
(2022) 02 SHI CK 0022
In the High Court Of Himachal Pradesh
Case No : Civil Writ Petition No. 660 Of 2022

Neetu Mattu

APPELLANT

Vs

State Of Himachal Pradesh And Others

RESPONDENT

Date of Decision : 10-02-2022

Acts Referred:

Central Civil Services (Leave) Rules, 1972 — Rule 19, 30(1), 31(1), 34(1), 39(2)(b)
(ii), 43, 43AA, 43(1), 43(B), 43C
Maternity Benefit Act, 1961 — Section 4, 5

Citation : (2022) 02 SHI CK 0022

Hon'ble Judges : Jyotsna Rewal Dua, J

Bench : Single Bench

Advocate : Arun Raj, Hemant Vaid

Final Decision : Disposed Of

Judgement

Jyotsna Rewal Dua, J

1. The petitioner primarily seeks a direction to the respondents to sanction adoption/ maternity leave of 180 days in her favour under Rule 43 (1) of

CCS(Leave) Rules, 1972, alongwith all consequential benefits.

2. The case set up by the petitioner is that:-

2(i) She is a regular State Government employee and presently working as Senior Assistant in the office of respondent No.3-Superintendent Engineer,

4th Circle, HPPWD Shimla. Even after one and half decades, no child was born from the wedlock of the petitioner and her husband. Under the

circumstances, the petitioner legally adopted a new born girl child on 11.11.2021 (the baby girl was born on 09.11.2021).

2(ii) The petitioner applied for sanction of child adoption leave to the respondent Department. Vide office order dated 16.12.2021, respondent No.3,

sanctioned adoption leave for 135 days in petitioner's favour, commencing from 15.11.2021 to 29.03.2022. The sanction was granted in view of

the provisions contained in the GOI Ministry of Personnel, P.G.& Pension, Department of Personnel & Training Office Memorandum dated

31.03.2006, as adopted by H.P. Government vide letter dated 27.10.2006.

2(iii) However, on 01.01.2022, the child adoption leave, earlier sanctioned to the petitioner, was cancelled with immediate effect. Accordingly earned

leave for 54 days w.e.f. 15.11.2021 to 07.01.2022 was sanctioned with permission to prefix/suffix gazette holidays. The cancellation was on the

ground that the Government of Himachal Pradesh vide notification dated 07.03.2012 had amended the Central Civil Service (Leave) Rules, 1972

(hereinafter called the Rules), by inter alia deleting Rule 43(B). Accordingly, an office order was issued by respondent No.3 on 24.01.2022,

sanctioning 89 days of earned leave in favour of the petitioner w.e.f. 15.11.2021 to 11.02.2022.

2(iv) The cancellation of child adoption leave compelled the petitioner to institute instant writ petition for the following prayers:-

â?? (i) Issue a writ, order or direction in the nature of Certiorari or any other writ for quashing and setting aside impugned Office notification No. Fin.

(C) A(3)- 11/2003 dated 07.03.2012 dated 07.03.2012 (Annexure P-8).

(ii) Issue a writ of mandamus directing the respondents to sanction adoption/ maternity leave of 180 days to the petitioner under Rule 43(1) of CCS (

Leave) 1972, Rules alongwith all consequential benefits.â??

3. I have heard learned counsel for the parties and gone through the case file. Learned counsel for the petitioner confined his submissions to relief No.

(ii) only.

In compliance to the previous order, learned Additional Advocate General has placed on record instructions dated 09.02.2022, relevant part of which is

extracted hereinbelow:-

Â?? Kindly refer to your office letter dated 08.02.2022 on the subject cited above. In this regard, it is intimated that the petitioner Smt. Neetu Mattu

had applied for casual leave w.e.f. 10.11.2021 to 12.11.2021 on account of adoption of child vide her application dated 10.11.2021. Thereafter, she

applied for maternity leave on 15.11.2021. The said application was returned to the petitioner with the observation that the paternity leave is not

applicable for female employees and the leave was also not applied on prescribed format. The petitioner thereafter applied for child adoption leave on prescribed format on 15.11.2021 to 30.03.2022. Vide office order dated 16.12.2021 the sanction was accorded for grant of child adoption leave for 135 days commencing w.e.f. 15.11.2021 to 29.03.2022. Later on the issue was examined again and it was observed that the leave has been incorrectly accorded in favour of the petitioner as the Govt. vide notification dated 07.03.2012 has made amendment to Central Civil Rules of 1972 in their application to the State of HP. By way of this notification/ amendment rules 43 B which makes provisions for grant of leave to a female government servant on adoption of child has been deleted. In view of the said fact the office. order dated 16.12.2021 was withdrawn and vide subsequent office order dated 01.01.2022 Earned Leave w.e.f. 15.11.2021 to 07.01.2022 instead of child adoption leave was sanctioned in favour of the petitioner. The earlier order sanctioning the child adoption leave inadvertently issued and as the notification dated 07.03.2012 could not be perused at the time of issuing the earlier order, the petitioner herself had applied for Earned Leave and have also move revised leave application on 14.01.2022.

