

(2023) 06 MP CK 0109

In the Madhya Pradesh High Court

Case No : ?Writ Petition No. 16241 Of 2018

Kirti Bugde (Bhagwat)

APPELLANT

Vs

State Of Madhya Pradesh And Others

RESPONDENT

Date of Decision : 30-06-2023

Acts Referred:

Constitution Of India, 1950 — Article 226
Madhya Pradesh Civil Services (Leave) Rules, 1977 — Rule 6(1), 38(C), 38(C)(2),
38(C)(4)

Citation : (2023) 06 MP CK 0109

Hon'ble Judges : Pranay Verma, J

Bench : Single Bench

Advocate : Manjula Mukati, Koustubh Pathak

Final Decision : Dismissed

Judgement

Pranay Verma, J

1. By this petition preferred under Article 226 of the Constitution of India, the petitioner has prayed for the following reliefs:

- a) set aside the show-cause notice dated 31.03.2022 (Annexure, P-8) issued by the respondent No. 3 regarding rejection: of petitioner's application of child care leave;
- b) set aside the show cause notice No. 2490 dated 02.06.2022 (Annexure P-10) issued by the respondent No. 2;
- c) set aside the letter dated 02. 06. 2022 (Annexure. p- 11)
- d) issued by the respondent No. 3 regarding rejection of petitioner's application of child care leave;
- e) direct the respondents to sanction the Child Care Leave of the petitioner according to the law;

f) direct the respondents to release the salary of the petitioner since January 2022 after regularizing her Child Care Leave from 14.03.2022 to 14.09. 2022; and

g) grant any other relief as this Hon'ble court may deem fit.

2. The facts of the case are that the petitioner was granted compassionate appointment on the post of Assistant Grade-III in Backward Classes and Minorities Welfare Department on 10.03.2017. By order dated 04.08.2021 she was transferred from District Mandsaur where she was posted at that time to District Dewas. Being aggrieved by her transfer order, the petitioner preferred Writ Petition No.14929 of 2021 before this Court which was disposed off vide order dated 12.08.2021 directing her to make a representation before the competent authority who was directed to decide the same. In pursuance of the said order, the petitioner made a representation on 16.08.2021 before respondent No.2. During pendency of her representation, she submitted an application on 22.10.2021 for her regularization on the post of Assistant Grade-III. Her representation against her transfer order was rejected by respondent No.1 on 29.12.2021 on the ground of non-availability of a typist at Dewas office. On 11.01.2022, 08.02.2022 and 24.02.2022 petitioner made applications for grant of medical leave to on ground of her illness. While petitioner was on medical leave, she was relieved from Mandsaur by order dated 21.01.2022 passed by the Joint Director. The petitioner did not join at her transferred place as she was on medical leave. After completion of her medical leave, petitioner gave her joining before respondent No.4 on 24.02.2022.

3. On 24.02.2022 itself petitioner made an application under Rule 38 (C) of M.P. Civil Services (Leave) Rules, 1966 for grant of Child Care Leave (hereinafter referred to as 'CCL') to her for a period of six months i.e. from 14.03.2022 to 14.09.2022. She did not receive any response on her application hence by letter dated 11.03.2022 to respondent No.4 she communicated that she is proceeding with her CCL awaiting confirmation of the same from the competent authority. By letter dated 14.03.2022 petitioner was communicated that as her service record was not available in the office and she had not made the application prior to three weeks (21 days) from the date leave was sought it is not possible to take a decision upon her application. Once the service record is received the application shall be considered. The petitioner however proceeded with her CCL for the duration mentioned in her application.

4. On 31.03.2022 respondent No.2 issued a show cause notice to petitioner to explain the delay of 36 days in giving her joining at her new place of posting. Her absence from 18.01.2022 up to 23.02.2022 was treated as unauthorized absence. On 08.04.2022 petitioner submitted her reply to the show cause notice after which no action was taken in the matter. On 02.06.2022 another notice was issued to petitioner by respondent No.2 stating that her application for CCL had been rejected on 14-03-2022 since the same was not submitted three weeks prior to the leave and she had been directed to return on duty but she has not

done so and has remained absent. The petitioner was directed to show cause as to why her two increments should not be stopped without cumulative effect. On 02.06.2022 itself respondent No.3 issued a letter to respondent No.5 regarding rejection of CCL to the petitioner. Respondent No.4 also thereafter directed petitioner to report for duty immediately. She did not do so and on 08.06.2022 submitted reply to the show cause notice dated 02.06.2022.

