

IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL

MUMBAI

ORIGINAL APPLICATION NO.814 OF 2023

DISTRICT : MUMBAI

Smt. Revati Anil Kulkarni,)
Age 38 years, Divisional Forest Officer in the office of)
Conservator of Forest, Sanjay Gandhi National Park,)
Borivali (East), Mumbai)..Applicant

Versus

The State of Maharashtra,)
Through the Principal Secretary,)
Revenue & Forest Department (Forest),)
Mantralaya, Mumbai 400032)..Respondent

Shri A.V. Bandiwadekar – Advocate for the Applicant

Smt. K.S. Gaikwad – Presenting Officer for the Respondent

CORAM : Smt. Medha Gadgil, Member (A)

RESERVED ON : 11th March, 2024

PRONOUNCED ON: 19th April, 2024

J U D G M E N T

1. The applicant who is working as Divisional Forest Officer, Sanjay Gandhi National Park, Borivali, Mumbai is challenging the impugned order dated 27.1.2015 by which she was sanctioned maternity leave for 180 days as extra-ordinary leave followed by postnatal child care leave for

43 days as extra ordinary leave. The applicant joined government service as Assistant Conservator of Forest on 29.7.2013. As per Rule 6 of the Recruitment Rules for the post of Assistant Conservator of Forest a person appointed to the said post by way of nomination shall be on probation for a period of 3 years including Assistant Conservator of Forest Training course of 2 years and field training of 1 year. After completion of training of 2 years the respondents issued her order of appointment on 18.7.2013 as a probationer. In the meantime she proceeded on maternity leave from 21.10.2013 to 18.4.2014 for a period of 180 days and the same was regularized by the respondents by order dated 27.1.2015 as extra-ordinary leave due to maternity reasons to the extent of 180 days and also her absence in view of postnatal child care to the extent of 43 days was regularized as extra-ordinary leave.

2. Ld. Advocate for the applicant pointed out that respondent no.1 declared the applicant to have successfully completed the probation period between 26.7.2013 and 25.7.2014 vide order dated 23.7.2016 when the said date ought to have been 23.6.2016. However, on 12.2.2021 the respondents issued the revised date of completion of probation period of the applicant along with others w.e.f. 5.3.2015. He pointed out that the correct date of completion of probation by the applicant ought to have been 25.6.2014 and the period of maternity leave of 180 days followed by one more spell of leave of 43 days ought to have been included while determining the date of completion of successful probation period by applicant. Subsequently the applicant was promoted to the post of Divisional Forest Officer on 31.5.2018. Ld. Advocate for the applicant pointed out that by circular dated 7.3.2019 the final seniority list of officers in the cadre of Assistant Conservator of Forest as on 1.1.2019 was published in which the applicant is shown at Sr. No.86 with the date of seniority being 12.7.2011. Following a series of litigation the provisional seniority list dated 27.3.2023 was published by the respondents in which

name of the applicant figured at Sr.No.73 with corresponding date of seniority being 24.7.2014. However, in the final seniority list dated 11.5.2023 the seniority of the applicant in the cadre of Assistant Conservator of Forest is shown to be 5.3.2015 though she is allotted the date of 24.7.2014 to be the deemed date of appointment in the said post.

3. Ld. Advocate for the applicant pointed out that applicant is challenging the order dated 27.1.2015 where under her maternity leave was illegally considered as extra ordinary leave to the extent of 180 days and also extra ordinary leave to the extent of 43 days. He pointed out that the maternity leave is a fundamentally human right of the applicant and denial of the same is violative of Article 29 and 39(d) of the Constitution of India. He further pointed out that the right to life under Article 21 of the Constitution of India includes the rights to become a mother which is the most natural phenomena. He therefore prays that the impugned order should be deemed to be grant of maternity leave by respondents with all consequential service benefits including being considered in continuous service in view of the mandatory provisions contained in Maternity Benefits Act, 1961. He further pointed out that the provisions of Maternity Benefits Act, 1961 are wholly in consonance with the directive principles of State policy as contained in Article 39, 42 and 43 of the Constitution.

