

**HIGH COURT OF TRIPURA
AGARTALA**

WP(C) No.600 of 2023

Shibani Das, aged: 51 years
wife of Sri Asish Debnath,
resident of C/o Dr. Sankar Sarkar, M.S., Shyamali Bazar,
PO-Kunjaban, PS- New Capital Complex,
District- West Tripura, Pin-799006.

....Petitioner(s)

VERSUS

1. The State of Tripura, represented by the Commissioner & Secretary to the Education (School), Government of Tripura, New Secretariat Complex, Gurkhabasti, Agartala, PO- Kunjaban, PS- New Capital Complex, Sub-Division- Sadar, District- West Tripura.

2. The Additional Secretary, Education (School) Department, Government of Tripura, New Secretariat Complex, Gurkhabasti, Agartala, PO- Kunjaban, PS- New Capital Complex, Sub-Division- Sadar, District- West Tripura.

3. The Director of Secondary Education, Government of Tripura, Office Lane, PO- Agartala, PS- West Agartala, District- West Tripura, Pin-799001.

4. The Headmistress, Sonamura Girls' Higher Secondary School, Sonamura, District- Sepahijala Tripura.

....Respondent(s)

For the Petitioner(s) : Mr. P. Roy Barman, Sr. Advocate
Mr. K. Chakraborty, Advocate

For the Respondent(s) : Mr. D. Sarma, Addl. G.A

Date of hearing & delivery : **04.10.2024**
of judgment & order

Whether fit for reporting : **Yes**

HON'BLE MR. JUSTICE ARINDAM LODH

Judgment & Order (Oral)

By means of filing the instant writ petition, the petitioner has prayed for following reliefs:-

*“i) Issue Rule upon the Respondents to show cause as to why a writ in the nature of Mandamus and/or order/orders and/or direction/ directions of like nature shall not be issued where by directing the Respondents, to sanction **Child Care Leave** for 327 days, in favour of the Petitioner, in terms of Rule 39(C) of the Tripura State Civil Service (Leave) (Thirteenth Amendment) Rules, 1986 (Annexure-1 infra);*

ii) Issue Rule upon the Respondents to show cause as to why a writ in the nature of Mandamus and/or order/orders and/or direction/directions of like nature shall not be issued whereby Quashing/setting aside the Memorandum, dated, 04.08.2020 (Annexure-4)

iii) Issue Rule upon the Respondents to show cause as to why a writ in the nature of Mandamus and/or order/orders and/or direction/ directions of like nature shall not be issued whereby Quashing and cancelling the Memo, dated, 31.07.2023, issued by the Director, Secondary Education, Govt. of Tripura.(Annexure:6)

iv) Make the rules absolute.

v) Call for records.

vi) Pass any further Order/Orders as this Hon'ble High Court considered fit and proper.”

2. Heard Mr. P. Roy Barman, learned senior counsel assisted by Mr. K. Chakraborty, learned counsel appearing for the petitioner. Also heard Mr. D. Sarma, learned Addl. G.A appearing for the State-respondents.

3. Mr. Roy Barman, learned senior counsel for the petitioner has submitted that the Government of Tripura had framed a rule under Article 309 of the Constitution of India vide notification dated 12.12.2017 (*Annexure-1* to the writ petition). It is the case of the writ petitioner that she applied for Child Care Leave (in short, 'CCL') for a period of 327 days since her son was appearing in CBSE examination, but, having found no response, the petitioner had filed a writ petition [WP(C) No.430 of 2023] before this Court. The learned Single Judge of this Court while disposing of the writ petition had passed a direction upon the respondents to consider the representation for granting CCL of 327 days. The said representation (*Annexure-3* to the writ petition) was disposed of by the competent authority of the respondents vide Memo dated 31.07.2023 (*Annexure-6* to the writ petition). The main ground considered by the respondents for rejection of the prayer of the writ petitioner is that CCL for 327 days in one go or in one spell could not be granted since the Memorandum dated 04.08.2020 issued by the Government of Tripura (*Annexure-7* to the writ petition) prescribed that Child Care Leave will be sanctioned by the concerned Head of Offices

upto maximum 30 days and gap of sanctioning CCL between the spells should be of at least 30 days i.e. after joining on expiry of CCL in one spell.

