
(2008) 01 RAJ CK 0013
In the Rajasthan High Court
Case No : Civil Writ Petition No. 4237 of 2006

Dr. (Smt.) Hemlata Saraswat	Vs	APPELLANT
State of Rajasthan and Others		RESPONDENT

Date of Decision : 28-01-2008

Acts Referred:

Constitution of India, 1950 — Article 15(3)

Citation : (2008) 01 RAJ CK 0013

Hon'ble Judges : Dinesh Maheshwari, J

Bench : Single Bench

Advocate : R.K. Singhal, for the Appellant; Rameshwar Dave and Dy. G.A., for the Respondent

Final Decision : Allowed

Judgement

Dinesh Maheshwari, J.—By way of this writ petition, the Petitioner has questioned the communication dated 27.4.2006 (Annex. 3) 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. 8,000/- per month with issuance of appointment order on 15.9.2003 (Annex. 1) putting her engagement on contract basis; that accepting the offer of appointment, she joined services and presently is posted at Primary Health Centre, Kantalia, Sojat Road, Pali (Rajasthan). According to the Petitioner, she proceeded on medical leave on 28.8.2005 by submitting a leave application; and, after delivering a male child, resumed duties on 11.1.2006 with fitness certificate.

2. The Petitioner has stated her grievance in the manner that though entitled, she has been denied maternity leave by the impugned communication dated 27.4.2006 (Annex. 3) on the ground that under the service rules, there was no

provision for allowing maternity leave to the persons working on consolidated salary, and she has not been allowed maternity leave despite submitting a representation on 17.2.2006 (Annex. 4) and serving a notice through lawyer on 17.4.2006 (Annex. 5).

3. Assailing such denial of maternity leave, the Petitioner has contended, inter alia, that being in employment of the Government of Rajasthan, may be on contract basis and on consolidated salary, the Rules applicable to the employees of the Government of Rajasthan equally apply to her; that Rule 103 of the Rajasthan Service Rules, 1951 provide for maternity leave and she is fully entitled and eligible to get such maternity leave; that the Government has taken a decision to grant maternity leave to the temporary female employees and, thus, the contractual employees are also entitled to get the same benefit. The Petitioner has referred to the decisions rendered in *Neetu Choudhary v. State of Rajasthan and Ors.* 2005 (107) FLR 492 (Raj), and *Smt. Sumitra Choudhary and Ors. v. State of Rajasthan and others*, S.B.. Civil Writ Petition No. 3295/2005 decided on 19.9.2005 wherein this Court has directed grant of benefit of maternity leave to the temporary employees. 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 petition have not been denied.

4. Learned Counsel for the Petitioner, while pressing on the grounds aforesaid with reference to the decision in *Neetu Choudhary and Smt. Sumitra Choudhary* (supra) has also relied upon the decision of this Court at Jaipur Bench in the case of *Smt. Pooja Arora v. State of Rajasthan and others*; S.B. Civil Writ Petition No. 493/2007 decided on 29.1.2007 and that of the Hon''ble Supreme Court in the case of *Municipal Corporation of Delhi Vs. Female Workers (Muster Roll) and Another*, . The learned Government Counsel has attempted to distinguish the said decisions with reference to the fact that the Petitioner is working on contract basis.

5. 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 27.4.2006 (Annex. 3) emanating from the Directorate of Medical & Health Services, Rajasthan, Jaipur 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 Choudhary* (decided on 19.4.2005) and *Smt. Sumitra Choudhary* (decided on 19.8.2005); and this writ petition deserves to be allowed with costs.

6. As shall be noticed hereafter, the aforementioned decision in *Neetu Choudhary* has been affirmed by the Hon''ble Division Bench with rather strong comments on the attempt on the part of the Government to deny maternity benefit to its

employees against the basic norms of equality, and so also against the propositions of gender justice and betterment of status of women; and, in view of settled position of law, there would not have been any necessity to expound further on the principles applicable but for the reason that such litigations are still of recurrence before this Court, it appears apposite to deal with the aspect a bit more in detail in the hope that such perfunctory approach would be corrected by the authorities concerned obviating the necessity of such avoidable litigation and also for the warning that for any such unjustified denial of maternity leave, the Officer concerned might be held personally responsible for the costs and consequences.

