

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05-08-2015

CORAM

THE HONOURABLE MR.JUSTICE M.SATHYANARAYANAN

WRIT PETITION No.23938 of 2015

K.Abirami

...Petitioner

vs

1. Assistant Elementary School Officer
Kattumannarkoil 608 301
Cuddalore District
2. The Secretary and Correspondent
Aided Elementary School
Keezhapazhanjanallur
Kattumannarkoil 608 301
Cuddalore District

...Respondents

Writ petition filed under Article 226 of the Constitution of India praying for issuance of a writ of mandamus directing the first respondent to grant maternity leave to the petitioner for the birth of her child under surrogate system, for the period from 22.06.2015 for 180 days with all privileges and other benefits as available under the Rules and Notifications by considering the application dated 11.6.2015, forwarded by the second respondent to the first respondent and disburse the amounts to the petitioner within a time frame.

For Petitioner : Mr.S.Subbiah

For Respondents : Mr.S.Gunasekaran
Government Advocate

ORDER

By consent, the writ petition itself is taken up for final disposal.

2.The petitioner would claim that she was appointed as Headmistress by the second respondent vide proceedings dated 4.7.1996, on account of the permanent vacancy caused due to the

retirement of the incumbent on 31.5.1996. The petitioner would state that the second respondent-Institution is an aided institution and her appointment was also approved and she is working and discharging her duties as Headmistress of the second respondent-School. It is further stated by the petitioner that though she was married on 8.4.1998, she was not blessed with any child and as per the expert's advice, she and her husband were advised to undergo Surrogate procedure and accordingly, they undergone the same at Sri Ramakrishna Hospital at Coimbatore and a Host Mother was also identified and the petitioner has entered into a legal agreement dated 11.10.2014, with her.

3.It is further stated by the petitioner that through the Surrogate method, a male child was born on 29.6.2015, and it is also registered with the Coimbatore City Municipal Corporation and a Birth Registration extract was also issued bearing Serial No.489, and the child is named as "N.A.Sai Niranjan" and is under the care and custody of the petitioner and her husband. It is the claim of the petitioner that though the child was born through surrogacy, she is to take care of the said child and there cannot be any difference between the naturally born child and the child born through Surrogate arrangement and the fact remains that for all practical purposes, the child born through surrogacy, is the child of the petitioner and her husband, and the petitioner, in order to take care of the child, has applied for maternity leave to the second respondent and it was forwarded to the first respondent and since no orders have been passed, she is constrained to approach this Court by filing this writ petition.

4.Mr.S.Subbiah, learned Counsel appearing for the petitioner, has drawn the attention of this Court to the typed-set of documents as well as the decision reported in 2013 (2) CTC 400 (K.KALAISELVI V. CHENNAI PORT TRUST), and would submit that similar issue was considered in the above cited judgment and this Court directed the Chennai Port Trust to grant leave to the petitioner therein, in terms of Madras Port Trust (Leave) Regulations, 1987, and therefore, the similar order may be passed.

5.The Court heard the submissions of Mr.S.Gunasekaran, learned Government Advocate, who accepted notice on behalf of the respondents and would submit that in the light of the above cited judgment, the first respondent may be directed to dispose of the petitioner's representation within a stipulated time.

6.This Court considered the rival submissions and also perused the materials placed before it.

7.It is relevant to extract the following portions of the above cited judgment [2013 (2) CTC 400]:-

"15.In the light of these rival contentions, it has to be seen whether the petitioner is entitled for a leave similar to that of the leave provided under Rule 3-A and whether her child's name is to be included in the FMI Card for availing future benefits?

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 21.9.2011. 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."

18. 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."

8. Though the petitioner prayed for a larger relief, this Court, in the light of the facts and circumstances, directs the first respondent to consider the application dated 11.6.2015, submitted by the petitioner, seeking maternity leave, on merits and in accordance with law, after taking note of the order dated 4.3.2013, made in W.P.No.8188 of 2012, reported in 2013 (2) CTC 400 (K.KALAISELVI V. CHENNAI PORT TRUST), and pass appropriate orders within a period of four weeks from the date of receipt of a copy of this order and communicate the decision taken, to the petitioner. The writ petition is disposed of accordingly. No costs.

Sd/-
Assistant Registrar (CS-IV)

//True Copy//

Sub Assistant Registrar

nsv

To

1. The Assistant Elementary School Officer
Kattumannarkoil 608 301
Cuddalore District
2. The Secretary and Correspondent
Aided Elementary School
Keezhapazhanjallur
Kattumannarkoil 608 301
Cuddalore District

1 CC to Mr.S.Subbiah, Advocate SR.No. 40597

1 CC to the Government Pleader, SR.No. 40615

KM (CO)
PSI (13.08.2015)

W.P.No.23938 of 2015