Central Administrative Tribunal
Principal Bench, New Delhi

O.A. No.1320/2014

Order reserved on 03.05.2016

Order pronounced on 06.05.2016

Hon'ble Mr. V.N. Gaur, Member (A)

Smt. Omwati Bhama, A.N.M.
Aged 56 years, Group C ANM
w/o Sh. Hariram Bhama
r/o D-601/10, Gali No.7A
Ashok Nagar, Shahdara
Delhi

.. Applicant

(By Advocate: Mr. V.M. Srivastava for Mr. A.K. Sharma)

Versus

1. Employees State Insurance Corporation
   Through Director General
   ESI Hqrs.
   Pancheep Bhawan, CIG Road
   New Delhi-2

2. Director (Medical), Delhi
   ESI Dispensary
   Nand Nagari, Dehi

..Respondents

(By Advocate: Mr. Prateek Kumar for Mr. Yakesh Anand)

O R D E R

The present OA has been filed by the applicant with the following prayers :-

> "(a) to quash/set aside order dated 13.03.2014 wherein respondent has directed to treat CCL w.e.f. 13.02.2012 to 29.03.2012 as dies-non with all its effect and further effect, copy of the same is Annexure-A in the interest of justice.

(b) Pass any other further order or orders which this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the case."

2. Briefly stated, the case of the applicant is that while working as ANM at ESI Dispensary, Nand Nagri, New Delhi, she applied for grant of Child Care Leave (CCL) w.e.f. 13.02.2012 to 29.03.2012 in order to help her daughter for preparing her CBSE Examination for 12th Standard scheduled from 01.03.2012. The respondents, however, sanctioned EL from 13.02.2016 to 18.02.2016 and refused to sanction CCL. The Medical Officer Incharge had recommended her leave with the condition of a substitute being provided in her place. The respondent No.2 informed the IMO Incharge that the CCL to the applicant cannot be granted with the condition of the substitute. When her representations to grant her CCL was not replied to, the applicant approached this Tribunal in OA No.409/2014 which was disposed of on 05.02.2014 with a direction that the respondents shall decide the representation made by the applicant within a period of six weeks. The respondents passed an order treating the period from 13.02.2012 to 29.03.2012 as *dies non*.

3. The learned counsel for applicant submitted that the applicant had unblemished record and she had applied for the CCL in view of the policy of the Government, according to which, CCL can be sanctioned to women employees having minor children for rearing

or for looking after their needs like examination, sickness etc. The respondents without examining the rationale behind the policy, in an arbitrary manner, refused to grant CCL. Even the EL already sanctioned has also been covered by the *dies non* order. The learned counsel, however, submitted that though the applicant had initially asked for leave to help her daughter during her 12th Class Board Examinations, later on, her daughter fell sick and was under treatment at the ESI Dispensary Nand Nagri, IGESI Hospital Jhilmil and a private clinic, from 02.02.2012 for more than a month. Therefore, despite having received the Memorandum from ESI Dispensary, Nand Nagiri, to resume duty immediately, she was unable to do so. The copies of Out Patient Ticket and prescriptions from the Dispensaries/Hospital earlier submitted to the respondents have been also attached with the OA. The learned counsel referred to the OMs issued by DOP&T dated 07.09.2010 and 30.12.2010, which clearly show the circumstances in which the CCL should be granted. Situations like examination is one of the specifically mentioned grounds in the DOP&T OM dated 30.12.2010 that would qualify a woman employee to avail CCL. With regard to the shortage of ANM at ESI Dispensary, the learned counsel submitted that at the time of asking for the leave, there were two other ANMs available at the Dispensary besides the applicant. Therefore, it should not have been difficult for the IMO Incharge to have carried on with the work with the help of two

ANMs. The learned counsel relied on the judgment of Hon'ble Supreme Court in the matter of ***Kakali Ghosh Vs. Chief Secretary, Andaman & Nicobar Administration & Ors.*** SLP (C) No.33244 of 2012. He also relied on the judgment of Hon'ble High Court of Delhi dated 08.07.2013 in the matter of ***Mahanagar Telephone Nigam Ltd. And Ors. Vs. Rakesh Kulshreshtha and Anr.*** - WP(C) No.1745-47/2012 and Chandigarh Bench of this Tribunal in OA No.931-CH-2011 dated 30.09.2011 in support of his contentions.