7. The fact that necessity, the female employees are entitled for maternity benefits and that authorities are not obliging them by extending such benefits is strongly illuminated by the decision of the Hon''ble Supreme Court in the case of Females Workers (Muster Roll) (supra). Therein, the female workers engaged by the Municipal Corporation, Delhi on Muster Roll basis raised a demand for grant of maternity benefit that was made available only to the regular female employees but was denied to them on the ground that their services were not regularised. On the cause being espoused by the Delhi Municipal Workers Union, the matter was referred for adjudication to the Industrial Tribunal on the question as to whether the female workers working on Muster Roll should be given any maternity benefit? The Municipal Corporation took the stand that the provisions of Maternity Benefit Act, 1961 ("the Act of 1961") or Central Civil Services Rules were not applicable to the female workers engaged on Muster Roll, as they were all engaged only on daily wages. By its award dated 2.4.1996 the Tribunal allowed the claim and directed the Corporation to extend the benefit under the Act of 1961 to Muster Roll female workers who were in continuous services for three years or more. Challenge to the said award in writ petition failed before the learned Single Judge of Delhi High Court and intra-Court appeal was dismissed on the ground of delay. Hence, the matter was before the Hon''ble Supreme Court.

8. The Hon''ble Supreme Court considered it appropriate to deal with the matter on merits, and, while taking note of the hazards of the female workers working even in advanced stage of pregnancy and, again, soon after delivery, in a look for earning their daily bread, unmindful of detriment to their health and to the health of the new born, the Hon''ble Court referred to Clause (3) of Article 15 of the Constitution of India that sanctions making of special provisions for women and children and then to the provisions, of course in Part IV of the Constitution of India containing Directive Principles of State Policy, including Article 42 that reads as under:

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

9. The Hon''ble Apex Court held that validity of an executive or administrative

action in denying maternity benefit has to be examined on the anvil of Article 42 which, even when not enforceable is nevertheless available for determining the legal efficacy of the action complained of. The Hon''ble Court said,-

10. Since Article 42 specifically speaks of "just and humane conditions of work" and "maternity relief", the validity of an executive or administrative action in denying maternity benefit has to be examined on the anvil of Article 42 which, though not enforceable at law, is nevertheless available for determining the legal efficacy of the action complained of

10. The Hon''ble Supreme Court then found that the benefits under the Act of 1961 were being provided to a class of employees of the Petitioner-Municipal Corporation but denied to the other class of women employees on the ground that they were not regular employees; and held such denial unjustified. The Hon''ble Supreme Court said:

11. The Parliament has already made the Maternity Benefit Act, 1961. It is not disputed that the benefits available under this Act have been made available to a class of employees of the Petitioner-Municipal Corporation. But the benefit is not being made available to the women employees engaged on muster-roll, on the ground that they are not regular employees of the Corporation. As we shall presently see, there is no justification for denying the benefit of this Act to casual workers or workers employed on daily wage basis.

11. The Hon''ble Supreme Court thereafter referred to the provisions of the Act of 1961 and other related provisions of the Employees' State Insurance Act, 1948 and after comprehension of the entire scheme of the enactments held,-

24. The provisions of the Act which have been set out above would indicate that they are wholly in consonance with the Directive Principles of State Policy, as set out in Article 39 and in other Articles, specially Article 42. A woman employee, at the time of advanced pregnancy cannot be compelled to undertake, hard labour as it would be detrimental to her health and also to the health of the foetus. It is for this reason that it is provided in the Act that she would be entitled to maternity leave for certain periods prior to and after delivery. We have scanned the different provisions of the Act, but we do not find anything contained in the Act which entitles only regular women employees to the benefit of maternity leave and not to those who are engaged on casual basis or on muster roll on daily wage basis.

