IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 20TH DAY OF NOVEMBER, 2024

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PRESENT

THE HON'BLE MR JUSTICE KRISHNA S DIXIT

AND

THE HON'BLE MR JUSTICE C M JOSHI

WRIT PETITION NO. 11915 OF 2024 (S-CAT)

BETWEEN:

NATIONAL INSTITUTE OF MENTAL HEALTH
AND NEUROSCIENCES (NIMHANS)
HOSUR ROAD, BANGALORE MILK DAIRY
BANGALORE-560 029.
REPRESENTED BY ITS DIRECTOR
DR. PRATHIMA MURTHY

...PETITIONER

(BY SRI. PRABHAKAR RAO K.,ADVOCATE)

AND:

SMT. S ANITHA JOSEPH,
[redacted]

...RESPONDENT

(BY SRI. SURAJ NAIK.,ADVOCATE)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA, PRAYING TO CALL FOR THE RECORDS PERTAINING TO THE IMPUGNED ORDER DATED 14.02.2024 IN OA NO-38/2023 BY THE HON'BLE CAT BENGALURU BENCH AND B) SET ASIDE THE IMPUGNED ORDER DATED 14.02.2024 PASSED IN OA NO.38/2023 BY THE HON'BLE CAT BENGALURU BENCH (ANNEXURE-A)

THIS WRIT PETITION, COMING ON FOR ORDERS, THIS DAY, ORDER WAS MADE THEREIN AS UNDER:

CORAM: HON'BLE MR JUSTICE KRISHNA S DIXIT
and
HON'BLE MR JUSTICE C M JOSHI

ORAL ORDER

(PER: HON'BLE MR JUSTICE KRISHNA S DIXIT)

Petitioner-NIMHANS, is knocking at the doors of Writ Court for assailing Central Administrative Tribunal's order dated 14.02.2024 whereby, respondents Original Application No.18/2023 having been favoured, it has been 'directed to consider grant of Child Care Leave from 14.1.2023 to 14.5.2023 for a period of 120 days and extend CCL benefits' within eight weeks.

2. Learned Panel Counsel appearing for the petitioner passionately submits that any leave is not a matter of right; whether application for leave should be granted or not involves a host of factors which are not judicially determinable; granting such a long leave would create difficulties in the ICU wherein, the respondent-employee is working; in any event, relief of the kind could not have been accorded to the employee. So arguing, he seeks invalidation of the impugned order. Learned counsel

appearing for the respondent-employee resists the petition making submission in justification of the impugned order and the reasons on which it has been constructed. In support of his resistance, he places reliance on an interim order of the Apex Court in ***SHALINI DHARMANI vs. STATE OF H.P.***[1]

3. Having heard the learned counsel for the parties and having perused the Petition Papers, we decline indulgence in the matter broadly agreeing with the reasoning part of the impugned order of the Tribunal:

(a) The first submission of Panel Counsel appearing for the Petitioner that any leave in public employment is not a matter of right and therefore, grievance of the kind could not have been carried to the Tribunal, appears to be too farfetched a proposition. Ours being a constitutionally ordained Welfare State and therefore, an entity that answers definition of 'State' u/a 12 of the Constitution has to conduct itself as a model employer vide ***BHUPENDRA***

[1] 2024 SCC OnLine SC 653

NATH HAZARIKA vs. STATE OF ASSAM[2]*.* Therefore, it cannot be gainfully argued that employer's decision to grant or refusal leave, is not justiciable. In appropriate cases involving elements of injustice, an aggrieved employee can resort to judicial process. However, the scope of interference in such matters, would depend upon facts & circumstances of each case.

(b) Refusal of leave though appears to be a small matter, more often than not, however, it cannot be too much generalized. It all depends upon the nature of leave applied for, the kind of employment and such other factors. Differentiation cannot be avoided: A casual leave is a matter of routine whereas, maternity leave is a serious matter. So also, medical leave depending upon the nature of ailment. The significance of Child Care Leave also cannot be discounted. Respondent, who hails from Kerala, is a bonafide employee of the petitioner working since 2016 with spotless service records. Her's is an inter-

[2] (2013) 2 SCC 516

caste marriage; she begot a baby. Maternity leave apart, a lactating mother at times has to be granted Child Care Leave; maximum is 120 days combined with leave of any other kind in terms of Rule 43C of the Central Civil Services (Leave) Rules, 1972. It is only in the case of an employee who is on probationary period, such a leave may be denied. This view can be gathered from the following text of sub-Rule (3)(iii):