5. The petitioner continued to remain absent from duty and after completion of the period for which CCL had been sought for by her in her application, she re-joined her duties on 15.09.2022. Thereafter, on 17.10.2022 she again submitted an application before respondent No.5 for grant of CCL to her from 09.11.2022 up to 09.04.2023 stating that her younger daughter is in 12th standard and she is required to make herself available during that period. The said application was not decided by the respondents. As per the petitioner she has not been paid her salary since January, 2022 despite having submitted applications before respondents No.2 & 5 in that regard. On such contentions, the instant petition has been preferred by petitioner claiming the reliefs as aforesaid.

6. Learned counsel for the petitioner has submitted that the respondents have illegally issued the show cause notice to her for availing CCL from 14.03.2022 up to 14.09.2022. Her application for CCL was not declined expressly and on the contrary by letter dated 14.03.2022 she was communicated that it was not possible to take a decision on her application in absence of her service records. By her letter dated 11.03.2022 petitioner had categorically submitted before respondent No.5 that she is proceeding to avail CCL awaiting confirmation of her application in which there was nothing wrong. Her application for CCL has been subsequently rejected by the respondents illegally and arbitrary without any genuine reason and on the contrary show cause notice was issued to her. The petitioner is entitled to avail CCL for 730 days in her career to take care of her children. She has not availed the entire duration of such leave. There has not been any fault on her part. Her application for CCL made on 17.10.2022 is very much necessary to be allowed but the same has not been considered by the respondents. Reliance has been placed on the decisions of this Court in Smt. Shalini Saxena and others vs. State of M.P. and others, W.P. No.828 of 2017 decided on 05.05.2017, Smt. Vimlesh Verma vs. State of M.P. and others, W.P. No.4837 of 2016 decided on 08.02.2017, Smt. Ratna Tripathi vs. State of M.P. and others, W.P. No. 20592/2016 decided on 03.08.2017, Smt. Pragati Gupta vs. State of M.P. and others W.P. No.18589/2017 decided on 12.07.2018, Smt. Sunita Meena vs. State of M.P. and others W.P. No.10451/2018 decided on 03.09.2019, of Punjab and Haryana High Court in Dr. Kanchanbala Vs. State of Haryana and others, CWP No. 21506 of 2017 decided on 10.10.2017, of Uttarakhand High Court in Smt. Tanuja Toliya vs. State of Uttarakhand and another W.P. (S/B) 263/2019 decided on 24.07.2020 and of the Calcutta High Court in Chhabirani Sinha @ Chhabirani Sinha (Deoyan) vs. State of West Bengal and Others, WPA No.30811/2017 decided on 24.02.2022 to submit that it is the right of petitioner to be granted CCL which cannot be denied particularly when

the same is not for her benefit but is for the benefit of her child.

7. Reply has been filed by the respondents and learned counsel for the respondents has submitted that petitioner proceed on CCL without sanction from the competent authority. Taking cognizance of her act who was relieved on 18.01.2022 but assumed her duties after 36 days, notice was issued to her for withholding two increments. The petitioner resisted her transfer order which was affected on account of administrative exigency. By letter dated 02.06.2022 petitioner was again served with notice stating that she has proceeded on CCL without sanction from competent authority and should show cause as to why action of withholding of two increments be not taken against her. It is mandatory in terms of Rule 6 (1)/ 2015 dated 22.08.2015 to submit an application at least three weeks prior to proceeding on leave. By order dated 13.10.2022 the Commissioner, Backward Classes and Minorities Welfare Department, Madhya Pradesh, Bhopal has held petitioner guilty for her conduct and penalty of withholding of one annual increment without cumulative effect has been imposed upon her. Though petitioner joined on 24.02.2022 but thereafter has never been to the office and reported for duty only on 14.09.2022. She has been present only for 49 days. She is a probationary hence during probation period no CCL can be granted to her except under exceptional circumstances. It is hence submitted that petition be dismissed.

