

(2018) 10 CAT CK 0088

In the Central Administrative Tribunal

Case No : Original Application No. 1841 Of 2017

Saphla Rani

APPELLANT

Vs

Chairman-Cum-Managing Director, Rites Limited

RESPONDENT

Date of Decision : 10-10-2018

Acts Referred:

All India Services (Leave) Rules, 1955 — Rule 18(D)
Constitution Of India — Article 21, 42

Citation : (2018) 10 CAT CK 0088

Hon'ble Judges : Praveen Mahajan, Member (A)

Bench : Single Bench

Advocate : J.M. Kalia, G.S. Chaturvedi

Final Decision : Allowed

Judgement

Briefly stated, the applicant is working as Junior Manager with the respondents. The applicant was blessed with a premature baby boy on 10.02.2014, through IVF mode. After availing maternity leave for 06 months from 10.02.2014 to 10.08.2014, she joined back on 11.08.2014. The applicant applied for child care leave vide her application dated 17.11.2014. Receiving no response, she followed it by reminders dated 29.12.2014, 23.04.2015 and 30.06.2015. The respondents vide their letter dated 28.07.2015 informed the applicant that her request cannot be considered as child care leave is not covered in the existing leave rules of the company. However, the applicant was advised to apply for any other kind of leave. The applicant represented on 29.07.2015 for child care leave from 01.08.2015 to 29.02.2016. Due to precarious medical condition of the child, the applicant made further representation in this regard on 29.02.2016. In the meanwhile, the Ministry of Women and Child Development, Government of India vide their letter dated 28.04.2016 requested the Ministry of Railways to extend the facility of child care leave to the women employees of IRCTC. The applicant repeated her request vide her letters dated 28.10.2016 and 01.12.2016, however the respondents, vide their reply dated 14.12.2016 refused to grant the

said leave. The applicant again represented to the Secretary, Ministry of Women and Child Development on 27.12.2016, who, in turn on 29.12.2016, requested the Railways to extend the benefit of child care leave in IRCTC as well as RITES and other PSU under the administrative control of Ministry of Railway. Getting no favourable response, the applicant sent a detailed letter dated 30.01.2017 to the PMO. This, in turn was forwarded to the Secretary, Department of Public Enterprises.

2. The respondents vide their letter dated 28.03.2017 informed the applicant that child care leave cannot be granted and directed her to join duty. As the applicant was representing to various authorities, the respondents in an arbitrary and biased manner placed her under suspension even though she was due to retire on 28.04.2017. The applicant was issued a frivolous and antedated articles of charge dated 25.04.2017 vide letter dated 28.04.2017. Aggrieved by this order, the applicant has filed the current O.A. seeking the following reliefs:-

"(a) Direction be issued to the respondent/management to implement the notification dated 11-09-2008/revised notification dated 18-11-2008 issued by the Govt. of India (DOPT) followed by the notification dated 18-06-2014 by the Govt. of India (Department of Public Enterprises) by which it directed to extend the benefit of child care leave to the women employees of the public sector enterprises also in line with identical rights given to the central government employees. These rights be directed to be extended with retrospective effect as on the date of notification.

b) To set aside the letter dated 28.07.2015, 14.12.2016 and 28.-03-2017 of the respondent by which it refused to grant child care leave to the applicant.

c) To direct the respondent to grant the child care leave to the applicant as per her application from 01-08-2015 till the date of her superannuation i.e. 28-4-2017 alongwith all consequential financial benefit as applicable."

3. The applicant has placed reliance on the following decisions:-

(i) Hon'ble Supreme Court in the case of Ka Ghosh Vs. Chief Secretary (Civil Appeal No. 4506/2014 decided on 15.04.2014), (ii) Vincent Vs. UOI, 1987(2) SCC 165, (iii) Bandhua Mukti Morcha Vs. UOI, MCD Vs. Female Worker & Anr., 2000(3) SCC 224, Githa Hariharan Vs. Reserve Bank of India, 1992 SC (2) 228, Apparel Export Promotion Council Vs. A.K. Chopra, 1989(1) SC 759 and Hon'ble High Court of Delhi in the case of Amandeep Kaur Vs. Union of India [WP(C)-6792/2015).

