

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
WRIT PETITION NO.7421 OF 2014

Deepika Sagar Nersekar,)
Age 34 years, Occ: Stenographar (HG),)
Court of Small Causes,)
Mumbai.).. Petitioner

Versus

1. The State of Maharashtra,)
Through -)

(a) The Secretary,)
Department of Social Welfare,)

(b) Additional Chief Secretary,)
General Administration Department,&))

(c) Additional Chief Secretary,)
Finance Department,)
Mantralaya, Nariman Point,)
Mumbai.)

2. The Chief Judge,)
Court of Small Causes, Mumbai.)

3. The State Co-ordination Committee,)
through Secretary, Department of)
Social Welfare, State of Maharashtra,))
dealing with the Welfare of the)
handicapped, Mantralaya, Mumbai.)

4. The National Trust for the Welfare of)
Persons with Autism, Cerebral Palsy,)
Mental Retardation & Multiple)
Disabilities, Ministry of Social Justice)
& Empowerment,)
Government of India, 16B,)
Bada Bazar Road, Old Rajinder Nagar,))
New Delhi – 110060).. Respondents

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Shri Vijay Pandurang Patil for the Petitioner.

Shri A.B. Vagyani, Government Pleader along with Shri A.I. Patel, AGP and Ms. Tintina Hazarika for the Respondent No.1.

Shri Vijay Hiremath i/b Ms Rebecca Gonsalves for the Respondent No.2.

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CORAM : A.S. OKA & P.D. NAIK, JJ

DATE ON WHICH SUBMISSIONS WERE HEARD : 6TH MAY 2016

DATE ON WHICH JUDGMENT IS PRONOUNCED: 13TH MAY 2016

JUDGMENT (PER A.S. OKA, J)

1. The Petitioner is an unfortunate mother of 8 year old female child Hetal who is suffering from Cerebral Palsy Diplegia since her birth. On 19th May 2014, the All India Institute of Physical Medicine and Rehabilitation has issued a medical certificate in the prescribed form certifying that Hetal is physically disabled and has 60% permanent physical impairment. The Petitioner is in the employment of the Court of Small Causes at Mumbai as the Stenographer (HG).

2. The Petitioner is relying upon Rule 43-C of the Central Civil Services (Leave) Rules, 1972 (for short “the Central Rules”) as amended in the year 2009. Rule 43-C reads thus:

“43-C. *Child care leave.*—(1) A woman government servant having minor children below the age of eighteen years and who has no earned leave at her credit, may be granted child care leave 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 up to two children whether for rearing or to look after any of their needs like examination, sickness, etc.

- (2) During the period of child care leave, she 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 any other kind.
- (4) 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 not exceeding 60 days and leave not due) up to a maximum of one year, if applied for, be granted in continuation with child care leave granted under sub-rule (1).
- (5) Child care leave may be availed of in more than one spell.
- (6) Child care leave shall not be debited against the leave account.”

3. Under the said Rules, a woman Government servant having a minor child below the age of 18 years and who has no earned leave at her credit is entitled to apply for Child Care Leave for a maximum period of 730 days during the entire service for taking care of children or looking after their needs like examination, sickness, etc. Under Sub-rule (2) of Rule 43-C, such woman Government servant is entitled to

full pay during the said leave period. This leave under Rule 43-C is not as a matter of right. It does not provide for grant of leave for a continuous period of 730 days in each case. It talks about grant of leave for total 730 days during the tenure of service. The Petitioner is not disputing that she is not governed by the Central Rules, but she is governed by the Maharashtra Civil Services (Leave) Rules, 1981 (for short “the State Rules”). The prayer in this Petition under Article 226 of the Constitution of India is for issue of a writ of mandamus directing the Respondents to grant leave to the Petitioner in terms of Rule 43-C for 730 days for the purposes of bringing up and welfare of a disabled daughter.