4. Learned counsel for respondents on the other hand submitted that it is not a right of the Govt. employee to get her leave sanctioned. At the time the applicant applied for leave., out of four posts of ANMs at ESI Dispensary, Nand Nagri, Delhi, one of the post was vacant due to unfortunate death of one of the ANMs Ms. Gulab Kaur on 29.05.2010. Two ANMs were working in Injection room in the morning and evening shift. However, one ANM Smt. Sunita Rani was on leave. Therefore, it was difficult to manage injection room with two ANMs. Out of the two ANMs, one ANM was not feeling well and she used to proceed on leave on medical grounds. Despite that, the respondents granted the applicant EL for six days on the ground of sickness of her daughter and thereafter she should have resumed the duty. The respondents issued Memoranda dated 22.02.2012, 29.02.2012 and 09.03.2012 directing her to join duty immediately, failing which the period of

unauthorised absence will be declared as *dies non*. The applicant did not care to report for duty as directed. Accordingly, the period of her absence from 13.02.2012 to 29.03.2012 was declared as *dies non*. With regard to the judgment cited by the learned counsel for the applicant, learned counsel for respondents submitted that in the context of the present case those are not applicable.

5. We have heard the learned counsels for the parties and perused the record. It is not in dispute that the applicant was entitled for grant of CCL under the scheme promulgated by the Govt. of India in the year 2008. It is also not in dispute that the ground on which the applicant had applied for CCL was covered by the conditions laid down in the OM dated 30.12.2010, which *inter alia* mentioned the situations like examination/sickness etc. among the possible purposes for which CCL could be granted to the women employees having minor children. The ground taken by the respondents for rejection of the request of the applicant is that there was a shortage of ANMs in the ESI Dispensary, Nand Nagri at that time. In para 9 of the counter reply, the respondents have stated that there were four ANMs working in ESI Dispensary at Nand Nagri, including the applicant. One post was vacant due to the death of one ANM since May, 2010. The health condition of one of the ANMs is stated to be indifferent and she used to proceed on leave on medical grounds on short notice. As a result, if the applicant had been sanctioned CCL, only two ANMs would be left

for performing duties at the Dispensary. Though it would be in the realm of the Medical Officer Incharge of the ESI Dispensary to take a call as to how to run the Dispensary with the existing staff, it can be seen that the respondents have also not been able to fill up the vacancy caused by the death of one ANM in 2010. Further, the CCL was denied to the applicant on the ground that one of the ANMs was having indifferent health and was going on leave very frequently. In other words, the leave was denied to the applicant to cater for the contingency that the one of the ANMs may go on sick leave. It is noted that with regard to the claim of unblemished service record raised by the applicant in Ground 'B' of the OA, the respondents have denied that the applicant had an unblemished service record but did not elaborate as to what has been wrong with the past record of the applicant. In any case, the respondents have not claimed that the applicant was a habitual leave taker or absentee and, therefore, her request for CCL could not be granted. Thus apparently an employee who is not a habitual absentee is denied leave when she needed it most giving preference to an employee who went on leave frequently even if the grounds were genuine. Here I find that the respondents had already granted EL for six days from 13.02.2012 to 18.02.2012 and thereafter the period left was from 19.02.2012 to 29.03.2012. I agree with the submission made by the learned counsel for respondents that leave is not a right of the Government employee, but at the same time the

policy of the Government behind scheme like CCL also has to be appreciated by the sanctioning authority. The purpose for which CCL can be availed are such that employee may not be in a position to manoeuvre its timings. If the child falls sick, the employee has to take leave at that time only and cannot postpone or prepone to suit the conditions prevailing in the office. The same would apply when the employee has applied leave for helping her ward during examinations. The situation will be more desperate if the examination is one of the board examinations. There is nothing on record to show that the respondents considered the request of the applicant with a sympathetic approach to find a via-media, e.g., it is not mentioned whether the IMO Incharge discussed this issue with other ANMs as also with the applicant to adjust period of the leave of the applicant in such manner that the purpose of the applicant would have been served without any serious dislocation of work in the Dispensary. If a mechanical view is taken that CCL would be granted only if a substitute is provided, in most of the offices and in most situations, this condition may not be easy to fulfil and, therefore, CCL will have to be denied. That would negate the very purpose that the CCL scheme is supposed to serve.