4. In reply, the respondents without disputing the facts of the case have submitted that no cause of action has accrued to the applicant as no legal or fundamental rights of the applicant have been infringed. They aver that the applicant is trying to draw parity with the women employees of Central Government by asking for incorporating the provision of child care leave in their leave rules. This, they say is not possible between two different sets of

employees, from different class, notwithstanding the fact that even in the Central Government an employee cannot proceed on child care leave without sanction. The applicant, who was on unauthorized absence, was warned of disciplinary action under RITES (Conduct, Discipline & Appeal) Rules, 1980 and was advised to join duty immediately. She availed 3739 days leave from 2001 till her superannuation on 30.04.2017. She was placed under suspension w.e.f. 21.04.2017 and charge sheeted for major penalty. The respondents submit that reliance placed by the applicant upon judgments of Hon'ble Supreme Court as well as Hon'ble High Court are not applicable to the current case. Hence, the O.A. be dismissed with cost.

5. The respondents have also filed an additional affidavit stating that they follow the guidelines issued by Department of Public Enterprises, which is the nodal department for Central Public Sector Enterprises. Vide OM dated 18.06.2014, the Department of Public Enterprises had advised/informed that women employees of the Central Government are entitled to maternity leave upto a maximum period of 180 days, child care leave upto a maximum of 02 years, child adoption leave upto a maximum of 180 days, paternity leave upto a period of 15 days and protection against sexual harassment of women at workplace. The employees of CPSEs are not Central Government employees, in respect of which it was clarified that CPSEs formulate their own HR Rules with approval of their respective Boards, in consultation, if required, with the concerned Ministries. The Child Care Leave has been refused to the applicant by the respondents, who are Central Public Sector Enterprises (CPSE) on the ground that they are not governed by Central Government employees Rules and Regulations, and are covered under the Leave Rules as approved by its Board of Directors.

6. I have gone through the facts of the case & perused the rival submissions. In their counter, the respondents have raised the issue pertaining to the leave availed by the applicant 2001 onwards and painstakingly explained how the respondents dealt with it. These details, in my view, are not relevant for adjudicating the present issue. The history of the leave record of the applicant starting from 2001/2003 onwards is not the subject matter of the present OA. The relief claimed by the applicant is only with regard to extend the benefit of child care leave to her in line with identical rights given to the Central Government employees. I, therefore, proceed to adjudicate this aspect alone without other (irrelevant) issues raised by the respondents in their pleadings.

7. The O.M. dated 11.09.2008 of Government of India, Ministry of Personnel, Public Grievances & Pensions (Department of Personnel & Training) in pursuance of recommendations of the 6th Central Pay Commission accepted enhancement of quantum of Maternity Leave and introduced Child Care Leave in respect of women employees of Central Government. It was held that:-

"(c) Women employees having minor children may be granted Child Care Leave by an authority competent to grant leave, for a maximum period of two years (i.e.730 days) during their entire service for taking care of upto two children

whether for rearing or to look after any of their needs like examination, sickness etc. Child Care Leave shall not be admissible if the child is eighteen years of age or older. During the period of such leave, the women employees shall be paid leave salary equal to the pay drawn immediately before proceeding on leave. It may be availed of in more than one spell. Child Care Leave shall not be debited against the leave account. Child Care Leave may also be allowed for the third year as leave not due (without production of medical certificate). It may be combined with leave of the kind due and admissible. " Another O.M. No. 13018/2/2008-Estt. dated 29.09.2008 was issued clarifying the aforementioned O.M. holding that child care leave can be granted to women employees having minor children below the age of 18 years, for a maximum period of 2 years (i.e. 730 days) during their entire service, for taking care of upto two children whether for rearing or to look after any of their needs like examination, sickness etc. The question as to whether child care leave would be admissible for the third child below the age of 18 years and the procedure for grant of child care leave was also discussed in the said OM.

