, Sage Publications, New Delhi, p255 - 263.

2. Bartlett, Katherine, T. 1991. "Feminist Legal Methods" in Katherine T. Bartlett and Rosanne Kennedy [eds.] Feminist Legal Theory: Readings in Law and Gender, Westview Press, Boulder, Colorado, p370-403. Explicating on what 'Asking the Woman Question' is all about, Bartlett states a follows:

   "The woman question asks about the gender implications of a social practice or rule: have women been left out of consideration? If so, in what way: how might that omission be corrected? What difference would it make to do so? In law, asking the woman question means examining how the law fails to take into account the experiences and values that seem more typical of women than of men, for whatever reason, or how existing legal standards and concepts might disadvantage women. The question assumes that some features of the law may be not only non-neutral in a general sense, but also 'male' in a specific sense. The purpose of the woman question is to expose those features and how they operate and to suggest how they might be corrected" [p371].

Appendix 1

Table 7.1.2: Estimate of Workers Actually Covered under Important Regulations in India, 1999-2000

Sl. No.	Name of the Act	Workers Actually Covered by Law (lakhs)*		Percentage Share of Workers Covered by Regulations in		Effectiveness in Coverage (%)**
				Total Work force	Hired Workers	
1	Factories Act	88.2	#	2.2	4.9	73.5
2	Shops and Establishments Act	68.8	#	1.7	3.8	44.7
3	Plantation Labour Act	9.7	$	0.2	0.5	35.6
4	Mines Act	6.4	@	0.2	0.4	87.4
5	Contract Labour Act	274.2	@	6.9	15.1	n.a
6	Minimum Wages Act	141.1	&	3.6	7.8	9.3
7	Employees State Insurance Act	75.7	##	1.9	4.2	87.5
8	Employees Provident Fund Act	263.0	@@	6.6	14.5	179.5
9	Workmen's Compensation Act	26.7	$	0.7	1.5	20.3
10	Maternity Benefit Act	6.3	$	0.2	0.3	16.1
11	Beedi Workers Act	32.1	@	0.8	1.8	92.0
12	Trade Unions Act	59.1	2	1.5	3.3	15.2

Source: ** is the ratio of workers actually covered by law to workers covered by definition. Estimated from different sources of the Ministry of Labour and generally pertain to the employment in enterprises that have submitted returns under the particular Act:

Note: @Annual Reports Ministry of Labour. # Indian Labour Statistics.
$ Indian Labour Year Book. & Report on the Functioning of the Minimum Wages Act.
ESI News Letter. @@ EPF website: http://www.epfindia.nic.in/operational_stat.htm.

Source: National Commission for Enterprises in the Unorganized Sector. 2009. Challenge of Employment: An Informal Sector Perspective, Vol. 1, Main Report, p187

Appendix 2

Cases Covered in the Study:

[Note: All cases listed below were downloaded from http://indiankanoon.org in January 2010]

1. Manager, Vidarbha Tobacco Products [P] Ltd. vs Fulwantabai Ishwardas Meshram [Smt.] and others. Judgment delivered by Justice R. M. Lodha on 24/03/1995. Equivalent citations: 1995 [4] BomCr 565 [1996] ILLJ 101 Bom
2. Anima Goel, Ms. Vs. Haryana State Agricultural Marketing Board. Judgment delivered by Justice M M Kumar on 17/11/2006. Equivalent citations: [2007] IIILLJ 64 P H, 2008 [1] SLJ 121 P H
3. Yamini J Dave vs. The Director, IUCAA and Another. Judgment delivered by Justice K. Rathod on 06/04/2004
4. N. Mohammed Mohideen and Another, vs The Dy Commissioner of Labour, Inspector of Labour , Bhadrakali and Santhammal, Judgment delivered on 09/06/2008 by Justcie K. Chandru in High Court of Madras
5. Mangalore Ganesh Beedi Works and another, vs. Union of India. Judgment delivered on 31/01/1974 by Justcie A N Ray. Equivalent citations: 1974 AIR 832, 1974 SCR [3]
6. Seema Gupta vs. Guru Nanak Institute of Management. Judgment delivered on 20/11/2006 by Justice S. Ravindra Bhat
7. Municipal Corporation of Delhi vs. Female Workers [Muster Roll] and another. Judgment delivered on 08/03/2000 by Justice Saghir Ahmad
8. Mrs. Bharti Gupta vs. Rail India Technical and Economical Services Ltd. [RITES] and others. Judgment delivered on 09/08/2005 by Justice S. Ravindra Bhat
9. Tata Tea Ltd. vs Inspector of Plantations. Judgment delivered on 11/12/1990 by Justice Radhakrishna Menon
10. Mrs. Pramila Rawat vs. District Judge, Lucknow, and another. Judgment delivered on 10/05/2000 by Justice Pradeep Kant
11. Bhartiben Babulal Joshi vs. Administrative Officer. Judgment delivered on 23/12/2003 by Justice H. K. Rathod
12. B. Shah vs. Presiding Officer, Labour Court, Coimbatore and others. Date of Judgment, 12/10/1977. Bench: Jaswant Singh and V R Krishna Iyer. Equivalent citations: 1978 AIR 12 1978 SCR [1] 701
13. Dr. Hemlata Saraswat vs. State of Rajasthan and others. Judgment delivered on 29/01/2008 by Justice Dinesh Maheswari
14. Durgesh Sharma vs. State of Rajasthan and others. Judgment delivered on 24/09/2007 by Justice P S Asopa
15. Aruna S. Pardeshi [Dr.] vs. Dean, swami Ramanand Tirth Medical College and others. Judgment delivered on 22/01/1987 by Justice G H Guttal. Equivalent citations 1987 [2] BomCr 311
16. Ram Bahadur Thakur [P] Ltd. vs. Chief Inspector of Plantations. Judgment delivered on 09/2/1989 by Justice Sreedharan. Equivalent citations: [1989] IILJ 20 Ker

