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THE HIGH COURT OF MADHYA PRADESH
W.P. No.27589/2019
Smt. Manisha Garun vs. State of M.P. & Ors.

Gwalior, Dated :20/01/2020

Shri Rajmani Bansal, Counsel for the petitioner.

Shri R.K. Soni, Government Advocate for the State.

This petition under Article 226 of the Constitution of India has been filed against the order dated 15.11.2019 by which the recovery of Rs.7,88,021/- has been directed to be made against the petitioner in 12 easy monthly installments of Rs.24625/-.

2. The necessary facts for disposal of the present petition in short are that the petitioner is working on the post of Staff Nurse. It is the case of the petitioner that she gave birth to a male child and for the welfare of her child, she applied for child care leave by making an application on 13.11.2017. Another application dated 19.11.2018 was given for extension of child care leave. Third application for extension of child care leave was given by the petitioner on 24.10.2018. Fourth application was also given by the petitioner for the extension of child care leave seeking extension of her leave from 1.5.2019 to 31.7.2019. It is submitted that although the application was made by the petitioner but no order was passed rejecting those applications.

3. It is submitted that on 27.7.2019 a show cause notice was issued to the petitioner on the ground that under the orders of the

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CMHO, Gwalior, the petitioner submitted her joining on 26.7.2017 and thereafter she remained unauthorizedly absent from 14.11.2017 and accordingly, the petitioner was directed that in case if any leave has been sanctioned by the superior officer, then the said order be produced. It was also mentioned in the notice that from 1.4.2018 to 31.5.2018 and from 1.6.2018 to 31.8.2018, her child care leave was allowed and thus it was mentioned that her unauthorized absence indicates that she is not interested in performing her official duties and, therefore, she was called upon to submit her explanation. The said show cause notice was replied by the petitioner. In the said reply, it was mentioned that she had filed an application for sanction of child care leave from time to time and the show cause notice has been issued without application of due mind. Thereafter, another show cause notice 13.8.2019 was issued on the ground that the petitioner was on unauthorized absence from 14.11.2017 and, therefore, the petitioner was directed to show cause as to why the period of unauthorized absence be not declared as “dies non” and as to why the salary paid to the petitioner for this period be not recovered. The said show cause notice dated 13.8.2019 was also duly replied by the petitioner and it was once again claimed that she was on child care leave.

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4. It is submitted by the counsel for the petitioner that in spite of the reply submitted by the petitioner, the respondents by impugned order dated 15.11.2019 has directed that the petitioner was on unauthorized leave from 1.10.2017 to 30.6.2019 except the period from 1.4.2018 to 31.8.2018 for which the child care leave was sanctioned and, accordingly, it has been held that an amount of Rs.7,88,021/- be recovered which was wrongly paid to the petitioner by way of salary for the period of her unauthorized absence. It has further been directed that the said recovery be made in 12 easy monthly installments of Rs.24625/-.

5. Challenging the order passed by the Civil Surgeon-cum-Chief Hospital Superintendent, Gwalior, it is submitted by the counsel for the petitioner that earlier the petitioner was posted in Morena and she was transferred to Gwalior. After submitting her joining at Gwalior, she went on child care leave and had sent various applications in that regard and no communication was sent to the petitioner informing that whether her application for child care leave has been sanctioned or not and since the petitioner was under an impression that her applications must have been allowed, therefore, she cannot be made to suffer for the mistake of the respondents. Furthermore, it is submitted by the counsel for the

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petitioner that the petitioner is a Class-IV employee and thus in view of the judgment passed by the Supreme Court in the case of **State of Punjab & Ors. vs. Rafiq Masih (White Washer) & Ors.** reported in **(2015) 4 SCC 334**, no recovery of an amount can be made from the salary of a class-IV employee even if the same is paid erroneously.

6. Considered the submissions made by the counsel for the petitioner.

7. It appears that earlier the petitioner was posted in Morena. She was transferred to Gwalior and in compliance of the transfer order, she submitted her joining on 10.11.2017 and thereafter did not work. The child care leave from 1.4.2018 to 31.8.2018 was sanctioned, however for the remaining period, there is no order of sanction of child care leave.