8. The Department of Public Enterprises (DPE) issued the O.M. dated 18.06.2014 to bring uniformity in facilities available to woman employees of CPSE like Maternity Leave and Child Care Leave. It was requested therein that similar facilities, as available to women employees of Central Government should be made available to women employees of CPSEs. However, it was clarified that since the CPSEs formulate their own H.R. rules with the approval of their respective Boards, in the interest of ensuring the welfare of women employees, these HR rules must incorporate all statutory provisions. It was further requested that administrative Ministries/Departments should advise CPSEs under their administrative control to bring some uniformity in their rules in line with similar facilities available to women employees of the Central Government, with approval of the respective Boards. The respondents state that since provision of maternity leave was already available in their leave rules, provision for paternity leave was duly incorporated. The Leave Rules of the respondent Corporation are available at Annexure-R-2. A perusal of the same shows that while different kinds of leave find a mention therein, including maternity leave and paternity leave, there is no provision for grant of child care leave.

9. The respondents have repeatedly urged in the counter as well as during the course of hearing that the provision of grant of child care leave does not exist in CPSEs. The reasoning advanced is that RITES is competing with PSUs and Multi National Companies in its line of business. In many of the projects, the company is having consortium with national and international firms for critical projects to meet with its contractual obligations to its clients. Due to commitment to the projects and clients, and peculiar nature of work of the company, the Board of Directors did not find it feasible to introduce child care leave in its 216th meeting held in August, 2015 and in its 224th meeting held in November, 2016.

10. I am not impressed with the contention of the respondents that the O.M. on

child care leave is not applicable to the respondent organization since it does not cover the employees of CPSEs who are not Central Government employees. Before I come to the admissibility of child care leave, I would like to briefly touch upon the issues, which emerged and which ultimately led to grant of maternity leave to women employees, by way of Maternity Benefit Act of 1961.

11. Article 25(2) of the Universal Declaration of Human Rights, 1948 stipulates that "Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection."

Article-6 of the same Conventions reads:- "States Parties recognize that every child has the inherent right to life. 2. States Parties shall ensure to the maximum extent possible for survival and development of the child." Keeping many of these factors in mind, Hon'ble Madras High Court in the case of K.Kalaselvi Vs. Chennai Port Trust (WP-8188/2012) decided on 04.03.2013 held that maternity leave can be granted even in those cases where child has been obtained through surrogacy procedure.

12. It would be apt to reproduce paras-15 to 18 of the Hon'ble High Court of Uttarakhand judgment in the case of Deepa Sharma (Dr.) Vs. State of Uttarakhand & Ors. [Writ Petition No. 54 of 2015 (S/B) dated 15.12.2016 stating that:-

"15. The International Labour Organization (ILO) has conducted the survey for maternity and paternity at work (Law and practice across the world) in 2014. The survey has covered the period w.e.f. 1994-2013 for duration of maternity leave across the world, maternity cash benefits, finance of maternity cash benefits, scope and eligibility requirements. The survey has also been undertaken for paternity, parental and adoption leave as well as protection of employment during maternity and non-discrimination in employment in relation to maternity, healthy arrangement of working time and arrangement of nursing breaks.

16. We are required to make labour laws in conformity with the recommendations made by the International Labour Organization read with Article 42 of the Constitution of India.

17. According to the Article 42 of the Constitution of India, "the State is required to make provision for securing just and humane conditions of work and for maternity relief.

18. The objective of ILO to conduct the survey was to promote motherhood and child care as well as to promote gender equality. Every female employee and male employee whether appointed on regular basis, contractual basis, ad hoc/tenure or temporary basis have a fundamental right to reasonable duration of maternity leave as well as paternity leave, child care leave (CCL) and adoption leave to promote motherhood and child care under Article 21 of the Constitution of India read with Article 42 of the Constitution of India."

It was 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. This led to introduction of child care leave, which can be availed of at any time by mother whenever she feels that child needs her care.