17. Dr. Thomas Eapen vs. Asst. Labour Officer and others. Judgment delivered on 17/03/1993 by Justice P K Shamsuddin. Equivalent citations: [1993] IILJ 847 Ker

18. Parkasho Devi vs. Uttar Haryana Bijli Vitran Nigam Ltd. and Others. Judgment delivered on 09/05/2008 by Justice Mohinder Pal. Equivalent citations: [2008] 3 PLR 248

19. Chairman, Punjab National Bank vs. Astamija Dash, 2008 AIR [SC] 3182: 2008 [7] SCR 365: 2008 [7] SC Ale 726: 2008 [3] LLJ 584. Justices S. vs. Astamija Dash, 2008 AIR [SC] 3182: 2008 [7] SCR 365: 2008 [7] SC Ale 726: 2008 [3] LLJ 584. Justices S. B. Sinha and V. S Sirpurkar

20. Arulin Ajitha Rani vs. The Principal, Film and Television Institute, Chennai. Judgment delivered on 27/06/2008 by Justice P K Misra, writ appeal no. 875 of 2006 in the High Court of Judicature at Madras.

Appendix 3

Summary of case and Judgment in Vidarbha Tobacco products [P] Ltd. vs. Fulwantabai Ishwardas Meshram and Others; Judgment delivered on 24/03/1995; 1995[4] Bom Cr 565 [1996] ILLJ 101 Bom

Smt. Fulwantabai, the worker, in the said writ petition filed an appeal under Section 31 [2] of the Beedi and Cigar Workers [Conditions of Employment] Act, 1966, before the Asst Commissioner of Labour, Gondia, on 24.10.1986. It was inter alia averred in the said appeal by her that she was beedi roller and working as such for the last 4-5 years for Vidarbha Tobacco Products, Ekodi [the petitioner employer] through Shri Chand Khan Mohamed Sheikh and Shri Khalil, the respondent - contractors. According to the worker, the petitioner-employer and the contractor did not provide log book/card to the worker and her correct name was not recorded in the register and for that an enquiry was made on spot by the Govt. Labour Officer on 25.9.1986. Due to this enquiry, the contractor terminated the services of the worker with effect from 29.6.1986 after receiving her beedis and despite repeated requests, the contractor did not give tobacco and leaves to her. On the basis of these facts, the worker prayed before the Asst Commissioner of Lab that she should be reinstated with back wages from the date of her termination. The contractor as well as petitioner-employer contested the appeal before the Asst Lab Commissioner by filing the reply on 26.3.1987. Though the reply was common by them, the contractor and employer set up the plea that he did not have any knowledge as to whether the worker had been in service with the contractor at any time. It was admitted by them that the Govt. lab officer, Gondia visited the site on 25.9.1986. However, in para 4 of the reply, the employment of worker was denied and it was for that reason that no requisite notice was required to be served on her…

The Asst Lab Commissioner after holding the enquiry and hearing the parties, held that the termination of the worker was bad in law and accordingly by the said judgment dated 6.6.1988, set aside the termination of the workman and directed the employer and the contractor to reinstate the worker with immediate effect. The worker was held entitled to guaranteed wages of 50 percent till her reinstatement. Dissatisfied with the judgment passed by the Asst Lab Commissioner allowing the appeal of worker, setting aside her termination and directing the petitioner-employer to reinstate her with 50 percent of guaranteed wages till reinstatement, has given rise to writ petition No. 15 of 1989 and similar other five writ petitions relating to different workers by different employers…