4. Ld. Advocate for the applicant states that applicant availed of leave for the period between 21.10.2013 to 18.4.2014 (180 days) and also availed of leave between 19.4.2014 and 31.5.2014 (43 days) towards child care. He states that the respondents have wrongly relied on the provisions of Rule 63(A) of MCS (Leave) Rules, 1981 which ought to be Rule 63(1)(a) thereof and not governed under the provisions of Rule 74(2) on the ground that at the relevant time the applicant did not complete one year of continuous service. He further pointed out that if there is any conflict

between the provisions of Maternity Benefits Act, 1961 and the MCS (Leave) Rules, 1981 the former would prevail on the latter especially when the former is primary legislation whereas latter is subordinate legislation as held by the Hon'ble Supreme Court in the matter of Kunal Singh.

5. Ld. PO refutes the contentions raised by the Ld. Advocate for the applicant. She relied on the affidavit in reply dated 20.12.2023 filed by Ananda Shankar Shendage, Under Secretary, Revenue & Forest Department, Mantralaya, Mumbai. He pointed out that since the applicant proceeded on leave on the ground of maternity she was granted extra ordinary leave of 180 days vide order dated 27.1.2015. He refers to recruitment rules published for the post of Assistant Conservator of Forest by exercising powers conferred by the proviso to Article 309 of the Constitution of India wherein it is clearly mentioned that:

“A person appointed to the post by nomination shall be on probation for a period of three years including two years of Assistant Conservator of Forests training course and 1 year field training as decided by the Principal Chief Conservator of Forests, Maharashtra State, Nagpur.”

6. He referred to the order dated 15.3.2023 passed by the Hon'ble Supreme Court in Civil Application No.822/2023 in SLP No.7282 of 2021 which reads as under:

“We also find that Rule 3B and 6 of the 1998 Rules also leave no ambiguity in this behalf and in fact read in consonance and the period of probation has to be necessarily excluded from period of service. As already stated, the grant of monetary benefit is a different aspect.”

7. On the basis of this order passed by the Hon'ble Supreme Court, the seniority lists of Assistant Conservator of Forest as on 1.1.2020, 1.1.2021 and 1.1.2022 were published vide Govt. Circular dated 11.5.2023 wherein the name of the present applicant was shown as per declaration of her extended probation period up to 23.7.2017 vide order dated 16.8.2017.

8. Ld. PO argues that the present applicant was promoted as per her seniority on the post of Divisional Forest Officer vide order dated 3.5.2018 as per Rule 2 of Recruitment Rules for the post of DFO.

9. Considered the submissions of both the sides. It is an admitted fact that the applicant went on maternity leave during her probation period of 3 years. It would be pertinent to look at Rule 74(2) of the MCS (Leave) Rules, 1981 which states that the employee who has completed one year service will be eligible for maternity leave. The said rule reads as under:

“74. Maternity leave-

(2) A female Government servant not in permanent employ who has put in at least one year of continuous service shall also, subject to the provisions of this rule, be eligible for maternity leave referred to in sub-rule (1), subject to the condition that the leave salary admissible during the period of maternity leave shall be regulated as follows, that is to say:-

(a) In the case of a female Government servant who has put in two or more years' continuous service, the leave salary admissible shall be as provided in sub-rule (1) of Rule 70 of these rules; and

(b) In the case of a female Government servant who has put in continuous service for a period exceeding one year, but less

than two years, the leave salary admissible shall be as provided in sub-rule (2) of Rule 70 of these rules.”

10. As per the Recruitment Rules published for the post of Assistant Conservator of Forest, it is clearly mentioned that:

“A person appointed to the post by nomination shall be on probation for a period of three years including two years of Assistant Conservator of Forests training course and 1 year field training as decided by the Principal Chief Conservator of Forests, Maharashtra State, Nagpur.”

11. I may also look at the directions issued by the Hon’ble Supreme Court dated 15.3.2023 in CA No.822/2023 in SLP No.7282 of 2021 confirming the order dated 23.4.2021 passed by the Hon’ble High Court in W.P. No.2026 of 2019, which reads as under:

“We also find that Rule 3B and 6 of the 1998 Rules also leave no ambiguity in this behalf and in fact read in consonance and the period of probation has to be necessarily excluded from period of service. As already stated, the grant of monetary benefit is a different aspect.”

12. In this connection I can examine the Maternity Benefit Act, 1961, Section 5 of which reads as under:

“5. Right to payment of maternity benefit. -- (1) Subject to the provisions of this Act, every woman shall be entitled to, and her employer shall be liable for, the payment of maternity benefit at the rate of the average daily wage for the period of her actual absence

immediately preceding and including the day of her delivery and for the six weeks immediately following that day.