Since, there is no provision in CCS's Leave Rules 1972 in its applicability to the state of HP for grant of child adoption leave, therefore, such leave cannot be granted in favour of the petitioner. So far as, the judgment in Sushma Devi's case as relied by the petitioner is concerned, the final status about the same needs to be verified and decision in this regard can be taken at the Govt. level.

You are, therefore, requested to apprise the Hon'ble Court about the above said facts and circumstances and seek appropriate direction in the matter accordingly on the next date of hearing.â??

4(i). Rule 43 of CCS (Leave) Rules, 1972 pertains to maternity leave. Rule 43(B) is regarding child adoption leave. These Rules are reproduced as under for ready reference:-

â?? 43. Maternity Leave

(1) A female Government servant (including an apprentice) with less than two surviving children may be granted maternity leave by an authority competent to grant leave for a period of 180 days from the date of its

commencement.

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

NOTE:- In the case of a person to whom Employees' State Insurance Act, 1948 (34 of 1948), applies, the amount of leave salary payable under

this rule shall be reduced by the amount of benefit payable under the said Act for the corresponding period.

(3) Maternity leave not exceeding 45 days may also be granted to a female Government servant (irrespective of the number of surviving children)

during the entire service of that female Government servant in case of miscarriage including abortion on production of medical certificate as laid down

in Rule 19:

Provided that the maternity leave granted and availed of before the commencement of the CCS (Leave) Amendment Rules, 1995, shall not be taken into account for the purpose of this sub-Rule.

(4) (a) Maternity leave may be combined with leave of any other kind.

(b) Notwithstanding the requirement of production of medical certificate contained in sub-rule (1) of Rule 30 or sub-rule (1) of Rule 31, leave of the kind due and admissible (including commuted leave for a period not exceeding 60 days and leave not due) up to a maximum of two years may, if

applied for, be granted in continuation of maternity leave granted under sub-rule (1).

(5) Maternity leave shall not be debited against the leave account.

(1) A female Government servant, with fewer than two surviving children, on valid adoption of a child below the age of one year may be granted child

adoption leave, by an authority competent to grant leave, for a period of 180 days immediately after the date of valid adoption.

(2) During the period of child adoption leave, she shall be paid leave salary equal to the pay drawn immediately before proceeding on leave.

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

(b) In continuation of the child adoption leave granted under sub rule (1), a female Government servant on valid adoption of a child may also be

granted, if applied for, leave of the kind due and admissible (including leave not due and commuted leave not exceeding 60 days without production of

medical certificate) for a period up to one year reduced by the age of the adopted child on the date of valid adoption, without taking into account child adoption leave.

(4) Child adoption leave shall not be debited against the leave account.

NOTE-""Child"" for the purpose of this rule will include a child taken as ward by the Government servant, under the Guardians and Wards Act, 1890 or

personal law applicable to that Government servant, provided such a ward lives with the Government servant and is treated as a member of the family

and provided such Government servant has, through a special will, conferred upon that ward the same status as that of a natural born child.â??

4(ii). In terms of the above Rule, child adoption leave is available to a female government servant on adoption of a child below the age of one year.

Office memorandum dated 31.03.2006, Annexure P-5, issued in this regard by the Government of India, Ministry of Personnel, P.G & Pensions

Department of Personnel & Training, was adopted by the Government of Himachal Pradesh, Finance (Regulations) Department on 27.10.2006

(Annexure P-6). The State Government decided to allow the benefit of child adoption leave to the female government servants.

4(iii) Vide notification dated 07.03.2012, Government of Himachal Pradesh amended the CCS (Leave) Rules, 1972, whereby Rule 43-AA, Rule 43-B

and Rule 43-C alongwith sub Clause (ii) of sub Rule 2(b) of Rule 39, were deleted from the Leave Rules.

It is by citing the notification dated 07.03.2012, whereby Rule 43(B) was deleted by the respondent-State from the CCS (Leave) Rules, 1972, that the

respondent No.3 had withdrawn the child adoption leave sanctioned in favour of the petitioner.

4(iv) In this regard, it would be appropriate to refer to the Maternity Benefit Act, 1961. The Act was amended in the year, 2017, whereby following

sub Section was inserted after sub Section 3 of Section 5:-

â??(4) A woman who legally adopts a child below the age of three months or a commissioning mother shall be entitled to maternity benefit for a

period of twelve weeks from the date of child is handed over to the adopting mother or the commissioning mother, as the case may be.â??

The newly incorporated sub-Section 4 in Section 5 clearly provides that a woman who legally adopts a child below the age of three months, or a

commissioning mother, shall be entitled to maternity benefit for a period of twelve weeks from the date child is handed over to her. In the instant case,

the petitioner had adopted two daysâ?? old female child on 11.11.2021. She was clearly entitled to the benefit of the Maternity Benefit

(Amendment)Act, 2017.