The Chandigarh Bench of this Tribunal in OA No.931-CH-2011, on the issue of denial of CCL had the following to say :-

> "9. Therefore, once a particular scheme is introduced by the employer for the benefit of its employees, it should be implemented in a fair and rational manner and we are of the view that the

respondents need not have completely rejected the request of the applicant for CCL as she needs this leave for the purpose of devoting some extra time to her minor children. Instead of completely rejecting her request, the respondents should have considered sympathetically her prayer for grant of CCL around the examination time.

10. Therefore, in our considered opinion, the matter requires re-examination. Thus, the impugned order dated 30.8.2011 (Annexure A-1) is hereby quashed and set aside while giving directions to the respondent concerned to consider sympathetically the prayer of the applicant for grant of CCL in different spells during and around the examination period of her children. Needful be done within a period of two months from the date of receipt of a copy of this order."

6. The Hon'ble High Court of Delhi in ***MTNL Vs. Rakesh Kulshreshtha and Another*** (supra) held as follows :-

"9. We have seen that the Tribunal has held that against three spells, the first spell between September 15, 1995 to September 26, 1999 and July 15, 2000 to August 07, 2000 no show cause notice was issued to the respondent No.1. The period was treated as dies non only for the reason that he has not performed his duties. Merely because the officer had not performed duties would not entail the period be treated as dies non. Dies non becomes indicative that such absence cause break in service resulting in forfeiture of service. It becomes obligatory on the part of the competent authority to first decide as to whether the officer was unauthorizedly absent. Since no show cause notice was issued to the respondent No.1 in so far as period 1 and 3 are concerned, the impugned orders have been rightly set aside by the Tribunal in T.A.No.12/2009 and T.A.No.1249/2009. In so far as T.A.No.16/2009 is concerned, the Tribunal also set aside the impugned orders in the said T.A. holding the same being non-speaking and non-reasoned order without referring to the points raised by the respondent No.1.

10. We agree with the conclusion of the Tribunal on the interpretation of F.R 17A and also with regard to denial of proper opportunity to the respondent No.1 before passing the impugned orders but would not agree in so far as the observation that necessary consequence pursuant to the quashing of orders shall follow, in as much as we see the periods in question relating to alleged absence is for several months. In one case it is for 4 years and 12 days. If the absence is not justified then surely it is a serious issue. F.R 17A and the instructions issued thereunder stipulates procedure before an action is taken for treating the period as dies non. The same need to be followed in letter and spirit. Appropriate would have been that the Tribunal should have remanded the matter to the competent authority calling upon him to issue show cause notice to the respondent No.1 as to why the periods in question be not treated as dies non and on receipt of the reply pass appropriate speaking and reasoned order. This would be in conformity with the law laid down by the Supreme Court wherein the Supreme Court was of the view that when departmental enquiry conducted against an officer found defective then the Court ought to have directed fresh proceedings from the stage of alleged illegality.

Reference in this regard be made to the opinion of the Supreme Court reported as 2008 (12) SCC 30 Union of India v. Y.S.Sadhu Ex-Inspector.

11. Accordingly we dispose of the writ petitions setting aside the impugned order dated October 11, 2011 and remand the matter to the competent authority giving liberty to it to issue show cause notice to the respondent No.1 as to why the periods in question be not treated as dies non. Upon receipt of reply it shall pass reasoned and speaking order."

7. The Hon'ble Supreme Court in ***Kakali Ghosh Vs. Chief Secretary, Andaman & Nicobar Administration and Ors*** (supra) ruled as under :-

"7. Learned counsel for the appellant submitted that there is no bar to grant uninterrupted 730 days of CCL under Rule 43-C. The High Court was not justified in holding that CCL can be granted in three spells in a calendar year as less as 48 days at a time. It was also

contended that the respondents failed to record ground to deny uninterrupted CCL to appellant for the rest of the period.

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14. In the present case, the appellant claimed for 730 days of CCL at a stretch to ensure success of her son in the forthcoming secondary/senior examinations (10th/11th standard). It is not in dispute that son was minor below 18 years of age when she applied for CCL. This is apparent from the fact that the competent authority allowed 45 days of CCL in favour of the appellant. However, no reason has been shown by the competent authority for disallowing rest of the period of leave.

