

(2006) 11 DEL CK 0015
In the Delhi High Court
Case No : Writ Petition (C) 651 of 2005

Seema Gupta

APPELLANT

Vs

Guru Nanak Institute of Management

RESPONDENT

Date of Decision : 20-11-2006

Acts Referred:

Central Civil Services (Leave) Rules, 1972 — Rule 19, 30, 30(1), 31, 31(1)
Constitution of India, 1950 — Article 14, 15(3), 16, 226, 311
Specific Relief Act, 1963 — Section 12, 14, 14(1), 21

Citation : (2006) 135 DLT 404

Hon'ble Judges : S. Ravindra Bhat, J

Bench : Single Bench

Advocate : Manjeet Singh, for the Appellant; Jasmeet Singh, for the Respondent

Final Decision : Allowed

Judgement

S. Ravindra Bhat, J.—The Petitioner was appointed as commerce lecturer in response to the advertisement published in Newspaper dated 28.03.2001, by the respondent college (hereafter "the college"). She joined the College on 1st May 2001. The terms of appointment were appointment to be on probation for one year which could be extended for another one year;

i) the appointment could be terminated without any notice and without assigning reason during the first year and by one month's notice on either side.

2. It is claimed that though entitled, the petitioner was not granted summer vacation leave for two years. 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 Nank Dev University Rules (GNDU Rules) which, it is averred, allowed maternity leave for that period.

3. The Petitioner was informed that as the Central Civil Service Rules were applicable to her services the provisions of GNDU Rules were inapplicable. In the

meanwhile, as per the pleadings, she was applying for extension of leave, initially sanctioned up-to May, 2004, on medical grounds. Her requests, were granted by the college, from 12-5-2004 to 11.6.04, for 31 days; later, from 12-6-2004 to 25th June, 2004 i.e. 14 days. The college used to send her show cause notices to report back to duty. In response to the letter application dated 22.06.2004 the college informed that the petitioner was governed by the CCS Rules and not by the GNDU Rules and that as per the CCS rules she was not entitled for the maternity leave beyond 135 days. The college also directed her to rejoin forthwith, threatening disciplinary action against her.

4. By letter dated 15.09.2004 the petitioner 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 claimed that despite that service of the request, petitioner was terminated on the basis of unauthorized leave/absence, on 14th October 2004 i.e. within two months of the extended maternity leave.

5. 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 years. In case of maternity leave even the requirement of producing medical certificate has been waived off.

6. The termination is impugned as arbitrary, illegal and contrary to provisions of the CCS Rules. It is also stated that the impugned termination is vocative of Articles 14 and 16 of the Constitution of India, as well as provisions of the Maternity Benefits Act.

7. The college, in its return, has disclaimed any liability. It states that the petitioner could not claim to continue in its services on the basis of any entitlement, since she was not a regular employee, but merely engaged on ad-hoc service. It is also averred that the college acted within the bounds of law, in granting all the leave mandated by the rules. Initially, a period of 135 days leave was sanctioned; later, it was extended twice, at the petitioner's request. If indeed the college harbored any ill will or bad faith against her, there would have been no extension of the leave, on two occasions.

8. It is alleged that repeated show cause notices were issued to the petitioner for overstaying the leave; the college was within its right to terminate her, in the larger interests of the students. It was submitted that the petitioner enjoyed a full six months, or 180 days leave; the college's refusal to grant any further extension, and in issuing an ultimatum to her, to rejoin the services, was not only justified, but dictated by exigencies of the situation.

9. The college has also taken the position that though leave can be availed of for one year, under Rule 43, it has to be granted on an employer's fair assessment of the situation. In the present case, the petitioner had repeatedly sought extensions; the employer had granted them. However, she did not heed warnings to cease absenting, and two final notices were issued on 13th and 17th

September, 2004. She did not comply with terms of those notices. As a result, the matter was brought to the notice of the management, and finally the termination letter was issued. These circumstances establish that the action impugned was justified.

10. Mr. Rajesh K. Gogna, Learned Counsel for the petitioner had argued on her behalf; later, Shri M.S. Ahluwalia, appeared on some dates of hearing. It was contended that Rule 43 (4) (b) of CCS Leave Rules entitled her to continuation of maternity leave up to a maximum period of one year which was requested for, but denied arbitrarily. Counsel contended that maternity leave had to be allowed, having regard to the peculiar needs of the employee. It was urged that the petitioner suffered from an acute case of infection; her newly born also suffered from jaundice. As a result, the petitioner wanted to take care of the infant. Such a request was not unreasonable.