4. The contention of the learned counsel appearing for the Petitioner is that Rule 43-C was brought on the statute book in the year 2009 which enables a woman Government servant to take care of her child who is suffering from illness. The learned counsel appearing for the Petitioner is relying upon the provisions of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (for short “Disabilities Act”). His submission is that under Section 13 of the Disabilities Act, it is necessary for the State Government to establish a State Co-ordination Committee and under Section 18, the State Co-ordination Committee is under an obligation to discharge several duties including the duty of review and coordination

of the activities of all the Departments of the Government and non-Government Organizations which are dealing with the matters relating to persons with disabilities. He pointed out that the function of the State Co-ordination Committee is also to advise the State Government on the formulation of policies, programmes, legislation and projects with respect to disability. His grievance is that the State Co-ordination Committee has failed to perform its duty. His contention is that the Committee ought to have advised the State Government to carry out an amendment to the State Rules on par with the Rule 43-C of the Central Rules. He relied upon a decision of the Apex Court in the case of *Justice Sunanda Bhandare Foundation v. Union of India and Another*¹ and pointed out that a direction was issued by the Apex Court to the State Governments to implement the Disabilities Act by the end of the year 2014. He submitted that in case of a similarly placed woman Government servant, the Apex Court by its judgment and order in the case of *Kakali Ghosh v. Chief Secretary, Andaman & Nicobar Administration and Others*² upheld the order of the Tribunal granting leave under Rule 43-C to the Appellant before the Apex Court.

5. The learned counsel appearing for the second Respondent representing the Court of Small Causes, Mumbai, submitted that the State Government has not made any provision in its Leave Rules on par

1 (2014)14 SCC 383

2 (2014) 15 SCC 300

with Rule 43-C of the Central Rules and therefore, the Petitioner is not entitled to leave as prayed for. The learned Government Pleader representing the State Government relied upon affidavits-in-reply filed by Shri Sunil Pandurang Pandhare, Under Secretary, Finance Department and Smt.Mamta S. Shere, the Assistant Commissioner, Social Welfare, Mumbai City.

6. Reliance is placed in the affidavit of Smt. Mamta S. Shere on the various child care facilities provided by the State Government. It is pointed out that since the year 1994, the State Government has reserved 30% posts for women in Government and Semi-Government services, but in the Central Government and its establishments, there is no such reservation. It is contended by Smt. Shere that the decision in the case of *Kakali Ghosh* will have no application in the present case as in the case of the Appellant before the Apex Court, the Central Rules were admittedly applicable.

7. In the affidavit of Shri Sunil P. Pandhare, a similar stand has been taken. It is pointed out that the State Government is spending large amounts on the salary of women employees. It is contended that if similar provision is made in the State, due to 30% reservation for women, a large amount will be spent on payment of salaries to the women Government servants who are granted leave for 730 days. It is

contended that if such a provision is made in the State Rules, a large number of women Government servants will be on leave which will affect the functioning of the Government and related organizations. The submission is that with due sympathy to the Appellant, no relief can be granted.

8. Before we consider the submissions, it will be necessary to make a reference to the orders made from time to time by the first Court in this Petition. The first order of the first Court is dated 29th September 2014 which refers to the role played by the State Co-ordination Committee. The Division Bench referred to Section 73 of the Disabilities Act which confers a rule making power on the State Government. Paragraph 9 of the said order dated 29th September 2014 reads thus:

“9. Section 73 of PWD Act confers powers on the appropriate Government to make rules for carrying out the provisions of the PWD Act. It is in exercise of the above statutory powers that the Central Government has inserted Rule 43-C in the Central Civil Services (Leave) Rules, 1972 in the year 2009. It is, thus, clear that the Persons with Disabilities Act has already conferred such power on the rule making authority i.e. both the Central Government and the State Government, to provide measures for the benefit of children with disabilities.”

9. In Paragraph 10 of the said order, the first Court observed that the State must take a proactive stand in such matters. On 13th

October 2014, time was granted to the State Government. Again on 24th November 2014, an adjournment was granted to the State Government. On 27th January 2015, time was again sought by the State Government. The order dated 27th January 2015 records that the matter was pending with the General Administration Department of the State Government. As there was no response from the State Government, on 23rd February 2015, the first Court passed an order which reads thus:

“In spite of the orders dated 29 September 2014 and 27 January 2015, the learned AGP has not received any instructions in the matter and prays for adjournment. In the circumstances, we have left with no other alternative but to direct the respondents to allow the petitioner to remain on leave and pay her salary and allowances for the leave period till further orders. Stand over to 2 March 2015.”