8. During the course of the arguments, it is fairly conceded by the counsel for the petitioner that the age of her child is 18 years. However, it is submitted that as per provisions of Rule 38 (C) of Madhya Pradesh Civil Services (Leave) Rules, 1977, the “**child**” means a child below the age of 18 years and thus the petitioner was well within her right to ask for the child care leave.

9. The only contention of the petitioner is that although she had

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made several applications for grant of child care leave but since she was not informed as to whether her applications were allowed or not, therefore, she was under an impression that her applications for child care leave must have been allowed.

10. The submission made by the counsel for the petitioner cannot be accepted. An employee cannot remain on unauthorized absence under a false impression that his/her application has been allowed. Unless and until the application for grant of child care leave is allowed, no vested right is created in favour of an employee to remain on leave. Furthermore, it was the duty of the petitioner to verify that whether her application for child care leave was allowed or not. It is clear from the documents filed along with this petition, the applications for grant of child care leave were submitted personally. Thus, the petitioner, could have verified from the office regarding the fate of her applications. It appears that after the petitioner was transferred to Gwalior in the year 2017 she went on unauthorized absence, after submitting her joining at Gwalior. Furthermore, in the applications, it is mentioned that the age of the child of the petitioner is 18 years. However, the petitioner has not filed any document in support of her contention. Even no document regarding the age of her child was sent along with the

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applications. Further, as per Rule 38 (C) of Madhya Pradesh Civil Services (Leave) Rules, 1977, an employee is entitled for a child care leave for a maximum period of 730 days during her entire service for taking care of her two eldest surviving children. It is nowhere mentioned either in the applications or in the writ petition as to whether the petitioner had ever availed her child care leave on earlier occasion or not. In order to take advantage of Rule 38 (C) of Madhya Pradesh Civil Services (Leave) Rules, 1977, the petitioner should have specifically pleaded that she has not availed the child care leave for more than 730 days as mentioned in Rule 38 (C) of Madhya Pradesh Civil Services (Leave) Rules, 1977. Merely because the age of the child of the petitioner is 18 years would not *ipso facto* make her entitled to avail the child care leave without *prima facie* establishing that she had not availed the child care leave exceeding the maximum period of 730 days. Even the petitioner has not pointed out her number of children. According to Rule 38 (C) of Madhya Pradesh Civil Services (Leave) Rules, 1977, an employee is entitled the child care leave for the maximum period of 730 days during her entire service for taking care of her two eldest surviving children only. Thus this Court is of the considered opinion that the petitioner has *prima facie* failed to

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point out that she was entitled for child care leave as claimed by her. On the contrary, it appears that after getting transferred from Morena to Gwalior, the petitioner went on unauthorized absence after submitting her joining at Gwalior and unauthorizedly got the advantage of the monthly salary for the period of her unauthorized absence. It appears that without there being any sanction of child care leave, the petitioner was paid her salary which according to the respondents themselves, was an erroneous act on the part of the Department. As the petitioner has failed to *prima facie* establish that her child care leave was ever sanctioned by the respondent except for the period mentioned in the impugned order, this Court is of the considered opinion that the petitioner was at fault in remaining absent from duty in absence of any sanction order.

11. So far as the question of recovery is concerned, it is not the case of recovery of amount paid in excess without fault of the recipient. The petitioner has failed to *prima facie* establish that she was not at fault. Not only she has failed to prove that She was entitled for child care leave for looking after her child aged about 18 years but she has also failed to *prima facie* establish that merely by making an application for grant of child care leave, she was entitled to go on leave even without sanction of her child care

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leave. Mere filing an application would not mean that her child care leave was sanctioned. In order to make herself eligible for the child care leave, the petitioner was required to satisfy the conditions mentioned in Rule 38(c) of Rules, 1977. Thus, this Court is of the considered opinion that the petitioner has miserably failed in establishing that she was entitled for child care leave. Thus it is held that the petitioner is not entitled to get the benefit of the judgment passed by the Supreme Court in the case of **Rafiq Masih (supra)**. As a consequence thereof, the order dated 15.11.2019 passed by the respondent No.3 is hereby affirmed.

12. The petition fails and is hereby **dismissed**.

(alok)

(G.S. Ahluwalia)
Judge