11. Learned Counsel relied upon provisions of Articles 14, 15(3) and 42 of the Constitution of India, to say that the obligation to make special provisions for women, was an affirmative duty; provisions for maternity, were in fact a part of the Directive Principles of State Policy. In furtherance of these constitutional provisions, Rule 43 was framed; likewise the Maternity Benefit Act was also enacted to grant relief to mothers, in recognition of the need for special treatment.

12. Learned Counsel also relied upon Article 25 of the Universal Declaration of Human Rights, 1948 and Article 11(2) of the Convention on Elimination of All Forms of Discrimination Against Women, 1979.

13. Mr. Jasmeet Singh, Learned Counsel for the college, submitted that the petitioner had not made out a case for intervention under Article 226 of the Constitution of India. He submitted that the employer had allowed absence for about 190 days, having regard to the repeated requests for extension of leave. It was submitted that the impugned order was issued bona fide, having regard to the exigencies of institutional functioning. The petitioner's repeated absence could not be tolerated, having regard to the workload.

14. It was submitted that after availing over 180 days leave, including the extended maternity leave, the petitioner started attending duties, but again sought casual leave on several occasions. Between July and middle of September, she availed of above 7 days" casual leave, on the pretext that her child was unwell. She then sought 5 months maternity leave, which could not be acceded to. In these circumstances, the respondent institution decided that being an ad-hoc lecturer, her services had to be dispensed with. Therefore, the termination letter was issued. This action was indefeasible, legally, and in the facts of the case.

15. Reliance has been placed upon Indian Oil Corporation Ltd. Vs. Amritsar Gas Service and Others, , where it was held that if a contract between the parties is terminable, the petitioner is debarred from seeking any relief. It was held that

he finding in the Award being that the Distributorship Agreement was revocable and the same being admittedly for rendering personal service the relevant provisions of the Specific Relief Act were automatically attracted. Sub-section (1) of Section 14 of the Specific Relief Act specifies the contracts which cannot be specifically enforced, one of which is a contract which is in its nature determinable". In the present case, it is not necessary to refer to the other clauses of sub-section (1) of Section 14, which also may be attracted in the present case since clause (c) clearly applies on the finding read with the reasons given in the award itself that the contract by its nature is determinable. This being so granting the relief of restoration of the distributorship even on the finding that the breach was committed by the appellant- corporation is contrary to the mandate in Section 14(1) of the Specific Relief Act and there is an error of law apparent on the face of the Award which is stated to be made according to the law governing such cases" The grant of this relief in the award cannot, Therefore be sustained.

It was submitted that the Petitioner is seeking in the present petition enforcement of a contract of personal services. Counsel submitted that such an order cannot be granted, by relying on Executive Committee of Vaish Degree College v. Laxmi Narain and Ors. reported as AIR 1976 SCC 888 where it was held that:

7. On a consideration of the authorities mentioned above, it is, Therefore, clear that contract of personal service cannot ordinarily be specifically enforced and a Court normally would not give a declaration that the contract subsists and the employee, even after having been removed from service can be deemed to be in service against the will and consent of the employer. This rule, however, is subject to three well recognized exceptions - (i) where a public servant is sought to be removed from service in contravention of the provisions of Article 311 of the Constitution of India; (ii) where a worker is sought to be reinstated on being dismissed under the Industrial Law; and (iii) where a statutory body acts in breach or violation of the mandatory provisions of the statute.

16. Counsel also submitted that the appointment of the petitioner was governed by a letter of Appointment dated 1st May 2001 and was temporary. She had no right to the post and her services were terminated as per Clause (9) of the letter of Appointment. He relied upon the decision in India Tourism Development Corpn. Ltd. Vs. Poonam Rai, to say that such action is legally sustainable. Reliance was also placed on Dr. Ajit Singh Nayyar v. Union of India 125 (2005) DLT 650.