8. I have heard the learned counsel for the parties and have perused the record.

9. The grievances of the petitioner are centered around the fact of non-grant of CCL to her. The provision of CCL was introduced by the State Government by way of a notification dated 22.08.2015 by amending Madhya Pradesh Civil Services (Leave) Rules, 1977 and inserting rule 38(C) therein. The said rule is as under :

38(C) Child Care Leave :-(1) Subject to the provisions of this rule, a woman Government servant may be granted child care leave by the competent authority for a maximum of 730 days during her entire service for taking care of her two eldest surviving children.

(2) The leave cannot be claimed as a matter of right.

(3) For the purposes of sub-rule (1), "Child" means :-

(a) a child below the age of eighteen years (including legally adopted child);

or

(b) a child below age of twenty two years with a minimum disability of forty percent as specified in Notification No.16-18/97-N1.1, dated the 1st June, 2001, Government of India, Ministry of Social Justice and Empowerment.

(4) Grant of child care leave to a woman government servant under sub-rule (1) shall be subject to the following conditions namely :-

(a) it shall not be granted for more than three spells in a calendar year. The leave availed even for a day, shall be counted as one spell. If the period of leave sanctioned continues into the next calendar year also then the spell shall be counted adjacent the year in which the leave was applied or in which major part of the leave applied falls. Calendar year means the period commencing from 1st January to 31st December of the year.

(b) it shall ordinarily not be sanctioned during the probation period. However, in special circumstances, if the leave is sanctioned during the probation period, then the probation period shall be extended by the period equivalent to the period for which the leave has been granted.

(5) During the period of child care leave, the woman Government servant shall be paid leave salary equal to the pay drawn immediately before proceeding on leave.

(6) Child care leave may be combined with leave of any other kind.

(7) The leave account shall be maintained separately and entry shall be made in the service book of the concerned woman government servant.

10. Sub Rule 2 of Rule 38(C) in no uncertain terms states that the leave cannot be claimed as a matter of right. As per the circular dated 17-11-2015 of the State Government it is mandatory to give reasons in the application for which leave is being sought for. Thus, though the employee is entitled for the leave but it would not mean that such leave when sought for has to be granted no matter what the circumstances may be and that the employer has no discretion in the matter as contended by the petitioner. While granting or declining to grant the leave, various relevant factors as then existing have to be necessarily taken into consideration and if after examining the matter from all angles there does not appear any plausible reason not to grant the leave, then the same should be granted. However, if there is any justifiable reason due to which it is found that leave cannot be granted, then the same can very well be refused for reasons to be recorded. Thus, the leave should ordinarily be granted but if circumstances so warrant, the same can very well be refused.

11. Sub Rule 4 (b) of Rule 38 (C) further provides that the leave shall ordinarily not be sanctioned during probation period. This sanctioning of leave during probation period has also been made subject to existence of special circumstances. If leave is sanctioned during probation period then the probation period shall be extended by the period equivalent to the period for which the leave has been granted. Thus, if a probationer wishes to avail the leave then it has to be satisfied by him/her that there exist such special circumstances which warrant grant of leave. This is an additional factor required to be fulfilled by a probationer to entitle her for CCL.

12. The question which requires determination in this petition is as to whether in the available facts and circumstances the leave ought to have been granted to

petitioner and whether she being a probationer had made out special circumstances for grant of leave to her.

13. For determination of the aforesaid questions, the overall fact situation needs to be considered. The petitioner was granted compassionate appointment on 10.03.2017 and was eventually posted at Neemuch. By order dated 04.08.2021 the petitioner was transferred to Dewas. She resisted her transfer and approached this Court which directed for decision of her representation which was rejected by the respondents for the reason of non-availability of a typist at Dewas specifically mentioning that there is no other typist at Dewas meaning thereby that petitioner was the only typist. It is hence apparent that there was administrative exigency for petitioner to be posted at Dewas. Granting leave to her would have resulted in there being no typist at all.