12. It was noticed that the provisions of Maternity Benefit Act had not been applied to the Corporation and the Tribunal felt that to be a lacuna and for the Corporation engaging more than 1000 women employees, it should have been brought within the purview of the Act so that maternity benefit contemplated by the same could be extended to the women employees of the Corporation and it was felt that this lacuna may be removed by the State Government by issuing necessary notification under proviso to Section 2 of the Act of 1961. The Tribunal proceeded to issue directions to the Management of Corporation to extend the

benefit of the Act of 1961 to such Muster Roll employees who were in continuous service for three years or more and who fulfilled the conditions of Section 5 of the Act. The Hon''ble Supreme Court appreciated the efforts of the Tribunal in issuing such directions and found them to be fully in consonance with the reference made.

13. Highlighting the need of removing inequalities and providing everyone his legal due and the peculiar need of a women when becoming a mother, the Hon''ble Supreme Court said,-

30. A just social order can be achieved only when inequalities are obliterated and everyone is provided what is legally due. When who constitute almost half of the segment of our society have to be honoured and treated with dignity at places where they work to earn their livelihood. Whatever be the nature of their duties, their avocation and the place where they work; they must be provided all the facilities to which they are entitled. To become a mother is the most natural phenomena in the life of a woman. Whatever is needed to facilitate the birth of child to a woman who is in service, the employer has to be considerate and sympathetic towards her and must realise the physical difficulties which a working woman would face in performing her duties at the work place while carrying a baby in the womb or while rearing up the child after birth. The Maternity Benefit Act, 1961 aims to provide all these facilities to a working woman in a dignified manner so that she may overcome the state or motherhood honourably, peaceably, undeterred by the fear of being victimised for forced absence during the pre or post-natal period.

14. Significantly, the Hon''ble Supreme Court also referred to Article 11 of the Convention on the Elimination of all forms of discrimination against women adopted by the United Nations on 18th of December 1979. Clause (2) of the said Article 11 as reproduced by the Hon''ble Supreme Court in the said decision, while emphasizing on Clause (a) and (b) thereof, reads thus:

2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures.

(a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;

(b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;

(c) To encourage the provision or necessary supporting social services to enable parents to combine family obligations with work responsibilities

and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities; (d) To provide special protection to women during pregnancy in types of work proved to be harmful to

them.

15. The Hon"ble Supreme Court said that the principles contained in Article 11 aforesaid have to be read into the contract of service between the Municipal Corporation, Delhi and the women employees on Muster Roll; and so read, those employees immediately become entitled to all the benefits conceived under the Maternity Benefit Act, 1961.

16. Neetu Choudhary (supra) was a case before this Court where the Petitioner, appointed as Nurse Gr. II on urgent temporary basis on a consolidated salary of Rs. 4,500/- per month, was on maternity duty from the month of December, 2001 to the month of March, 2002 and delivered a child on 21.1.2002. Her claim for allowing maternity leave was denied by the Deputy Secretary to the Government of Rajasthan in its Department of Medical & Health Services on the ground that the persons employed on consolidated salary (contract basis) were not entitled for casual leave, day off, maternity leave etc. It was contended on behalf of the Petitioner that being an employee appointed on urgent temporary basis under the Rajasthan Medical & Health Subordinate Service Rules, 1965, she was entitled to maternity leave in view of the provisions of Rule 103 of the Rajasthan Service Rules, 1951. This Court noted the said Rule 103 of the Rules of 1951 thus:

103. Maternity Leave.-A competent authority may grant "maternity leave" to a female Government servant thrice during the entire period of her service. However, if there is no surviving child even after availing of it thrice, maternity leave may be granted on one more occasion. The maternity leave may be allowed on full pay for a period which may extend upto the period of 90 days from the date of its commencement.