(emphasis added)

10. On the basis of the said order that the Petitioner has been granted leave. On 26th November 2015, this Court directed that the Petition shall be disposed of finally at the stage of admission.

11. We have considered the submissions. We have perused the provisions of the Disabilities Act, Central Rules and the State Rules. We have already referred to the order of the first Court dated 29th September 2014. In Paragraph 9 which is quoted above, it is observed that Rule 43-C is inserted in the Central Rules by exercising the statutory powers under the Disabilities Act.

12. In both the affidavits-in-reply filed on behalf of the State Government, there is no reference to the discharge of the functions and duties by the State Co-ordination Committee under the Disabilities Act. Section 18 which lays down the functions of the State Co-ordination Committee reads thus:

“18. Functions of the State Co-ordination Committee. - (1) Subject to the provisions of this Act, the function of the State Co-ordination Committee shall be to serve as the state focal point on disability matters and facilitate the continuous evolution of a comprehensive policy towards solving the problems faced by persons with disabilities.

(2) In particular and without prejudice to the generality of the foregoing function the State Coordination Committee may, within the State perform all or any of the following functions, namely:-

- (a) review and coordinate the activities of all the Departments of Government and other Governmental and Non-Governmental Organizations which are dealing with matters relating to persons with disabilities.,
- (b) develop a State policy to address issues faced by persons with disabilities;
- (c) advise the State Government on the formulation of policies, Programmes, legislation and projects with respect to disability;
- (d) review, in consultation with the donor agencies, their funding from the perspective of their impact on persons with disabilities;
- (e) take such other steps to ensure barrier-free environment in public places, work places,

public utilities, schools and other institutions;

(f) monitor and evaluate the impact of policies and programmes designed for achieving equality and full participation of persons with disabilities;

(g) to perform such other functions as may be prescribed by the State Government.”

13. Under Clause (c) of Sub-Section (2) of Section 18, it is the duty of the State Co-ordination Committee to advise the State Government on formulation of policies and legislations with respect to the disabilities. It is not clear from the affidavits as to whether the State Co-ordination Committee has performed its statutory duties and functions. In fact, after filing of this Petition, the State Co-ordination Committee ought to have considered the question raised by the Petitioner and advised the State Government, if necessary, on the amendment of the State Rules.

14. We are conscious of the fact that the Petitioner is not governed by the Central Rules and, therefore, we cannot issue a writ of mandamus directing the Respondents to grant the benefits to the Petitioner which are available under the Central Rules. The State Rules do not provide for grant of leave on par with Rule 43-C and hence, a writ of mandamus as prayed cannot be issued.

15. In this Petition, we are not on a wider question whether there should be a provision for grant of child care leave in the State Rules as provided in Rule 43-C of the Central Rules. We are on the question whether a woman Government servant should be given benefit of grant of special child care leave in the event she has a child which falls in the category of a person with disability within the meaning of Clause (t) of Section 2 of the Disabilities Act. There are special needs of such a child. There may be cases where there is no one else in the family to look after such a child with disability and therefore, a woman Government servant who is the mother of the child may not be able to take proper care of the child unless special leave is granted. According to us, it is for the State Co-ordination Committee to examine this aspect and advise the State Government accordingly.

16. At this stage, we may note the stand taken by the State Government in the affidavit of Shri Sunil P. Pandhare, Under Secretary of the Finance Department. On Page 27 of his affidavit, in Paragraph 7, he has stated thus:

“7.In the Central Government/Govt. Of India, there is no reservation to women in recruitment. Whereas, Government of Maharashtra provides for 30% reservation to women in all posts under the State Govt. vide the G.R. dt. 01.04.1994. **The State Govt.'s expenditure on the salary of women employees is**

Rs.19,495.80 crores which is 30% of total expenditure of the salaries of all State employees i.e., Rs.64,986 crores per annum (hereto annexed and marked as Exhibit-3 is the copy of Extract from the Budget in brief, page No.13).

