

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 20.01.2021

Judgment Delivered on : 04.02.2021

Coram:

THE HONOURABLE MR.JUSTICE R.SUBBIAH
and
THE HONOURABLE MR.JUSTICE SATHI KUMAR SUKUMARA KURUP

Writ Appeal No.3091 of 2019
and
C.M.P.No.19665 of 2019

The Secretary to Government,
P & AR Department,
Fort St.George,
Chennai-600 009. ... Appellant/Respondent

Vs.

1. V.Kamatchi,
Assistant Section Officer,
Rural Development and Panchayat Raj Department,
Secretariat, Chennai-600 009.
2. The Secretary to Government,
RD & PR Department,
Fort St.George, Chennai-600 009.
3. The Joint Secretary to Government,
Rural Development and Panchayat Raj Department,
Fort St. George,
Chennai-600 009. ... Respondents

Writ Appeal filed under Clause 15 of the Letters Patent against the order dated 23.04.2019 passed by the learned Single Judge in Writ Petition No.17436 of 2017 on the file of this Court.

Prayer in W.P.No.17436 of 2017:

Writ Petition filed under Article 226 of the Constitution of India praying for the issuance of a Writ of mandamus directing the 1st respondent to take into account the period of Maternity Leave availed by her as service for the promotion to the Post of Assistant Section Officer by including her name for the panel year 2009-2010 and fixed her seniority at the appropriate place

viz. at 50A of the Seniority List released vide G.O.Ms. No.111 P & AR(V) Department dated 11.11.2016.

For appellant : Mrs.A.Srijayanthi, Spl.G.P.

For respondents: Mr.A.Muthukumar for R-1/caveator

JUDGMENT

R.SUBBIAH, J

This Writ Appeal is filed by the Secretary to Government, Personnel and Administrative Reforms Department, Fort St.George, Chennai as against the order dated 23.04.2019 passed in W.P.No.17436 of 2017, whereby the learned Single Judge allowed the said Writ Petition filed by the first respondent herein and directed the appellant and respondents 2 and 3 herein to take into account the services of the first respondent/writ petitioner for the period from 01.06.2009 to 28.08.2009 as regular service and include her in the panel for the year 2009 with all consequential benefits and necessary orders were directed to be passed within six weeks from the date of the order.

2. The brief facts which are necessary for disposal of the present appeal are as follows:

(i) The first respondent/writ petitioner had been selected by the Tamil Nadu Public Service Commission (TNPSC) on direct recruitment and she joined duty as Assistant in Rural Development and Panchayat Raj Department, Secretariat, Chennai, on 25.06.2007. Her seniority as per the list of the TNPSC, was fixed in Sl.No.98, vide U.O.Note.No.31961/U2/2008-1, P and AR, dated 20.06.2008. Her services were regularised in the category of Assistant with effect from 25.06.2007 as per Office Proceedings No.444, R.D. & P.R (OP), dated 18.07.2008. She had passed the requisite tests, viz, foundational training for promotion to the post of Assistant Section Officer on 05.05.2009.

(ii) While the respondent/writ petitioner was on probation, she availed maternity leave from 01.06.2009 to 29.08.2009, after which, she joined duty and was promoted as Assistant Section Officer (ASO) with effect from 04.05.2010. She had been declared as having completed the period of probation satisfactorily in the category of Assistant in the Tamil Nadu Secretariat Service on the afternoon of 14.12.2009. While so, the respondent/writ petitioner's junior R. Jaya Subramanian who stood in Sl.No.124 in the TNPSC list and who joined duty on the same date when the writ petitioner joined on 25.06.2007, had been included in the regular panel for the year 2009-2010 and promoted to the post of ASO on 09.12.2009.

(iii) In view of the postponement in completion of probation period, her name had not been considered in the panel for promotion to the post of ASO in the year 2009-2010 and consequently her name had not been included in the panel of the year 2009-2010 for the reason that she had taken maternity leave for three months. It is her further contention that the benefit of maternity leave is extended to married women servants by the Government as per Fundamental Rules in F.R.101(a) and (b) and as per the latest amendment to Maternity Benefits Act, 2016 introduced by the Government of India.