Mr. Qazi, the learned counselor the petitioner-employer first of all has challenged the

vires of Section 31 [2] [a] of the Beedi Workers Act, 1966… has contended that the said Section is violative of Art 14 of the Constitution of India as it confers unguided and uncontrolled powers on the State Govt. to appoint any person or anybody as an appellate authority for hearing the appeal filed by the employee challenging his/her discharge, dismissal or retrenchment…

What needs to be noted here is that, the employers through their Counsel did not address the substantive issues relating to termination of the workers that the Asst. Labour Commissioner had pointed out to be bad in law; rather by questioning the authority of the Asst. Labour Commissioner to pass an order, they attempted to convert the case into one of violation of Article 14 of the Constitution.

Despite the fact that the entire Beedi Workers Act 1966 has been held to be constitutionally valid by the Supreme Court in the Mangalore Beedi Works' case, Mr. Qazi contended that the Supreme Court did not examine the constitutionality of Section 31 [2] [a] of the Beedi Workers Act, 1966 from the point of view that it did not provide any guidelines but rather conferred unbridled and uncontrolled powers on the State Govt. and therefore the said provision being unconstitutional should be struck down…

The High Court Judge however ruled that… *discretion under Section 44 of the Beedi Act has been given to the State Govt; the latter may, by notification in the Official Gazette… make rule providing for the authority to whom and the time within which an appeal may be filed by a dismissed, discharged or retrenched employee… I am of the clear view that the said provisions contained in Section 31 [2] [a] is constitutional and cannot be invalidated on the ground of contravention of Article 14 of the Const. of India…*

No documentary evidence was produced by the employer to show that the workers were not in the employment with the contractor of the employer. The contractor and employer under law are required to maintain registers, logbooks etc. and from the production of the said documents if the workers were not working with them, it could have been shown that these two workers were not working with them as beedi workers. The very fact that no documentary evidence has been produced by the contractor or employer leads to an adverse inference against the employer… Therefore there is no merit in the contention of the learned counsel for petitioner-employer in these two writ petitions and the order passed by the Asst Commissioner of Lab on 6.6.1988 does not deserve to be interfered with in the extraordinary jurisdiction of this Court…It must be grasped that judiciary is respected not on account of its power to legalise injustice on technical grounds but because it is capable of removing injustice and is expected to do so…In the result, there is no merit in these seven writ petitions and all the writ petitions are dismissed with no order as to costs.

Appendix 4

The judgment in the case relating to Yamini J. Dave vs The Director, IUCAA and Another delivered on 06.04.2004, is dealt with in some detail below to bring out the many connected issues that had to be dealt with along with securing justice on the issue of maternity benefits.

In this Letters Patent Appeal, the appellant, Yamini Dave, has challenged the judgment passed by Single Judge in Special Civil Application No. 11047 of 1994 dated January 10, 1996, whereby the petition filed by the appellant had been dismissed.

The facts giving rise to the present Letters Patent Appeal may be narrated thus: The appellant, Yamini Dave, was appointed clerk-cum-typist by the respondents vide appointment letter dated Sept 9, 1991 pursuant to advertisement dated May 11, 1991,

in INFLIBNET programme with IUCAA, an autonomous registered society established by UGC. The candidates appointed to the posts advertised were to remain on probation for a period of one year from the date of appointment and subject to service conditions and conduct rules approved by the governing body of INFLIBNET/IUCAA. Yamini Dave joined the post of clerk-cum-typist on Sept 11, 1991. By Office Order dated Sept 15, 1992, she was informed that her probationary period stood closed from 10.09.1992. The appellant proceeded on 90 days maternity leave from May 3, 1994 to July 31, 1994, sought through application dated May 2, 1994. She reminded respondents vide letter dated May 28, 1994, to sanction her leave. The respondents sanctioned the leave vide order dated June 2, 1994… Again, the appellant sought extension of maternity leave from Aug 1, 1994 to September 4, 1994 as per rules applicable to Central govt, employees. By Memorandum dated Sept 9, 1994, her services were terminated. The appellant challenged her termination through Special Civil Application No. 11047 of 1994. However same was dismissed.