> *"It shall not ordinarily be granted during the probation period except in case of certain extreme situations where the leave sanctioning authority is satisfied about the need of child care leave to the probationer, provided that the period for which such leave is sanctioned is minimal".*

(c) The related contention of the Panel Counsel that the text of sub-Rule (1) of 43C employs the term 'may be granted' and therefore, enormous discretion lies with the employer to grant or not to grant leave of the kind, cannot be countenanced. Let us see text of this sub-Rule (1), which is reproduced below:

> *"Subject to the provisions of this rule, a female Government servant and single male*

> *Government servant may be granted child care leave by an authority competent to grant leave for a maximum period of seven hundred and thirty days during entire service for taking care of two eldest surviving children, whether for rearing or for looking after any of their needs, such as education, sickness and the like. "*
> *(underlining is ours)*

It hardly needs to be stated that law is not the slave of dictionaries; the word 'may' may imply discretion going by the English usage; however, when it comes to the realm of law, the meaning of a word or a term depends upon the intent & policy content of the instrument of law and the other words/terms which they keep company with, vide *nocitur a socis*. At times, 'may' can mean 'shall' and 'shall' can mean 'may', surprises none associated with legal profession. Added, any discretion in a Welfare State has to be exercised according to the rules of reason & justice. Observations of Lord Halsbury in ***SUSANNAH SHARP vs. WAKEFIELD***[3] are worth reproducing:

> *"… when it is said that something is to be done within the discretion of the authorities that something is to be done according to the rules*

[3] (1891) A.C. 173, 179.

> *of reason and justice, not according to private opinion, according to law, and not humour. It is to be, not arbitrary, vague and fanciful, but legal and regular…".*

Civil servants and public servants are not the 'native captives' of State entities under Article 12; they form a part of the Executive and they enjoy protection & status; although their entry in the employment begins with a contract, it graduates to status. Therefore, the action of the employer has to be consistent with the same. Contention of the Panel Counsel does not accord with this view.

4. Leave Rules of the kind have been promulgated to give effect to the Directive Principles of State Policy constitutionally enacted in Article 42 and to accord with the pith & substance of Article 21 as expensively construed by the Apex Court from precedent to precedent. The former reads: "*The State shall make provision for securing just and humane conditions of work and for maternity relief".* In ***B. SHAH vs. PRESIDING OFFICER, LABOUR***

COURT, COIMBATORE & OTHERS[4]***,*** at Paragraph No.18 it is observed as under:

> *"…It has also to be borne in mind in this connection that in interpreting provisions of beneficial pieces of legislation like the one in hand which is intended to achieve the object of doing social justice to women workers employed in the plantations and which squarely fall within the purview of Article 42 of the Constitution, the beneficent rule of construction which would enable the woman worker not only to subsist but also to make up her dissipated energy, nurse her child, preserve her efficiency as a worker and maintain the level of her previous efficiency and output has to be adopted by the Court."*

5. The above apart, India is a signatory to several International Conventions. A lactating mother has a Fundamental Right to breastfeed her baby and to spend reasonable time with it as is required for its rearing, more particularly, during the formative years. The baby too has a Fundamental Right to be breastfed. In a way, both these rights constitute one singularity. This important attribute of motherhood is protected under the umbrella of Fundamental Rights guaranteed under Article 21 of the

[4] (1977) 4 SCC 384

Constitution. '*Breastfeeding is a human rights issue for babies and mothers. It should be protected and promoted for the benefit of both'* say the UN experts[5]. International Convention on the rights of the Child, 1989 vide Article 3(1) provides:

> "*…in all actions concerning children, whether undertaken by public or private social welfare institutions, court of law, administrative authorities or legislative bodies,* ***the best interests of the child shall be a primary consideration…***"

6. Article 25 (2) of the Universal Declaration of Human Rights provides : *"Motherhood and childhood are entitled to special care and assistance…".* Article 24(1) of the International Covenant on Civil and Political Rights (ICCPR, 1966) recognizes right of the child to the measures of protection as are required by its status as a minor and the correlative duty resting on the shoulders of its family, society and the State. In October 1979, a Joint WHO/UNICEF Meeting on Infant & Young Child Feeding adopted the following statement:

[5] Joint Statement dated 17.11.2016 by the UN Special Rapporteurs on the Right to Food, Right to Health.

