



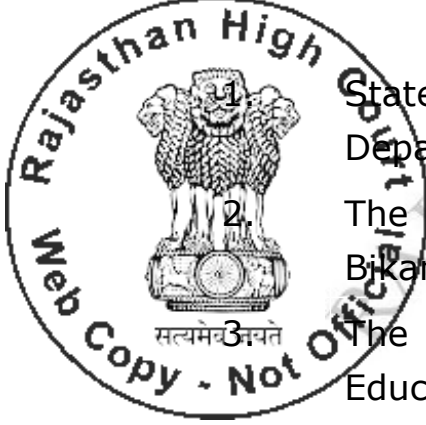
**HIGH COURT OF JUDICATURE FOR RAJASTHAN AT
JODHPUR**

S.B. Civil Writ Petition No. 4384/2020

Smt. Neeraj W/o Rupa Ram, Aged About 34 Years, Resident of
47, Village Sindhpora, Post Hirani Via Kuchaman, District Nagour.

----Petitioner

Versus



1. State of Rajasthan, through the Principal Secretary,
Department of Education, Jaipur.

2. The Director, Department of Secondary, Education,
Bikaner.

3. The District Education Officer (Head Quarter), Secondary
Education, Bikaner.

4. The Block Development Officer, Primary Education
Department, Nokha, Dist. Bikaner.

----Respondents

For Petitioner(s) : Mr. Bhavit Sharma through Cisco
Webex App

For Respondent(s) : Mr. Rishi Soni associate to Mr. Pankaj
Sharma, AAG through Cisco Webex
App

JUSTICE DINESH MEHTA

Judgment

Reportable

07/12/2020

1. The conundrum, which is required to be resolved in the present case, is, whether a candidate, who has given birth to a child prior to joining the Government service, is entitled for maternity leave under Rule 103 of Rajasthan Service Rules, 1951?



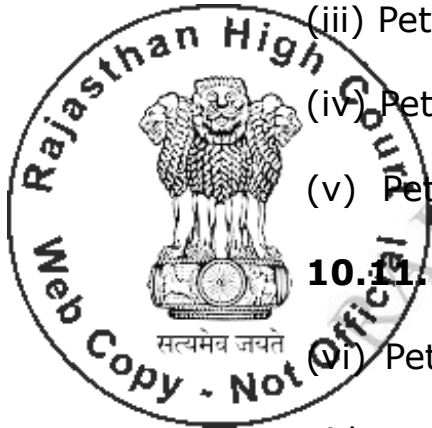
2. Before venturing into such exercise, it would be apt to take note of certain dates, which have implication on the issue at hands:

- (i) The petitioner gave birth to a child on **15.05.2016**;
- (ii) The petitioner was given appointment on the post of Physical Training Instructor (PTI), Grade-III on **04.06.2016**;
- (iii) Petitioner gave her joining on **06.06.2016**;
- (iv) Petitioner applied for maternity leave on **21.06.2016**;
- (v) Petitioner did not attend Office from **26.06.2016** to **10.11.2016** (142 days);
- (vi) Petitioner's application for maternity leave was decided vide order(s) dated **13.08.2018** and **17.07.2019**;
- (vii) Petitioner's services were confirmed w.e.f. **26.09.2018** (vide order dated **21.11.2019**);
- (viii) The writ petition filed on **19.05.2020**.

3. The petitioner, who was appointed on the post of Physical Training Instructor, Grade-III, vide appointment order dated 04.06.2016, mothered a baby boy on 15.05.2016, just a few days before receiving the appointment order.

4. As the petitioner had to undergo a Cesarean Section she was not fit enough to join, but with a view to ward off adverse consequence of non-joining, she preferred to give her joining on 06.06.2016.

5. For the purpose of taking care of her child and herself, she moved an application for grant of maternity leave on 21.06.2016, while clearly mentioning that she has given birth to a child on 15.05.2016 by cesarean section and, thus, she will be unable to





attend the duties. The petitioner had enclosed birth certificate and other relevant documents with the application so filed.