15. Leave cannot be claimed as of right as per Rule 7, which reads as follows:

"7. Right to leave

(1) Leave cannot be claimed as of right.

(2) When the exigencies of public service so require, leave of any kind may be refused or revoked by the authority competent to grant it, but it shall not be open to that authority to alter the kind of leave due and applied for except at the written request of the Government servant."

However, under Sub-Rule (2) of Rule 7 leave can be refused or revoked by the competent authority in the case of exigencies of public service.

16. In fact, Government of India from its Ministry of Home Affairs and Department of Personnel and Training all the time encourage the government employees to take leave regularly, preferably annually by its Circular issued by the Government of India M.H.A.O.M. No. 6/51/60-Ests. (A), dated 25th January, 1961, reiterated vide Government of India letter dated 22/27th March, 2001. As per those circulars where all applications for leave cannot, in the interest of public service, be granted at the same time, the leave sanctioning authority may draw up phased programme for the grant of leave to the applicants by turn with due regard to the principles enunciated under the aforesaid circulars.

17. In the present case the respondents have not shown any reason to refuse 730 days continuous leave. The grounds taken by them and as held by High Court cannot be accepted for the reasons mentioned above.

18. For the reasons aforesaid, we set aside the impugned judgment dated 18th September, 2012 passed by the Division Bench of Calcutta High Court, Circuit Bench at

> Port Blair and affirm the judgment and order dated 30th April, 2012 passed by the Tribunal with a direction to the respondents to comply with the directions issued by the Tribunal within three months from the date of receipt/production of this judgment."

8. The Hon'ble High Court in ***Rakesh Kulshreshtha*** (supra) has dealt with the issue of declaration of absence of an employee as *dies non.* The view taken by the High Court was that a show cause notice was necessary before declaring the period of absence as *dies non.* The learned counsel for the respondents in the present OA submitted that the respondents had issued memorandum three times in February/March 2012 directing the applicant to resume her duty, failing which the period of absence will be treated as *dies non* and, therefore, they had fulfilled the requirement of giving show cause notice to the applicant. I do not agree with this interpretation of the learned counsel for respondents. A direction to the applicant to report for duty with the threat of declaration of absence as *dies non* is not the same as passing an order of *dies non* after considering the submissions of the applicant in response to a show cause notice. The Memoranda issued to the applicant directing her to report for duty are grounds for proceeding against her in case of non compliance, while the manner in which the period of absence has to be treated can be decided only after giving show cause notice and considering the representation of the applicant. The two cannot be equated.

9. The Hon'ble supreme Court in the ***Kakali Ghosh*** (supra), as emphasised in para 14 of the judgement, has taken note of the fact that the appellant therein had claimed for 730 days of CCL at a stretch to ensure success of her son in the forthcoming Secondary/Senior Secondary Examinations. It was also not in dispute that son was minor below 18 years of age when she applied for CCL. This was apparent from the fact that the competent authority allowed 45 days of CCL in favour of the applicant. However, no reason had been shown by the competent authority in disallowing the rest of the leave. In the present case also, the respondents had recognized the need for leave when the applicant reported about the sickness of her daughter and six days EL was granted. But, later on, though there was documentary proof that daughter of the applicant continued to be under treatment for more than a month, no reason has been given, other than the shortage of staff for denying the CCL during this period. I, therefore, do not find of CCL to applicant based on malafide ground or in conformity with the scheme.

10. Taking into account the entire conspectus of the case, the order dated 12/13.03.2014 passed by the respondents is quashed and set aside. The respondents are further directed to issue a fresh show cause notice to the applicant with regard to the declaration of her period of absence from 19.02.2012 to 29.03.2012, leaving out the period for which EL had already been sanctioned and pass a

speaking order within a period of four weeks from the date of receipt of a copy of this order. Needless to say that while doing so, the respondents shall keep in mind the observations in judgments quoted above, particularly in the judgment of Hon'ble Supreme Court in ***Kakali Ghosh*** (supra).

11. Accordingly, the OA stands disposed of in terms of the aforesaid directions.

(V.N. Gaur)
Member (A)

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