4. Mr. Sarma, learned Addl. G.A has submitted that in view of this Memorandum dated 04.08.2020, the petitioner is not entitled to enjoy CCL for a period of 327 days in one spell.

5. I have considered the submissions of learned counsel appearing for the parties.

6. It is settled proposition of law that *a rule framed under Article 309 of the Constitution of India has a statutory force and cannot be amended or superseded by any Government instruction or administrative order unless it is found to be clarificatory in nature filling up the gaps where certain things are silent on any certain points.*

[Emphasis supplied]

7. There should not be any quarrel at the bar that any gap in the statutory provision can be filled up by executive orders which are not inconsistent with the Rule. The executive authority can supplement the rule but not supplant. If the Government wants to provide anything by way of substitution or incorporating a particular point, it can be done only by a statutory amendment itself.

[Emphasis supplied]

8. In the considered view of this Court, an administrative instruction which runs counter to or is inconsistent with the statutory rules cannot be enforced, rather deserves to be quashed as having no force of law.

9. In the instant case, Rule 39(C) has been inserted in Tripura State Civil Service (Leave) Rules, 1986 (here-in-after referred to as “Leave Rules, 1986”) by way of amendment under Article 309 of the Constitution of

India vide notification dated 12th December, 2017. The said notification may be reproduced hereunder, for convenience, *in extenso*:-

“GOVERNMENT OF TRIPURA
FINANCE DEPARTMENT

No.F.1(1)-FIN(G)/86

Dated, Agartala the 12 December, 2017

NOTIFICATION

In exercise of the power conferred by the proviso to Article 309 of the Constitution of India and all other powers enabling him in this behalf, the Governor of Tripura is pleased to make following rules further to amend the Tripura State Civil Service (Leave) Rules, 1986 namely:-

- (1) These Rules may be called the Tripura State Civil Service (Leave) Rules (Thirteenth Amendment) Rules, 1986*
- (ii) They shall come into force on and from the date of issue of this Notification.*
2. *Below Rule 39(B), the following shall be inserted:*
 - 39(C): Child Care Leave: A woman Government servant having minor children below the age of 18 (eighteen) years may be granted Child Care leave (CCL), by an authority competent to grant leave, for a maximum period of two years (i.e., 730 days) during the entire service for taking care of upto two children whether for rearing or to look after any of their needs like examination, sickness etc. subject to the following conditions:-*
 - (i) Child Care Leave shall not be admissible, if the child is eighteen years of age or older*
 - (ii) During the period of Child Care Leave, she shall be paid leave salary equal to the pay drawn immediately before proceeding on leave.*
 - (iii) Child Care Leave may be availed of in more than one spell.*
 - (iv) Child Care Leave shall not be debited against the leave account.*
 - (v) Child Care Leave may be combined with leave of any other kind, due and admissible.*
 - (vi) The nature of Child Care Leave shall be like Earned Leave and therefore, 2nd & 4th Saturdays, Sundays, Gazetted Holidays etc. falling during the period of leave would also be counted for Child Care Leave, as in case of Earned Leave.*
 - (vii) Child Care Leave shall not be demanded as a matter of right and under no circumstances can any employee proceed on Child Care Leave without prior sanction of leave by the competent authority*
 - (viii) The period of willful absence or unauthorized absence shall not be converted into Child Care Leave.*
 - ix) Child Care Leave shall not ordinarily be granted during the probation period except in case of certain extreme situation where the leave sanctioning authority is fully satisfied about the need of Child Care Leave to the probationer. It may also be ensured that period for which such leave is sanctioned during the probation is minimal.*

Sd/-

(M. Nagaraju, I.A.S)
Principal Secretary to
the Government of Tripura.”