14. Though the petitioner was relieved from Mandsaur on 21.01.2022 but joined at Dewas only on 24.02.2022 and submitted applications for grant of medical leave to her for that period. On 24-02-2022 itself she submitted an application for grant of CCL to her for a period of six months w.e.f.14.03.2022. The same was not made prior to three weeks from the date of commencement of leave as is mandatorily required. Though three weeks since making of her application had not expired and her application was not decided but even then she unilaterally proceeded on leave on 11-03-2022 itself in anticipation of grant of leave by merely sending an intimation in that regard. Such act of proceeding on leave in anticipation of grant of leave and without there being a specific order sanctioning leave is totally unknown to law.

15. The application of petitioner was in fact considered on 14.03.2022 i.e. within the period of three weeks for making the same and it was observed that due to non-availability of her service record the same cannot be decided specifically mentioning that the same can be considered only after receipt of record. The fact remains that leave as sought for by petitioner was not granted to her. She hence had no right to proceed on leave on her own and to herself decide that the order deferring consideration of her application was erroneous and that leave ought to have been granted to her. Her application was not allowed and leave as prayed for by her was not granted. She could have challenged such order in accordance with law but it was incumbent upon her to have immediately returned on duty. However, she did not do so and continued with her leave.

16. On 02.06.2022 an order was passed by respondent No.3 specifically rejecting the application of petitioner for CCL and she was directed to report on duty. The petitioner did not do so and continued with her leave despite specific directions. Instead, on 08.06.2022 she made an application for reconsideration of her application. The respondents were not obliged to reconsider her application since the same already stood rejected. The petitioner eventually reported for duty on 15.09.2022 i. e. after completing the period of six months of CCL as had been sought for by her.

17. Interestingly, though petitioner rejoined on 15.09.2022 but on 17.10.2022 itself she made another application for grant of CCL to her w.e.f.09.11.2022 for a period of six months. The aforesaid conduct of petitioner unmistakably shows that she is not in any manner interested in performing her duties. She had resisted her transfer order and had thereafter remained on medical leave and had applied for CCL thereafter and despite the same not having been granted remained on such leave on her own for a period of six months and after rejoining again made an application within a short span of time for grant of CCL to her. It is clear that for one reason or the other petitioner is only interested in obtaining leave and has no desire to work.

18. Though the petitioner has challenged Annexure P/8 dated 31.03.2022 rejecting her application for CCL but said Annexure is a show cause notice issued to her. It is not an order rejecting her application for CCL. The notice dated 02.06.2022 (Annexure P/10) has also been challenged but from the order dated 13.10.2022 (Annexure R/7) filed along with the return it is seen that petitioner has been inflicted penalty of stoppage of one increment without cumulative effect. This order has been passed pursuant to the show cause notice dated 02.06.2022 and has not been challenged by petitioner hence challenge to the show cause notice does not survive for consideration. The show cause notice dated 31.03.2022 is not required to be challenged by the petitioner since as per herself after filing of reply no further proceedings in the matter were taken. The notice hence automatically lost its efficacy.

19. Various judgments relied upon by the learned counsel for the petitioner have been rendered by this Court as well as by different High Court to the effect that CCL should generally be granted since the same is not for the benefit of the employee but is for the benefit of the child. But in the present case, the conduct of petitioner unmistakably shows that she has used the provision of CCL only as a pretext for obtaining leave and has failed to demonstrate that such leave was sought for by her for benefit of her child. In her application dated 14.03.2022 she did not even mention as to for which child and for what purpose leave has been sought for by her. In her second application she has stated that her daughter is in Class XII and she is required for her studies but looking to her previous conduct such reason cannot be believed.

20. From the service book of petitioner filed by the respondents it is evident that in the year 2022 she has worked only for 48 days and has availed all sorts of leave including causal leave and earned leave and has also on various occasions been absent without any leave. Such conduct of petitioner disentitles her for grant of any relief to her in exercise of extraordinary jurisdiction under Article 226 of the Constitution of India. In the facts and circumstances of the case, it has to be necessarily held that petitioner has failed to make out a case that she was/is entitled for grant of CCL to her. The order passed by the respondents rejecting her application for that purpose cannot be found fault with.

21. In view of the aforesaid discussion, I do not find any merit in the petition

which is accordingly dismissed. However, it is made clear that in future if petitioner makes an application for grant of CCL to her, then the same shall be considered and decided by the respondents on its own merits. The petitioner shall also be entitled for the salary for the period which she has worked.