13. In the present case, the applicant has explained the reasons as to why her daughter who has been conceived by way of IVF needs her constant care and attention. She has explained why she was unable to join her duties due to compelling circumstances beyond her control. Undoubtedly, leave is not a matter of right of the employee and the same can be refused by the employer in view of the exigencies of the services. But no reasons have been advanced by the respondents for not approving child care leave except a combination of reasons starting from the past history of the applicant and the fact that child care leave is not applicable to CPSEs. Hon'ble Madras High Court in the case of K. Kalaiselvi (supra) held that:-

"27. India is a signatory to various international covenants and treaties. The Universal Declaration of Human Rights, adopted by the United Nations on 10-12-1948, set in motion the universal thinking that human rights are supreme and ought to be preserved at all costs. There have followed a series of conventions, which reflect the broad international consensus on important issues of global concern.

28. Of the International Conventions, two which are very relevant for the present issue are "Convention on the Elimination of all Forms of Discrimination against Women" (CEDAW) and "ILO:Maternity Protection Convention 2000". Convention on the Elimination of all Forms of Discrimination against Women (CEDAW):

29. The United Nations adopted this Convention on 18-12-1979. India ratified it on 19-6-1993 and acceded to it on 8-8-1993 with reservation on Article 5(e), 16(1), 16(2) and 29 of CEDAW."

Thus after years of deliberations at National and International level, the right of a woman employee for maternity leave has now been established as supreme. The Maternity Benefit Act, 1961, amended vide Gazette of India No. 6 of 2017 on 28.03.2017 effective from 01.04.2017, gave legal recognition to gender equality. The concept of child care leave is nothing but an extension of similar thought process ensuring maximum possible protection for survival and development of the child.

14. In the same judgment, their Lordships dealt with the issue of grant of child care leave as envisaged under Rule-18(D) of All India Services (Leave) Rules, 1955. The issue raised by the respondents in the current O.A. is the same as dealt with by the Hon'ble Madras High Court in the case of K. Subha Vs. Deputy Inspector General of Police, Group Centre, Central Reserve Police Force, Cheenai, Tamil Nadu and Ors. (WP-31503/2012) decided on 04.03.2013 wherein their Lordships held that:-

"8....While the instructions provide that Child Care Leave cannot be demanded as a matter of right and is to be treated like Earned Leave and sanctioned as such, keeping in view that this leave is to be granted to women employees for rearing or to look after any of the needs of their children like examination, sickness etc., a more humane view needs to be taken when lady personnel apply for grant of this leave."

The concept of child care leave is a testimony to the recognition and need felt for ensuring welfare of working women by giving them benefit of leave to ensure child health. In the circumstances detailed in the present O.A., it cannot be disputed even by the respondents that the health and care of the girl child of the applicant requires urgent and committed attention.

15. A Notification issued by Government of India is applicable to all Ministries, including the respondents, who are an extended arms of the Railways. There is no doubt that every child needs care for the first few years of his/her life. The respondents themselves have incorporated in the Leave Rules, a provision for paternity leave along with maternity leave. It should not require intervention of Courts to lay down guidelines when the basic rationale of leave for the working woman mother to take care of the child, stands accepted by way of an Maternity Benefit Act. Discretion to exercise their own HR Rules should not be exercised in a cussed manner, as done by the respondents. The applicant's post misdemeanors should not be allowed to cause any prejudice to her right to child care leave. I am convinced that it is incumbent upon the respondents to show empathy for their women employees and follow the guidelines laid down in O.M. dated 11.09.2008, referred to above. They would still retain the discretion not to allow child care leave in those cases where administrative exigencies do not so warrant. However, the factual matrix of the present case leaves no room for ambiguity that child care leave is absolutely justified in the instant case. The applicant has delivered a premature IVF child, at an advanced age, clearly making her presence imperative for welfare of the child.

16. In view of the same, O.A. is allowed and the impugned orders vide which child care leave was rejected are quashed. The respondents are directed to allow child care leave applied by the applicant, as per law on the subject. No costs.