I say that the State Govt. is already spending 62.63% of its revenues on the salary, pension and interest. Only 37.37% is available for developmental works and schemes including those that pertain to the welfare of the disabled population of the State. **If the State Government has to make CCL applicable to all women employees, then so much of redundancy has to build into the employee force of the State. This would mean that the salary component will further eat into the funds meant for developmental schemes.”**

(emphasis added)

17. Emphasis in this Petition is on making a provision for grant of a special leave to a woman Government servant who is the mother of a disabled child covered by the definition of “persons with disabilities”. The stand taken in the affidavit of Shri Sunil P. Pandhare does not appear to be rational inasmuch as the the issue of grant of special leave to a woman Government servant becomes more relevant in the State as there is 30% reservation for women in the employment.

18. Persistent default by the State Government led to passing of a drastic ad-interim order dated 23rd February 2015 under which the Respondents have been directed to grant full pay leave to the Petitioner. Thereafter, the State Government never applied for vacating the said order.

19. From its preamble, it appears that the Disabilities Act has been enacted to give effect to the Proclamation on the Full Participation and Equality of the People with Disabilities in the Asian and Pacific Region. In a meeting to launch the Asian and Pacific Decade of the Disabled Persons, 1993-2002 convened by the Economic and Social Commission for Asian and Pacific Region, which was held at Beijing from 1-12-1992 to 5-12-1992, a proclamation was adopted on the Full Participation and Equality of the People with Disabilities in the Asian and Pacific Region. Our country is a party to the said Proclamation. The Proclamation provided that :

“To give full effect to the Proclamation it was felt necessary to enact a legislation to provide for the following matters:

- (i) to spell out the responsibility of the State towards the prevention of disabilities, protection of rights, provision of medical care, education, training, employment and rehabilitation of persons with disabilities;
- (ii)

Thus, it is the duty of the State to make a provision for medical care and rehabilitation of children with disabilities. Allowing sufficient time to a mother who is a Government servant to take care of her disabled child will be a part of taking care and rehabilitation of children with disability. Therefore, the State Government has a duty to make a legislation to provide for these aspects.

20. The State Co-ordination Committee has not considered the said issue and has not advised the State Government in terms of clause (c) of sub-Section 2 of Section 18. We propose to fix a time bound programme directing the State Co-ordination Committee to consider this aspect and propose to grant a reasonable time to the State Government to take appropriate decision. In the peculiar facts of the case, we propose to continue the ad-interim relief granted earlier till the State Government takes a decision.

21. Hence, we dispose of the Petition by passing the following order:

ORDER :

- (a) We direct the State Co-ordination Committee constituted by the Government of Maharashtra under Sub-section (1) of Section 13 of the Disabilities Act to perform its function by advising the State Government on the formulation of policy and legislation on the issue whether there should be a provision made for grant of special child care leave to a woman Government servant who is a mother of

a disabled child covered by the definition of person with disability under Clause (t) of Sub-section (2) of the Disabilities Act.

- (b) If the State Co-ordination Committee is not in existence, the same shall be forthwith constituted. The State Co-ordination Committee shall take appropriate decision as expeditiously as possible and in any event on or before 30th June 2016;
- (c) The State Co-ordination Committee shall submit its advise on the aforesaid issue in terms of Clause (c) of Sub-section (2) of Section 18 of the Disabilities Act to the State Government by 10th July 2016;
- (d) The State Government shall take a decision on the advise of the State Co-ordination Committee as expeditiously as possible and in any event by 16th August 2016;
- (e) The decision of the State Government shall be forthwith communicated to the Petitioner;

- (f) The ad-interim relief granted on 23rd February 2015 shall continue to operate after the disposal of the Petition. If the State Government decides not to grant such benefits, the ad-interim relief granted on 23rd February 2015 shall cease to operate with effect from 1st September 2016 and the Petitioner will have to resume her duty with effect from 1st September 2016;
- (g) If the State Government decides to grant benefit of special child care leave to such category of women Government servants, the case of the Petitioner will be governed by the decision of the State Government and the ad-interim relief shall cease to operate;
- (h) The Petition is disposed of on above terms;
- (i) Civil Application does not survive and the same is disposed of.

(P.D.NAIK, J)

(A.S. OKA, J)