4(v) It would also be appropriate, at this stage, to notice a judgment delivered by the Honâ??ble Division Bench of this Court on 04.03.2021 in CWP

No.4509 of 2020, titled Sushma Devi Versus State of Himachal Pradesh and others. The question before the Honâ??ble Court was as to whether a

woman employee is entitled to avail maternity leave even in case where she begets the child through surrogacy. The stand taken by the State in that

case was that maternity leave is admissible on adoption of child as per Rule 43 (1) of CCS (Leave) Rules, 1972 for 180 days. But there was no

clarification with regard to admissibility of maternity leave to a female government employee on surrogacy. The stand of the State is apparent from the

following para:-

â??3. The respondents have filed short reply wherein they have not denied that the petitioner had been blessed with a baby through surrogacy and

had applied for maternity leave. The only ground taken for non grant of the leave was that as per Notification of H.P. Government issued vide

Finance Department No. Fin.(C)-A(3)-1/2008 Loose dated 21.12.2017, maternity leave is admissible on adoption of a child as per Rule 43

(1) of CCS (Leave) Rules 1972 for 180 days, but there is no clarification in the said notification regarding admissibility of maternity leave to a female

Government employee on surrogacy. â??

The Court in para-8 of the judgment observed that â??once, the respondents admit that the minor child is that of the petitioner, then she is entitled to

the leave akin to the persons, who are granted leave in terms of the rules (ibid). The purpose of the said rules is for proper bonding between the child

and parents. Even, in the case of adoption, the adoptive mother does not give birth to the child, yet the necessity of bonding of the mother with the

adopted child has been recognized by the Central Government.â??

After taking note of the legal position and plethora of precedents on the issue, the writ petition was allowed. The respondents were directed to

sanction maternity leave to the petitioner therein in terms of Rule 43(1) of CCS

(Leave) Rules. The operative paras of judgment are as under: -

13. It was long felt that the working women were unable to depute their time towards their children due to exigencies of service. Hence, the

concept of grant of child care leave was introduced to ensure the welfare of the child so as to enable the mother to avail child care leave whenever

she feels that the child needs the care. This is in tune with the international covenants and treaties to which India is a signatory.

14. As rightly held by the Bombay High Court, the object of the maternity leave is to protect the dignity of motherhood by providing for full and healthy

maintenance to the woman and her child. Maternity leave is intended to achieve the object of ensuring social justice to women. Motherhood and

childhood both require special attention.

15. Not only are the health issues of the mother and the child considered while providing for maternity leave, but the leave is provided for creating a

bond of affection between the two. To distinguish between a mother who begets a child through surrogacy and a natural mother, who gives birth to a

child, would result in insulting womanhood and the intention of a woman to bring up a child begotten through surrogacy.

Motherhood never ends on the birth of the child and a commissioning mother cannot be refused paid maternity leave. A woman cannot be

discriminated, as far as maternity benefits are concerned, only on the ground that she has obtained the baby through surrogacy. A newly born child

cannot be left at the mercy of others as it needs rearing and that is the most crucial period during which the child requires care and attention of his

mother. The tremendous amount of learning that takes place in the first year of the baby's life, the baby learns a lot too. A bond of affection has

also to be developed.

16. In view of the aforesaid discussion, we find merit in this petition and the same is accordingly allowed and the respondents are directed to

sanction/grant maternity leave to the petitioner in terms of Rule 43(1) of the CCS (Leave) Rules, 1972.

4(vi) The controversy involved in the present petition directly came for consideration before the Hon'ble Division Bench of this Court in CWP

No.1675 of 2021, titled Dr. Pratiba Himral Versus State of Himachal Pradesh and others, decided on 29.09.2021. The petitioner therein had adopted a

female child on 11.03.2020, who was born on 25.02.2020. The question before the Court was, whether the petitioner can claim benefit of maternity

leave of 180 days in terms of Rule 43 of CCS (Leave) Rules, 1972. The Court held that "not only are the health issue of the mother and the child

considered while providing for maternity leave, but the leave is provided for creating a bond of affection between the two. To distinguish between a

mother who begets a child through adoption and a natural mother, who gives birth to a child, would result in insulting womanhood and the intention of a

woman to bring up a child begotten through adoption. Motherhood never ends on the birth of the child and a commissioning mother cannot be refused

paid maternity leave. A woman cannot be discriminated, as far as maternity benefits are concerned, only on the ground that she has obtained the baby

through adoption. A newly born child cannot be left at the mercy of others as it needs rearing and that is the most crucial period during which the child

requires care and attention of his mother. The tremendous amount of learning that takes place in the first year of the baby's life, the baby learns a

lot too. A bond of affection has also to be developed. The Writ petition was accordingly allowed and the respondents were directed to sanction

maternity leave to the petitioner in terms of Rule 34 (1) of CCS (Leave) Rules, 1972.

5. The ratio of the above judgment squarely applies to the facts of the instant case. The petitioner, as observed earlier, had adopted a two days old

girl child on 11.11.2021. Her case is covered by the Maternity Benefit (Amendment) Act, 2017 as well as by the ratio of the above judgments.

Accordingly, the instant writ petition is allowed and the respondents are directed to sanction/grant maternity leave to the petitioner under Rule 43(1) of

CCs (Leave) Rules, 1972 and to treat the same as service period.

Pending miscellaneous application(s), if any, also stand disposed of.