17. This Court, while referring to the Government of Rajasthan order dated 25.2.1955 declaring entitled a female Government servant for maternity leave held and ordered:

The Government of Rajasthan under its order No. F. 12(1) F.II/54 dated 25.2.1955 declared the temporary female Government servants entitled for maternity leave. In view of this decision of the Government of Rajasthan the Petitioner being a temporary female Government servant is entitled for the maternity leave under Rule 103 of the Rules of 1951. Such benefits cannot be denied to the Petitioner merely on the count of the mode of payment of wages. The Petitioner is working with Respondents on urgent temporary basis and her status remains unchanged irrespective of the mode of payment of salary. In view of provisions of Rule 103 of the Rules of 1951 and decision of Government of Rajasthan dated 25.2.1955 the Petitioner is entitled for maternity leave. The order dated 30.10.2001 cannot be made applicable upon the Petitioner as she is working in temporary capacity though getting consolidated wages. For the reasons mentioned above the writ petition is allowed and the Respondents are directed to sanction maternity leave to the Petitioner as applied by her and all

benefits consequential thereto be given to her within a period of two months from the date a certified copy of this order is placed before the competent authority by the Petitioner.

18. In the case of Pooja Arora (*supra*), this Court has again noticed the said Rule 103 and the clarification made by the State Government that maternity leave is admissible to the temporary female Government servant and so also an amendment to the effect that the authority competent to sanction leave upto four months shall also be competent to sanction leave upto 135 days; and this Court again disapproved any distinction with regard to the nature of employment for the purpose of maternity leave and said:

Even in my considered opinion, no distinction with regard to nature of appointment of female Government servant can be made by Government for grant of maternity leave under Rule 103 of RSR since natural course has to take place at its own and nature of appointment is of no significance for purposes of maternity leave.

19. In the case of Smt. Sumitra Choudhary and Ors. (*supra*), this Court has allowed maternity benefits to the employees similarly situated as Neetu Choudhary. However, significant it is to notice that the said decision in Neetu Choudhary was sought to be assailed before the Division Bench of this Court in time barred appeal, being D.B. Civil Special Appeal No. 2542/2006 (DR/J): State and Ors. v. Neetu Choudhary. While dismissing the said appeal on 31.10.2006, the Hon''ble Division Bench has pronounced rather heavily against the posture adopted by the Department and said,-

A bizarre argument has been advanced by the Appellant in this case. The appointment against the sanctioned post under the rules being offered, the Respondent was appointed after regular selection. However, other benefits along with benefit of maternity leave are being denied to the women employees of the State, which is against the very basic norms of equality of law and, moreover, on the one hand the Government at all forums is talking about the 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 it that appointment in first place was given after due selection by following regular process of selection. On the first principles of a Welfare State, her appointment cannot be treated as a back-door entry to deny the basic benefit of maternity leave to women employees of the State.

20. It is not that the decision of the Hon''ble Single Judge of this Court in Neetu Choudhary's case was not in the knowledge of the Respondents. The said decision was rendered in relation to the very same department of the Government of Rajasthan, i.e. the Medical and Health Services; and had been rendered way back on 18.4.2005. The Petitioner did refer to the decisions of this Court in her representation dated 17.2.2006 (Annex. 4) and again pointed out

the law declared by this Court in the lawyer's notice dated 17.4.2006 (Annex. 5). It remains inexplicable that the Respondents would, with impunity, chose to ignore the rights of the Petitioner and even the law declared by this Court.

21. The Petitioner, even if working on contract basis, has entered into services under the order dated 15.9.2003 (Annex. 1) after having been found fit and eligible by the Selection Committee as stated in the said order. Here has not been a back door entry. Merely because the Respondents would choose to put her on consolidated salary and state it to be a contractual appointment, the fact that she is a woman employee cannot be lost sight of and the essential benefits fundamentally dealing with the very basics of human rights of allowing maternity benefit to the women cannot be and ought not to have been ignored, and the Petitioner ought to have been allowed maternity leave as applied for. It may be pointed out that there had not been any other reason of denying maternity leave to the Petitioner except that she was working on consolidated salary on contract basis. Such being a proposition already declared unacceptable, the action of the Respondents is a not only illegal but mala fide too.

22. 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.

23. This petition for writ is, therefore, allowed; and the impugned communication dated 27.4.2006 (Annex. 3) 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 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 of the Petitioner, to recover the amount of costs, strictly in accordance with law, from the person/persons responsible for this unnecessary litigation,