(iv) Since the respondent/writ petitioner had availed the eligible maternity leave as per the Rules with pay and allowances, the said period should have been considered as duty period. As the official respondents refused to include the said period for the purpose of reckoning her seniority and promotion, she had filed the Writ Petition in W.P.No.17436 of 2017 praying for issuance of a Writ of Mandamus to direct the appellant to take into account the period of maternity leave availed by her as service for promotion to the post of ASO by including her name for the panel year 2009-2010 and fix her seniority at the appropriate place, viz., at S.No.50-A of the seniority list released, vide G.O.Ms.No.111, P & A.R. (U) Department, dated 11.11.2016.

3. The learned Single Judge, after hearing the submissions made on either side, allowed the said Writ Petition by issuing direction as stated supra. Aggrieved by the same, the present Writ Appeal is filed by the State.

4. The learned Special Government Pleader appearing for the appellant submitted that the first respondent/writ petitioner had joined service on 25.06.2007 and she had taken leave totally for 170 days till her probation was declared on 14.12.2009, out of which, only 90 days' leave was maternity leave. Even if the maternity leave was treated as service period, her name cannot be included in the panel for promotion for the year 2009-2010, unless her probation is declared successfully in the feeder category. In this regard, the learned Special Government Pleader invited the attention of this Court to Rule 36(a) of the erstwhile General Rules under the Tamil Nadu State and Subordinate Service Rules, now Section 41(1) of the Tamil Nadu Government Servants (Conditions of Service) Act, 2016 and submitted that as per the said provision, the person who had completed the probation on the crucial date alone will be eligible for promotion. In this case, the first respondent/writ petitioner was not qualified for inclusion in the panel of ASO on the crucial date, i.e. on 01.08.2009, as she had not completed the probation as on 01.08.2009. Only after the crucial date, i.e. 01.08.2009, she had completed the probation

on 14.12.2009. The learned Special Government Pleader further submitted that the learned Single Judge had directed the authority only to include the maternity leave of 90 days for inclusion of her name in the panel, but the learned Single Judge had not considered the other leave availed of by the first respondent/writ petitioner for nearly 80 days, and hence, for all these reasons, the learned Special Government Pleader prayed for allowing the Writ Appeal.

5. Countering the above submissions, the learned counsel appearing for the first respondent/writ petitioner submitted that the contention with regard to the leave availed of by the writ petitioner other than the maternity leave, was not argued before the learned Single Judge and similarly, it was not even mentioned in the counter affidavit filed by the respondents before the Writ Court. The only point urged by the Government before the learned Single Judge in the counter as well as in the oral submission, is that she availed maternity leave while she was in probation. The learned Single Judge, considering the submissions, had given a direction to include the maternity leave and treat her maternity leave as service period and the said finding is unassailable. Therefore, the appellant cannot take a new plea in this Writ Appeal. Since the said ground was not canvassed in the Writ Petition before the learned Single Judge, it is not open for the appellant to raise the same for the first time in this appeal, as the same is not a pure question of law. Hence, the new plea raised by the Government cannot be considered and on that score alone, the only contention raised by the Government in the present Writ Appeal is liable to be rejected.

6. It is further submitted by the learned counsel appearing for the first respondent/writ petitioner that, on a reading of the tabular column given in the typed set of papers filed along with the Memorandum of Grounds of Writ Appeal in page 70, it is clear that the first respondent had availed of only 23 days of Earned Leave before 24.06.2009, i.e. before completion of two years' period of probation and the same cannot be put against the writ petitioner. Any leave taken after the two years period of probation, i.e. after 24.06.2009, cannot be a ground for rejecting the case of the writ petitioner. Sl.No.6 in the said tabular column is the maternity leave and the same should be treated as service period. The learned counsel appearing for the first respondent/writ petitioner further submitted that the leave taken as specified in Sl.Nos.7 and 8 in the said tabular column, are irrelevant, as those periods are after the period of probation. Further, if the period of maternity leave taken from 01.06.2009 to 29.08.2009 is taken as service period, then the writ petitioner is certainly eligible for promotion on the crucial date, i.e. on 01.08.2009. Thus, the learned counsel

appearing for the first respondent/writ petitioner sought for dismissal of the Writ Appeal.