> *"Breastfeeding is an integral part of the reproductive process, the natural and ideal way of feeding the infant and unique biological and emotional basis for child development. … It is therefore a responsibility of society to promote breastfeeding and to protect pregnant and lactating mothers to many influences that would disrupt it".*

Further, Section 3(ix) of the Juvenile Justice (Care and Protection of Children) Act 2015 which enacts *inter alia* the above principle of paramount interest of the child, reads as under:

> *"All decisions regarding the child shall be based on the primary consideration, that they are in the best interest of the child and to help the child to develop full potential"*

7. The modern Medical Science says that breastfeeding is the best way to give babies all the necessary nutrients & antibodies, which provide a vital shield of protection. The experts in the field of neo-natal science are of a considered opinion that the interaction between the lactating mother and the suckling infant involves a world of messages, which is essential for the intellectual & emotional development of the child. WHO recommends exclusive breastfeeding until the baby attains the age of at

least six months. *The research also shows that the adolescents & adults who were breastfed have less chance to be overweight & obese and that they demonstrate better IQ test results. Breastfeeding lowers the risk of breast & ovarian cancers, diabetes & post-partum depression. It is more than a feeding method – it is a critical public health strategy for optimal infant development and maternal health throughout the life course*.[6]

8. The petitioner-NIMHANS which is an instrumentality of State under Article 12, has to conduct itself as a model employer vide *BHUPENDRA NATH HAZARIKA*, *supra* and be considerate whilst treating the claims of women employees for Maternity and Child Care Leave. It cannot be oblivious to the fact that it is the mother who is the best judge to decide what would be in the best interest of a growing baby. Proviso to clause (a) of section 5(1) of the National Food Security Act, 2013 enacts a Parliamentary injunction.

[6] Chowdhury.R., B.Sinha, M.J.Shankar. et.al.2015 "Breastfeeding and Maternal Health Outcomes: A Systematic Review and Meta-Analysis Act paediatrica 104, no.467; 96-113

Its text being significant & interesting, is reproduced: '*Provided that for children below the age of six months, exclusive breast feeding shall be promoted'.* European Court of Justice observed that a policy of the kind recognizes legitimacy firstly of protecting a woman's biological condition during & after pregnancy and, secondly of safeguarding the special relationship between a mother & her child over the period which follows its birth. (See ***HOFMANN Case***)[7]. While construing the provisions of Rules relating to Maternity and Child Care Leave, all this need to be kept in view. The greatness of a civilization can be measured *inter alia* by observing how women & children are treated. Our *smrutikaaraas* millennia ago declared:

> '*yatra naaryastu poojyante ramante tatra devataaha. Yatraitaastu na poojyante sarvaastatra aphalaaha Kriyaaha*'

It nearly translates to - *where women are honoured, divinity blossoms there; where they are dishonoured, all action remains unfruitful'*

[7] Hoffman v. Barmer Ersatzkasse, case, 184/83, ECLI:EU:C:1984:273

9. The vehement submission of learned Panel Counsel appearing for the petitioner that the respondent-employee is working in the ICU and her long absence would disrupt routine work of significance, is liable to be rejected for more than one reason: Firstly, he has admitted before us that there are more than 700 nurses of whom 70% are women. How absence of one such nurse would create unsurmountable difficulty, remains a riddle wrapped in enigma. During the relevant period, how many of such nurses have remained away from the job because of resignation, retirement, removal or leave is also not forthcoming. In matters like this, decision has to be a bit data driven, and not on the basis of assumptions & presumptions. It is also not shown to us that the 5% Rule would have been violated if Child Care Leave was accorded to the respondent, either. She has also explained in her representation dated 12.08.2022 as to why she needed such a long leave. What heavens would have fallen down if her request was favourably considered, is difficult to

guess. The Tribunal in its well reasoned order has rightly granted relief to the employee.

In the above circumstances, this petition being devoid of merits, is liable to be and accordingly, dismissed, costs having been reluctantly made easy. The petitioner shall give effect to the subject order of the Tribunal forthwith.

This Court places on record its deep appreciation for the able research & assistance rendered by its official Law Clerk cum Research Assistant, Mr.Raghunandan K S.

Sd/-
(KRISHNA S DIXIT)
JUDGE

Sd/-
(C M JOSHI)
JUDGE

Cbc/Bsv
List No.: 1 Sl No.: 6