10. On plain reading of the said amended Leave Rules, 1986, it is apparent that a woman Government servant may be granted Child Care Leave (CCL) for a maximum period of 2(two) years (i.e. 730 days) during the entire service for taking care of upto 2(two) children whether for rearing or to look after any of their needs like examination, sickness, etc. subject to certain conditions.

11. Condition No.(iii) stipulates that “*Child Care Leave may be availed of in more than one spell*”. In my opinion, the said condition necessarily implies and indicates an option or discretion given to a woman Government servant to apply for Child Care Leave for a maximum period of 730 days at one spell or it may be availed in more than one spell.

12. Rule 39(C) of the Leave Rules, 1986 was sought to be modified or amended vide memorandum dated 04.08.2020 issued by the Government of Tripura (*Annexure-7* to the writ petition) restricting Child Care Leave for a maximum period of 30 days in one spell and further prescribing a gap sanctioning CCL between the spells should be at least 30 days i.e. after joining on expiry of CCL in one spell.

13. In my opinion, the memorandum dated 04.08.2020 restricting the maximum availability of CCL for 30 days and maintaining a gap of 30 days before sanctioning another spell of 30 days puts reasonable restrictions without any reasonable nexus to the objects the legislatures wanted to achieve by bringing the amendment of Leave Rules, 1986 vide notification dated 12th December, 2017 as quoted here-in-above.

14. On meticulous perusal of Rule 39(C), in my opinion, the framers of the Rule have not intended to put any restrictions upon the period of availing of the CCL keeping in mind the interest of the children. The

legislatures while introducing CCL for women government servants kept in mind that a mother is the best person to know and cater best service to the need of the children. Only restrictions, which are apparent in Rule 39(C), according to me, are that (i) a woman Government servant cannot avail CCL beyond 730 days (2 years); (ii) CCL is applicable for taking care of up to 2(two) children only and (iii) the 2(two) children must be minor i.e. below 18 years of age.

15. In view of this, I am of the considered view that the memorandum dated 04.08.2020 runs counter to or inconsistent to Rule 39(C) of the amended Leave Rules, 1986 having no force in the eye of law and is liable to be quashed. In my further opinion, Rule 39(C) is very explicit as regards the period of availability of the CCL by a woman Government servant. There is no gap or it cannot be said that rule is silent about the mode of availability of the CCL. As such, the periods restricting the availability of the CCL by a woman Government servant under memorandum dated 04.08.2020 amounts to amendment of Rule 39(C) of the amended Leave Rules, 1986 which is framed under Article 309 of the Constitution of India vide notification dated 12th December, 2017. Meaning thereby, the said memorandum overrides or supersedes the Child Care Leave Rule embodied in Rule 39(C), which is impermissible in law.

16. It is not that the Government is obviated from modifying or incorporating any other conditions in the Rule 39(C) of the amended Leave Rules, 1986, but, for this necessary rule has to be framed under Article 309 of the Constitution of India and not by any administrative instructions/order.

17. In the present case, the petitioner had applied for CCL availing for 327 days at one spell which was rejected by the competent authority of

the respondents on the basis of memorandum dated 04.08.2020 as illegal being inconsistent to Rule 39(C) of the amended Leave Rules, 1986. So, the foundation of the rejection of the prayer of the petitioner for granting 327 days CCL at one spell is *non-est* and thus, not sustainable in law. Therefore, the memorandum dated 04.08.2020 issued by the Government of Tripura, Education (School) Department is liable to be set aside as *void ab initio*. Accordingly, the said memorandum dated 04.08.2020 stands set aside and quashed.

18. In the result, the respondents are directed to grant CCL to the petitioner for 327 days in response to her representation (*Annexure-3* to the writ petition). As a corollary, the memo dated 31.07.2023 rejecting the representation of the petitioner also stands set aside and quashed.

The instant writ petition stands allowed in terms of above observations and directions.

JUDGE

Rohit

SANJAY GHOSH
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