

Central Administrative Tribunal
Principal Bench
New Delhi

O.A.No.3104/2015

Order Reserved on: 29.04.2015
Order pronounced on 10.05.2016

Hon'ble Shri V. Ajay Kumar, Member (J)
Hon'ble Dr. B. K. Sinha, Member (A)

Ms. Nisha Chhillar
@ Nishal Grewal, age-32 (Staff Nurse)
W/o Mr. Sandeep Grewal
R/o H.No.229, Ground Floor
C&D Block, Shalimar Bagh
New Delhi – 110 088. ... Applicant

(By Advocate: Sh. Aman Saroha)

Versus

1. Govt. of NCT of Delhi
Through The Joint Secretary (Services)
Services Department
Branch-IV, 7th Level, B-Wing
Delhi Secretariat, I.P.Estate
New Delhi – 110 002.
2. The Department of Health & Family Welfare
Through The Principal Secretary
9th Level, A-Wing
Delhi Secretariat
I.P.Estate
New Delhi-110 002.
3. Sanjay Gandhi Memorial Hospital
Through The Medical Superintendent
Mangolpuri, S-Block
New Delhi-110 083.

4. Govt. of NCT of Delhi
Through The Chief Secretary
5th Floor, Delhi Sachivalaya
New Delhi. ... Respondents

(By Advocate: Ms. Alka Sharma)

O R D E R

By V. Ajay Kumar, Member (J):

The applicant, a Staff Nurse in the 3rd Respondent-Hospital, filed the OA aggrieved by the action of the respondents in not granting Maternity Leave to her for the reason that she begets the child through surrogacy.

2. The learned counsel for the applicant submits that the applicant was married to one Shri Sandeep Grewal on 27.08.2005, however, due to certain health problems she had to undergo a surgery for removal of her uterus and as a result, she could not become pregnant and give birth to a child. In order to have a baby, the applicant with the consent of her Husband, entered into a gestational surrogacy agreement on 27.12.2014 with one Ms. Pooja Devi as a surrogate mother to bear a child by employing the In-Vitro Fertilization (IVF) methodology. The expected date of delivery as per the Doctors of the concerned clinic was 05.07.2015. The applicant, being the commissioned mother, has applied for granting of maternity leave of 180 days vide application dated 08.06.2015 by duly enclosing all the requisite documents. However, the said application was rejected by

the respondents without assigning any reasons. In the meanwhile, a male child was born on 10.06.2015 via surrogacy route to the surrogate mother.

3. The learned counsel further submits that during the said period, the applicant proceeded on Earned Leave w.e.f. 11.06.2015 to 31.07.2015 for 51 days on the ground of new born child care. The respondent No.3, vide the impugned memorandum dated 17.07.2015, while stating that, as per leave records only 18 Earned Leave and 21 HPL are available to the credit of the applicant as on 30.06.2015, and directed the applicant to apply for Extra Ordinary Leave (EOL) on private affairs for remaining 33 days. The 3rd Respondent further vide Order dated 06.08.2015 informed that as per the letter dated 12.06.2015 received from the Joint Secretary (Services), Govt. of NCT of Delhi along with copy of letter dated 28.05.2015, issued by Ministry of Home Affairs, Govt. of India, regarding Maternity Leave on account of Surrogate pregnancy, it is specifically mentioned that "the issue of Maternity Leave is governed by Rule 43 of the CCS (Leave) Rules, 1972, which is not applicable to the cases of Surrogate pregnancy", and hence, the request of the applicant cannot be acceded to.

4. Aggrieved by the same, this OA has been filed seeking the following relief(s):-

"8.1 Quash the impugned inaction/order of the respondents whereby they are not allowing the Maternity Leave of the applicant, being arbitrary, malafide, discriminatory and illegal.

8.2 Direct the competent authority of respondent no.1 to accord approval of maternity leave for a period of 180 days and Child Care Leave as and when required by the applicant to enable her to give motherly care and protection to the new born child;

8.3 Direct the respondents to provide such other benefits to the petitioner on equal footing in terms of Rule 43 of the CCS (Leave) Rules, 1972, as are being provided to the employees who got child (ren) under normal/natural circumstances;

8.4 Award the cost of this application to the applicant.

8.5 Pass any other relief(s), direction(s), instruction(s), which this .. Tribunal deems fit and proper looking to the above facts and circumstances of the case in favour of the applicant in the best interest of justice."

5. The learned counsel appearing for the respondents, while reiterating the reasons given in order dated 06.08.2015, opposed the OA by submitting that the respondents followed the rules in force and hence no illegality or infirmity in the impugned order.