17. It would be essential, before discussing the merits of the case, to notice the relevant provisions. Rule 43 of the CCS Rules, which governs the situation, as per the version of both parties, reads as follows:

Chapter V

Special kinds of leave other than study leave

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 (35 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 the 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 one year 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.

18. Article 15(3) of the Constitution empowers the State to make special provisions inter alia, for women. Article 42 provides for just and humane conditions of work and maternity relief. The State is directed to make provision for securing just and humane conditions of work and for maternity relief.

19. The Maternity Leave benefit Act was enacted to fulfill the mandate of Article 42 of the Constitution of India. Section 12 Act prohibits the dismissal of a woman during or on account of her absence from work due to her pregnancy. Section 21 provides for penalty for discharge or dismissal of such woman of during or on account of her absence from work connected with the birth of a child.

20. Long ago, the Universal Declaration of Human Rights, by Article 25 had declared that everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of un-employment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. Article 25(2) provides that:

2) 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.

21. It would, while on the topic, also be essential to quote relevant provisions of the Convention for Elimination of All Forms of Discrimination Against women (CEDAW). They are as follows:

11(2). In order to prevent discrimination against women on the ground 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;

22. The facts here show that the petitioner was initially granted 135 days maternity leave. The trouble, however seems to have started after expiry of that period. It is alleged (and not denied by the respondent) that the leave due to the petitioner, including medical leave was not credited to her. She sought extension of leave, which was granted up to end of June, 2004. Thereafter, she joined duties, but had applied for leave on 7 occasions. The management took exception, and issued three memos, on different dates. The petitioner replied, again, on several dates, refuting allegations of absenteeism, and claiming that she ought to be given leave as per Rule 43, for one year. The management however, treated this as an instance of willful and truant behavior, and granted a final opportunity to report for duties. After that, the termination letter was issued.

23. The entire correspondence between parties discloses that the petitioner's request was on account of her erratic, and indifferent health condition as well as that of her infant child. It is an undisputed fact that Rule 43 of the CCS Rules applies as a term or condition of her service. No doubt, the request for one full years' leave was initially not made by the petitioner; she made the request after she rejoined duties, in July 2004. Yet she did make an application for the purpose, after being served with repeated show cause notices alleging habitual absenteeism.

24. The importance of treating female employees who avail of maternity leave and who might face problems in raising infants, was foreseen by the rule making authority, when Rule 43 (4)(b) was framed. The provision enables the employer to grant, and the employee to seek up to one years' leave in continuation of the initial maternity leave. The concern shown may be gauged by the fact that the employee is absolved of the normal requirement of having to produce a certificate- which implies that medical concerns alone are not determinative in granting such extended leave. The provision, in my opinion, has to be construed

in the background of the Universal Declaration of Human Rights and CEDAW, as an integral part of the State's obligation to promote the Directive Principle embodied in Article 42, of the Constitution.

25. The nature of the right, in the above rule, to my mind, also constitutes a special provision under Article 15(3). Although the respondent institution is not "State" yet, it is admittedly governed by the CCS Rules. In these circumstances, it has a duty to fulfill those conditions. The present case, and application of Rule 43, falls into what may be justly described as a "horizontal" application of the fundamental right, viz Article 15(3) in order to give effect to Article 42. Fundamental rights are ordinarily enforceable against State or state agencies, or those "authorities" acting as instrumentalities of the state. Yet, once the object of a fundamental right, such as for instance, the equality clause, or protective legislation relating to gender, is sought to be given shape through some statute, and made applicable to non-state "actors" such intervention is known as horizontal application of the concerned fundamental right. In this case, Rule 43 is an instance of application of gender protective rights to public, but non state entities like the respondent institution. In another sense, the rule has to be understood as a larger social concern for extending special care to employees who are given maternity benefits. It promotes non-discriminatory practices, and forces employers to give reasonable accommodation to female employees.

26. Viewed from this perspective, the contentions of the respondents about the application of the rule in the Executive Committee of Vaish Degree College case (supra) and the Indian Oil Corporation case (supra) are inapt. 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 the 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 the benefits under Rule 43.

27. 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.

28. 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. The respondent No. 1 is directed to comply with the directions regarding reinstatement and payment of arrears of salary, within six weeks from today. It shall also pay costs quantified at Rs. 15,000/- to the petitioner, within the said six weeks.

29. The writ petition is allowed in the above terms.