7. Keeping the submissions made on both sides, we have carefully perused the materials available on record.

8. As we have dealt with the facts in detail as above, we refrain from reiterating the same any further, except the facts which are germane alone are discussed hereunder.

9. It is the main submission of the learned Special Government Pleader appearing for the appellant that, even as per the direction issued by the learned Single Judge, if the maternity leave of 90 days is included as service period, still there is shortage of 80 days. The crucial date for drawing the panel is 01.08.2009. Only if the probation is declared before 01.08.2009, the candidates are eligible to be included in the panel for promotion to the next post of ASO. In this case, on account of the leave taken by the first respondent/writ petitioner, other than the maternity leave, her probation was declared only on 14.12.2009. In this regard, the learned Special Government Pleader invited the attention of this Court to the tabular column in the grounds of appeal with regard to the particulars of leave availed of by the first respondent-writ petitioner, which is extracted hereunder:

Sl.No	Kind of leave	Period		No. of days
		From	To	
1	Earned leave	29.04.2008	30.04.2008	2
2		18.08.2008	29.08.2008	12
3		27.11.2008	28.11.2008	2
4		16.03.2009	20.03.2009	5
5		14.05.2009	15.05.2009	2
6	Maternity leave	01.06.2009	29.08.2009	90
7	ELWA with MC	30.08.2009	09.09.2009	11
8		15.09.2009	30.10.2009	46

10. With regard to the above submissions of the learned Special Government Pleader appearing for the appellant, the learned counsel appearing for the first respondent/writ petitioner mainly submitted as follows:

(a) The submission with regard to the leave availed of by the first respondent/writ petitioner other than the maternity leave, was neither raised in the counter affidavit filed by the appellant before the Writ Court, nor any submission was made in that regard before the Writ Court during the course of arguments, and hence, the appellant is not entitled to take such a ground for the first time in the present Writ Appeal, and

(b) The first respondent/writ petitioner had joined service on 25.06.2007 and she had availed of only 23 days of Earned Leave before completion of two years of probation, and therefore, the same cannot be put against her in the present Writ Appeal and any leave after two years probation, i.e. after 24.06.2009, cannot be a ground to reject the case of the first respondent/writ petitioner.

11. With regard to the first submission of the learned counsel appearing for the first respondent/writ petitioner, we are of the opinion that even though the appellant/State had not taken such a plea with regard to the total leave availed of by the first respondent/writ petitioner, apart from maternity leave, the facts with regard to the leave availed of by her is borne out by records, and therefore, the same can be raised in the Writ Appeal. Furthermore, it is not disputed by the first respondent/writ petitioner that she has not availed of the leave as stated by the learned Special Government Pleader appearing for the appellant. On the other hand, it is submitted by the first respondent/writ petitioner that other than the maternity leave of 90 days, she had availed leave only for 23 days within the two years from the date of joining her service. It is further submitted by the first respondent/writ petitioner that, except 23 days, rest of the leave she had availed was only after the period of two years from joining the service and therefore, those leave availed by the first respondent/writ petitioner cannot be put against the first respondent/writ petitioner to deny her the benefit of declaration of probation.