Explanation. – For the purpose of this sub-section, the average daily wage means the average of the woman's wages payable to her for the days on which she has worked during the period of three calendar months immediately preceding the date from which she absents herself on account of maternity, or one rupee a day, whichever is higher.

(2) No woman shall be entitled to maternity benefit unless she has actually worked in an establishment of the employer from whom she claims maternity benefit for a period of not less than one hundred and sixty days in the twelve months immediately preceding the date of her expected delivery:

Provided that the qualifying period of one hundred and sixty days aforesaid shall not apply to a woman who has immigrated into the State of Assam and was pregnant at the time of the immigration.

Explanation: - For the purpose of calculating under this sub-section the days on which a woman has actually worked in the establishment, the days for which she has been laid-off during the period of twelve months immediately preceding the date of her expected delivery shall be taken into account.

(3) The maximum period for which any woman shall be entitled to maternity benefit shall be twelve weeks, that is to say, six weeks up to and including the day of her delivery and six weeks immediately following that day:

Provided that where a woman dies during this period, the maternity benefit shall be payable only for the days up to and including the day of her death:

Provided further that where a woman, having been delivered of a child dies during her delivery or during the period of six weeks immediately following the date of her delivery, leaving behind in either case the child, the employer shall be liable for the maternity benefit for the entire period of six weeks immediately following the day of her delivery but if the child also dies during the said period, then for the days up to and including the day of the death of the child.”

13. Ld. Advocate for the applicant relied on the following judgments:

(1) Deepika Singh Vs. Central Administrative Tribunal & Ors. 2022 SCC OnLine SC 1088. In this case the appellant was in the submission of the respondents disentitled to maternity leave on the ground that she had two surviving children and was not entitled to maternity leave in respect of her own biological child. The Hon’ble Supreme Court observed as under:

“25. Unless a purposive interpretation were to be adopted in the present case, the object and intent of the grant of maternity leave would simply be defeated. The grant of maternity leave under Rules of 1972 is intended to facilitate the continuance of women in the workplace. It is a harsh reality that but for such provisions, many women would be compelled by social circumstances to give up work on the birth of a child, if they are not granted leave and other facilitative measures. No employer can perceive child birth as detracting from the purpose of employment. Child birth has to be construed in the context of employment as a natural incident of life

and hence, the provisions for maternity leave must be construed in that perspective.”

(2) Dr. Kavita Yadav Vs. The Secretary, Ministry of Health and Family Welfare Department & Ors. Civil Appeal No.5010/2023 decided by the Hon'ble Supreme Court of India on 17.8.2023. In this case the appellant who was a pathology doctor working on temporary basis was denied maternity leave. In this case appeal was allowed and the employer was directed to extend the maternity benefits as would have been available to the appellant in terms of Section 5 & 8 of the Maternity Benefit Act, 1961. In this case the Hon'ble Supreme Court in para 7 quoted para 19 & 20 of the judgment in Deepika Singh Vs. Central Administrative Tribunal & Ors. (2022) 7 SCR 557, which reads as under:

“19. Sub-section (1) of Section 5 confers an entitlement on a woman to the payment of maternity benefits at a stipulated rate for the period of her actual absence beginning from the period immediately preceding the day of her delivery, the actual day of her delivery and any period immediately following that day. Sub-section (3) specifies the maximum period for which any woman shall be entitled to maternity benefit. These provisions have been made by Parliament to ensure that the absence of a woman away from the place of work occasioned by the delivery of a child does not hinder her entitlement to receive wages for that period or for that matter for the period during which she should be granted leave in order to look after her child after the birth takes place.

20. The Act of 1961 was enacted to secure women's right to pregnancy and maternity leave and to afford women with as much flexibility as possible to live an autonomous life, both as a mother and as a worker, if they so desire. In Municipal Corporation of Delhi v.

Female Workers (Muster Roll), 8 a two-judge Bench of this Court placed reliance on the obligations under Articles 14, 15, 39, 42 and 43 of the Constitution, and India's international obligations under the Universal Declaration of Human Rights 1948 and Article 11 of the Convention on the Elimination of All Forms of Discrimination Against Women¹⁰ to extend benefits under the Act of 1961 to workers engaged on a casual basis or on muster roll on daily wages by the Municipal Corporation of Delhi. The Central Civil Services (Leave) Rules 1972, it is well to bear in mind, are also formulated to entrench and enhance the objects of Article 15 of the Constitution and other relevant constitutional rights and protections.”