6. Heard Shri Aman Saroha, the learned counsel for the applicant and Ms. Alka Sharma, the learned counsel for the respondents, and perused the pleadings on record.

7. The learned counsel for the applicant, while drawing attention of this Tribunal to Annexure 8, Judgement of the Hon'ble High Court of Delhi, dated 17.7.2015, in **Rama Pandey vs. Union of India**, WP(C) No.844/2014, submits that a female employee, who is the commissioning mother, would be entitled to apply for Maternity Leave under sub-rule (1) of Rule 43 of the said Rules.

8. The Hon'ble High Court of Delhi in the aforesaid Judgement in **Rama Pandey v. Union of India**, after extensively considering Rule 43 of the CCS (Leave) Rules, 1972, and the case law on the subject, held as under:

"24. In view of the discussion above, the conclusion that I have reached is as follows :-

- (i). A female employee, who is the commissioning mother, would be entitled to apply for maternity leave under sub-rule (1) of Rule 43.
- (ii). The competent authority based on material placed before it would decide on the timing and the period for which maternity leave ought to be granted to a commissioning mother who adopts the surrogacy route.
- (iii). The scrutiny would be keener and detailed, when leave is sought by a female employee, who is the commissioning mother, at the pre-natal stage. In case maternity leave is declined at the pre-natal stage, the competent authority would pass a reasoned order having regard to the material, if any, placed before it, by the female employee, who seeks to avail maternity leave. In a situation where both the commissioning mother and the surrogate mother are employees, who are otherwise eligible for leave (one on the ground that she is a commissioning mother and the other on the ground that she is the pregnant women), a suitable adjustment would be made by the competent authority.
- (iv). In so far as grant of leave qua post-natal period is concerned, the competent authority would ordinarily grant such leave except where there are substantial reasons for declining a request made in that behalf. In this case as well, the competent authority will pass a reasoned order.

25. The writ petition is disposed of, in the aforementioned terms.

26. Parties shall, however, bear their own costs."

9. In K. Kalaiselvi v. Chennai Port Trust, Writ Petition No.8188/2012, decided on 04.03.2013, the Hon'ble High Court of Madras, while considering the short question that whether a woman employee working in the Chennai Port Trust is entitled to avail maternity leave even in case where she gets the child through arrangement by Surrogate parents, held as under:

"16. This court do not find anything immoral and unethical about the petitioner having obtained a child through surrogate arrangement. For all practical purpose, the petitioner is the mother of the girl child G.K.Sharanya and her husband is the father of the said child. When once it is admitted that the said minor child is the daughter of the petitioner and at the time of the application, she was only one day old, she is entitled for leave akin to persons who are granted leave in terms of Rule 3-A of the Leave Regulations. The purpose of the said rule 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, but yet the necessity of bonding of the mother with the adoptive child has been recognised by the Central Government. Therefore, the petitioner is entitled for leave in terms of Rule 3-A. Any other interpretation will do violence to various international obligations referred to by the learned counsel for the petitioner. Further, it is unnecessary to rely upon the provisions of the Maternity Benefit Act for the purpose of grant of leave, since that act deals with actual child birth and it is mother centric. The Act do not deal with leave for taking care of the child beyond 6 weeks, i.e., the post natal period. The right for child care leave has to be found elsewhere. However, this court is inclined to interpret Rule 3-A of the Madras Port Trust (Leave) Regulations, 1987 also to include a person who obtain child through surrogate arrangement.

17. It will not be unnecessary if a reference is made to the All India Services (Leave) Rules, 1955, wherein the Central Government had recognised even paternity leave to be granted. Rule 18(D) was introduced with effect from 21.09.2011. The child care leave is given to a female member of the service. Rule 18(D) reads as follows :

"18(D)Child Care Leave to a female member of the Service--
(1)A female member of the Service having minor children below the age of eighteen years may be granted child care leave by the competent authority for a maximum of 730 days during her entire service for taking care of upto two children.

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

(3)Child care leave may be combined with leave of the kind due and admissible.

(4)Notwithstanding the requirement of production of medical certificates contained in sub-rule (1) of rule 13 or rule 14, leave of the kind due and admissible (including commuted leave not exceeding 60 days and leave not due) up to a maximum of one year, if applied for, be granted in continuation of child care leave granted under sub-rule(1).

(5)Child care leave may be availed in more than one spell.

(6)Child care leave shall not be debited against the leave account of the member of the Service."