12. From the aforesaid submissions of the counsel for both sides, it is evident that before declaration of probation on 14.12.2009, the first respondent/writ petitioner had availed various leave including earned leave and earned leave with or without medical certificate etc., It is in those circumstances, the probation of the first respondent/writ petitioner was postponed proportionate to the number of days taken by her as leave on various accounts. It is needless to mention that declaration of probation is subject to the satisfactory performance of the employee in discharge of his/her duties. In this context, it is useful to refer a judgment of this Court reported in 2019 (2) Writ LR 745 = 2020 (1) CTC 138 (Tmt.M.Priya Vs. The Registrar General, The High Court of Judicature at Madras, High Court Buildings, Chennai--600 104,

Madras and others), wherein, the Division Bench (in which one of us, R.Subbiah, J was a member), held as follows:

"33. A person who is appointed to a government service will be on probation for a period of two years. The entitlement of such person appointed to get all the benefits attached to the post such as annual increment, promotion etc., depends first on getting his probation declared. In other words, such appointment will be construed as temporary in nature and only if probation is declared, the appointee will get entitled to all the service benefits attached to the post. The regularisation of the temporary service is technically termed as declaration of probation. During the period of probation, the appointing authority is bound to assess, evaluate and adjudge the potentiality of such employee to continue in service, his basic understanding to the work assigned to him, the efficiency with which he could complete the tasks assigned, the manner in which he co-ordinates with other employees to get the work done, the behaviour towards the superiors, punctuality in attending the office etc, The two years probation period from the date of initial appointment will be a testing time for the government servant, within which time, he has to prove his potentiality and capability to discharge his work efficiently and honestly and thereby inspire the confidence of the employer. In the absence of possession of the above qualities during the period of probation, the appointing authority cannot be expected to mechanically declare the probation of a government servant on completion of two years. Therefore, before declaring the probation, the appointing authority will normally get the feed back relating to the employee from his immediate superiors, the conduct of the employee during the discharge of the work and thereafter form an opinion as regards the suitability of the employee to continue in service. The potentiality or suitability of the employee appointed to a government service is an important factor for declaration of probation. For assessing the same, the appointing authority is given a discretionary power. It is sufficient for the appointing authority to merely say that the performance of an employee during the course of his probation is satisfactory or not satisfactory and the

appointing authority need not elaborate reasons for coming to such conclusion. On the contrary, if any allegation of misconduct is made, during the period of probation, then the appointing authority, even before declaring the probation, is bound to conduct a disciplinary proceeding to prove the charges levelled against the employee."

13. In the present case, as the first respondent/writ petitioner had taken various kinds of leave before declaration of her probation, the employer had proportionately postponed the declaration of probation in her favour. Therefore, it cannot be said that the declaration of probation was postponed merely because the first respondent/writ petitioner had availed maternity leave. The maternity leave availed by the first respondent/writ petitioner was not taken into account for the purpose of postponement of her probation, rather, the other leave taken by the first respondent/writ petitioner was. Further, we find that the postponement of declaration of probation of the first respondent/writ petitioner was not challenged by her till this date. As per Rule 36(a) of the General Rules under the Tamil Nadu State and Subordinate Service Rules (now, Section 41(a) of the Tamil Nadu Government Servants (Conditions of Service) Act, 2016), a person who has completed the probation on the crucial date shall alone be eligible for promotion. In the instant case, the first respondent/writ petitioner's probation was not declared on the crucial date, namely on 01.08.2009, on which date the panel was prepared for promotion as ASO. Therefore, the question of including her name in the said panel, does not arise, even after including 90 days' maternity leave as service/duty period.

14. Hence, for the reasons stated supra, the findings rendered by the learned Single Judge for allowing the Writ Petition, are liable to be set aside. Accordingly, they are set aside. Resultantly, the present Writ Appeal is allowed. The Writ Petition in W.P.No.17436 of 2017 shall stand dismissed. No costs. Consequently, C.M.P. is closed.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

CS
To

1. The Secretary to Government,
P & AR Department,
Fort St.George, Chennai-600 009.
2. The Secretary to Government,
RD & PR Department,
Fort St.George, Chennai-600 009.
3. The Joint Secretary to Government,
Rural Development and Panchayat Raj Department,
Fort St. George, Chennai-600 009.

+lcc to Mr.A.Muthukumar, Advocate Sr.6475
+lcc to the Government Pleader Sr.6315

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