(3) Archana Nanabhau Dahifale Vs. State of Maharashtra & Anr. 2019(2) Mh.L.J. 697. In this case it is stated that Section 27 of the Maternity Benefit Act, 1961 contemplates that provisions of this Act shall have effect notwithstanding anything contained in any other law. It was held that the petitioner cannot be deprived of the beneficial provisions of Act or any other rules which may entitle her to benefits which are more favourable than those contained in agreement.

(4) State of H.P. & Ors. Vs. Sita Devi, CWP No.647/2020 decided by the Hon'ble High Court of Himachal Pradesh, Shimla on 12.6.2023. The respondent herein was engaged on daily wages basis over a span of two decades of service. It was held in this case that it is no longer res integra that a female employee irrespective of the capacity in which she is working is entitled to maternity leave at par with a female counterpart who are regular employees.

(5) Municipal Corporation of Delhi Vs. Female Workers (Muster Roll) & Anr. (2000) 3 SCC 224. In this case it was held that the provisions of the Maternity Benefit Act, 1961 entitle maternity leave even to women engaged

in casual basis or on muster roll and not only those on regular employment.

14. Considered the submissions of both the sides. In this case the applicant was denied maternity leave as she was on probation at that time. To be a mother is a right of a woman and therefore the State being a welfare and progressive State has guaranteed the maternity leave of 180 days to every woman employee. The period of probation should not be a preventive factor or obstacle for a woman who wants to be a mother during her probation. The seniority of such female employee should not go below her colleague of the same batch on the ground that she was absent on account of maternity leave. However, it is mandatory for any employee to complete the period of one year or two years as the case may be as a probation period. The seniority of such female employee should not go below to her colleagues of the same batch on the ground that she was absent on account of her maternity leave. However, it is mandatory for any employee to complete the period of one year or two years as the case may be as a probationary period. During the period of probation the performance of the employee is assessed by the employer. Adequate period is required to assess the performance of the employees and thus normally one or two years is fixed based on the nature of the duty for a particular job. There should not be lesser period even on account of maternity leave and no concession in reducing such probation period is to be given to any female employee. However, her seniority also should not suffer as she wants to be a mother which is her basic human and natural right.

15. Thus, it is a matter of computation and assessment. It can be resolved by applying different methods of computation of the period of assessment of the performance. The period of maternity leave or extraordinary leave granted for child care is to be extended only for the purpose

of assessment of the work and the performance of such female employee. If the performance of such employee after expiry of the extended period is found satisfactory, then she is to be given a deemed date of seniority as per the date of completion of her batch mates of her batch. For e.g. a woman joining on 1.1.2010, the period of probation is two years which was supposed to get over on 1.1.2012. However, in between she conceived and had to avail of to go for maternity leave. Thus, on 1.1.2012, she will fall short of 180 days to complete the adequate period of two years for the assessment of her performance. Therefore, after 1.1.2012, period of 180 days, i.e., up to 1.7.2012 is required for her assessment. Thus, in July 2012 the authority or employer shall assess the performance of that female woman employee. If the performance is found not satisfactory, then by way of routine her period of probation can be extended. But if her performance during the extended period of 180 days is found satisfactory, then she is to be given deemed date of 1.1.2012 as completion of her probation period. Thus, by way of changing this method of computation of assessment of her probation, the establishment gets sufficient period as per the prescribed rules for assessment of the performance. Similarly valuable rights of a newly born child to be with the mother and mother's right to be with the child both are protected.

16. In the aforesaid facts and circumstances of the case and relying on the ratio laid down in the abovementioned cases, I proceed to pass the following order:

ORDER

(1) The Original Application is allowed and the impugned order dated 27.1.2015 is quashed and set aside.

(2) The leave period of 180 days (21.10.2013 to 18.4.2014) is to be treated as maternity leave & the leave period of 43 days (19.4.2014 to 31.5.2014) is to be treated as child care leave.

(3) The applicant is deemed to have completed the probation period on 24.7.2014 and applicant be granted all consequential service benefits. This exercise is to be completed within a period of two months from today.

(4) No order as to costs.

Sd/-
(Medha Gadgil)
Member (A)
19.4.2024

Dictation taken by: S.G. Jawalkar.

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