In the result, the writ petition will stand allowed. The respondent Chennai Port Trust is directed to grant leave to the petitioner in terms of Rule 3-A recognising the child obtained surrogate procedure. Further a direction is issued to the respondent to include the name of the child G.K.Sharanya, as a member of the petitioner's family and also include her name in the FMI card forthwith. With reference to the expenditures incurred, since such a procedure has not been contemplated for the purpose of reimbursement, this court is not inclined to give any direction with reference to reimbursement of the amounts involved in such procedure. No costs. Consequently, connected miscellaneous petitions stand closed."

10. In **P. Geetha v. The Kerala Livestock Development Board Ltd.**, Writ Petition (C) No.20680/2014(H), decided on 06.01.2015, the Hon'ble High Court of Kerala at Ernakulam, while considering the following issues,

"i. Whether the petitioner is entitled to maternity leave, having had a child through the process of surrogacy, she herself being the genetic or biological mother?

ii. Whether, in the face of a particular legislative field having been occupied by an extant domestic enactment, the International Law conventions and treaty obligations can be enforced through Municipal Courts?

iii. Whether the dichotomy in maternity is admissible, so that pre-natal and post-natal periods can be viewed distinctly in relation to two different women?"

held as under:

"74. Thus, to conclude, this Court declares that there ought not to be any discrimination of a woman as far as the maternity benefits are concerned only on the ground that she has obtained the baby through surrogacy. It is further made clear that, keeping in view the dichotomy of maternity or motherhood, the petitioner is entitled to all the benefits an employee could have on post-delivery, sans the leave involving the health of the mother after the delivery. In other words, the child specific statutory benefits, if any, can, and ought to, be extended to the petitioner.

75. It is only apt to end this exposition on motherhood with the words of Margaret Sanger, the American Birth Control Activist and Nurse, who said: "When motherhood becomes the fruit of a deep yearning, not the result of ignorance or accident, its children will become the foundation of a new race."

11. In **Hema Vijay Menon v. State of Maharashtra and Ors.**, Writ Petition No.3288/2015, decided on 22.07.2015, before the Hon'ble High Court of Bombay (Nagpur Bench), the short question that arises for consideration was whether a mother is entitled to avail maternity leave, though she begets the child through surrogacy. It was observed as under:

"8. As rightly pointed out on behalf of the petitioner, there is nothing in Rule 74 of the the Maharashtra Civil Services (Leave) Rules, 1961, which would disentitle a woman, who has attained motherhood through the surrogacy procedure to maternity leave. Rule 74 provides for maternity leave to a female government employee. We do not find anything in Rule 74 which disentitles the petitioner to maternity leave, like any other female government servant, only because she has attained motherhood through the route of surrogacy procedure. It is worthwhile to note that by the Government Resolution dated 28.07.1995, maternity leave is not only provided to a natural mother but is also provided to an adoptive mother, who adopts a child on its birth. The only reason for refusing maternity leave to the petitioner is that there is nothing in the Government Resolution, dated 28.07.1995 for providing maternity leave to the mother who begets the child through surrogacy. If the Government Resolution, dated 28.07.1995 provides maternity leave to an adoptive mother, it is difficult to gauge why maternity leave should be refused to the mother, who secures the child through surrogacy. In our view, there cannot be any distinction whatsoever between an adoptive mother that adopts a child and a mother that begets a child through a surrogate mother, after implanting an embryo in the womb of the surrogate mother. In our view, the case of the mother who begets a child through surrogacy procedure, by implanting an embryo created by using either the eggs or sperm of the intended parents in the womb of the surrogate mother, would stand on a better footing than the case of an adoptive mother. At least, there cannot be any distinction between the two. Right to life under Article 21 of the Constitution of India includes the right to motherhood and also the right of every child to full development. If the government can provide maternity leave to an adoptive mother, it is difficult to digest the refusal on the part of the Government to provide maternity leave to a mother who begets a child through the surrogacy procedure. We do not find any propriety in the action on the part of the Joint Director of Higher Education, Nagpur, of rejecting the claim of the petitioner for maternity leave. The action of the respondent Nos. 1 to 3 is clearly arbitrary, discriminatory and violative of the provisions of Articles 14 and 21 of the Constitution of India. It is useful to refer to the unreported judgment of the Delhi High Court in the case of Rama Pande vs. Union of India, and relied on by the learned counsel for the petitioner, in this regard."

12. In view of the aforesaid categorical findings of various High Courts squarely covering the field and in the circumstances, the OA is allowed as prayed for, however, without costs.

(Dr. B. K. Sinha)
Member (A)

(V. Ajay Kumar)
Member (J)