In the light of material referred to above, it is clear that according to the advertisement, appointment of appellant was on probation for one year and appointment was made initially for a period of two years with clarification that post was likely to continue indefinitely. One year probationary period stood closed with effect from 10th Sept 1992, and therefore issuance/extension of the appointment on year to year basis, which is admittedly not provided in the advertisement, appears to be contrary to the letter of appointment dated 9th Sept 1991. Therefore the decision taken on 17th Aug 1993, in Office Note extending the appointment of appellant on year to year basis is contrary to the principles of natural justice because initial appointment was for a period of two years. So after two years, the respondents were not authorized to convert her appointment on contractual basis. In advertisement no such condition was incorporated or made known to the appellant. Even UGC had not instructed thus while sanctioning the post, but even then, decision has been taken to continue the appellant on year to year basis. That decision is illegal and arbitrary and it is hit by Article 14 of the Constitution of India. It is nowhere discussed what would be the legal effect of closing of period of probation. Closing the period of probation without any adverse remarks and allowing the appellant to continue in service thereafter, in the opinion of the Court, means that the appellant is a confirmed employee of the respondents. Based on the observations of a Committee dated 19th Aug 1994, that made allegation of misconduct against the appellant… services of the appellant were terminated on 9th September, 1994. …considering the total facts, termination is not a simpliciter but it is attached with stigma… without giving any opportunity and without holding any departmental inquiry, termination order has been passed by the respondents… Even temporary employees are entitled to minimum requirement, that is, an opportunity of hearing before passing any adverse order…

The moment probation period is not extended further or no order of termination is passed against an employee or where probationary period is closed after completion of one year, it means that there is positive decision taken by the authority to the effect that probationary period has been cleared with satisfactory work by the employee. Even it is also not the case of the respondent that during probation period of one year, the appellant remained inefficient and was not found suitable and was inefficient. Whatever observations that were made by the committee related to subsequent period of probation, that is to say, when the appellant became a permanent employee of the respondent.

No doubt, that appointment on contractual basis for a period of one year was accepted by the appellant but that may not be sufficient because looking to the unemployment ratio in the country, naturally, anyone may surrender to the terms of the employer. But merely acceptance of the order does not amount to acceptance on free will. The

respondent being the employer was a State Authority and it ought to have acted in accordance with law and in all fairness as is naturally expected from the State Authority, which is not found from the action of the respondent authorities…

Appellant had applied for maternity leave in the year 1994 and also applied for medical bills. The leave has been rejected which has been considered as absent period in the year 1994. However, in fact, the appellant had never proceeded on unauthorized leave or remained absent unauthorizedly during her service period. The period the appellant had requested for maternity leave which was rejected subsequently by the respondent and that is how created a situation that in the year 1994 as if the appellant worked only for 29 days. This is factually incorrect and seems to have been taken into consideration by the Committee while taking the impugned decision to discontinue the appellant. In view of the observations made by the Apex Court in MCD vs. Female Workers [Muster Roll] and Another reported in 2000 3 SCC 224, the appellant is entitled to maternity leave under the provisions of the Maternity Benefit Act, 1961, as well as Service Rules of IUCAA…

It is also necessary to note that services of the appellant have been discontinued during the period of maternity leave, and even this act of respondents is illegal and arbitrary.

Based on the relevant observations of the recommendations of the committee, ultimately, the service of the appellant has been terminated on 10th Sept 1994. Therefore the question is whether the observations made by the Committee as 'casual', 'careless' and 'no improvement during the extension period' and remaining 'absent' can be said to be stigma or not? In fact the appellant was deemed to be a confirmed employee as observed by us, but termination is based on such recommendations which made allegations against the appellant about misconduct and even though no opportunity was given to the appellant and straightaway her services have been terminated by the respondent. In such circumstances, it is the duty of the Court to lift the veil to find out the real cause for termination. If real cause is an allegation or misconduct then an opportunity has to be given following the principles of natural justice…

If for the determination of suitability of the probationer for the post in question or for his further retention in service or for confirmation, an enquiry is held and it is on this basis of that enquiry that a decision is taken to terminate his service, the order will not be punitive in nature. But if there are allegations of misconduct and an enquiry is held to find out the truth of that misconduct and an order terminating the service is passed on the basis of that enquiry, the order would be punitive in nature as the enquiry was held not for assessing the general suitability of the employee for the post in question, but to find out the truth of allegations of misconduct against the employee.

Therefore after considering the law laid down by the Apex Court in respect of the issue, namely, whether the order of termination is stigmatic or not and regular departmental inquiry is necessary or not and principles of natural justice required to be observed or not, in our opinion, looking to the decision taken by the committee on 19th August 1994… are bad and unfortunately same became basis to terminate the service of the appellant… Therefore, it is clear case of termination based on allegation attached with stigma. Inspite of that no opportunity was given to the appellant who is deemed to be confirmed and as such no departmental inquiry was held and therefore, in such circumstances, the order of termination is held to be illegal.

If the employer terminates the service illegally and the termination is motivated as in this case, namely to resist the workman's demand for revision of wages, the termination may well amount to unfair labour practice. In such circumstances, reinstatement being the normal rule, it should be followed with full back wages.

*