6. On 10.11.2016, the petitioner reported back on duties after remaining absent for 142 days.

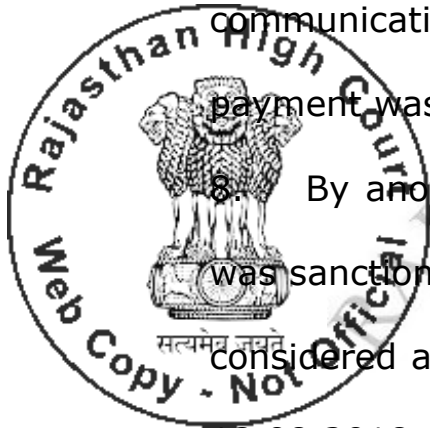
7. The petitioner's aforesaid leave application (filed on 21.06.2016) came to be dealt with by the respondents firstly vide communication dated 13.08.2018 whereby 90 days' leave without payment was sanctioned.

8. By another communication dated 17.07.2019, the petitioner was sanctioned a total 142 days' leave, out of which 90 days were considered as leave without payment as per communication dated 13.08.2018 and 52 days' leave was treated as extra ordinary leave (EOL), that too without payment.

9. Despite completion of probation period of two years, the respondents extended petitioner's probation period by 112 days and confirmed her services w.e.f. 26.09.2018, vide order dated 21.11.2019.

10. The petitioner has approached this Court with a grievance that the respondents are not justified in deferring petitioner's confirmation for a period of 112 days. According to the petitioner, her confirmation ought to have been made effective from 05.06.2018. Petitioner has also called the orders refusing maternity leave in question.

11. Mr. Bhavit Sharma, learned counsel appearing for the petitioner, submitted that the respondents were not justified in deferring petitioner's confirmation by 112 days, while maintaining that respondents' action in not granting maternity leave to the petitioner is arbitrary and contrary to Rule 103 of the RSR.





12. He contended that order dated 21.11.2019 so also the respondents' action of not sanctioning maternity leave, deserve to be quashed and set aside.

13. Learned counsel relied upon the judgment dated 19.05.2017, rendered by this Court in *Harshita Yadav Vs. State of Raj. & Ors.*; S.B. Civil Writ Petition No.11833/2014 and submitted that the petitioner is entitled for maternity leave, irrespective of the fact that she gave birth to a child before entering into the Government Service.

14. Mr. Rishi Soni, Associate to Mr. Pankaj Sharma, AAG, learned counsel appearing for the respondent – State raised a preliminary objection that the petition at hand suffers from delay and laches.

15. Highlighting the fact that the petitioner's application for maternity leave had been considered vide orders dated 13.08.2018 and 17.07.2019, he submitted that the petitioner has approached this Court in May, 2020, after a delay of about a year and, thus, her writ petition seeking equitable relief deserves to be dismissed.

16. Apart from the aforesaid preliminary objection, an argument was advanced that judgment in *Harshita Yadav's* case (supra), passed by the Jaipur Bench of this Court is not binding, inasmuch as basic provisions of Rule 103 of the RSR governing maternity leave have not been taken into consideration. He stressed that *Harshita Yadav's* judgment solely hinges upon the provisions of Maternity Benefit Act, 1961 (hereinafter referred to as the "Act of 1961") and provisions of RSR have not been considered.

17. Zealously reading the provisions of Rule 103 of the RSR, Mr. Soni submitted that maternity leave is permissible only in a case





where a child is born after a female joins her duties as a Government servant. Laying much emphasis or stress upon the use of expression "to a Government servant" in opening line of Rule 103, he argued that on the date of giving birth to a child (on 15.05.2016), the petitioner was not a Government servant and hence, she cannot be granted maternity leave. Put it differently his contention has been that since the child was born to the petitioner prior to joining the Government services, she cannot claim maternity leave under the Rules.

18. It was submitted that the petitioner, if so advised, could have applied for extension of joining in wake of contingency she was in, instead of joining in a hurry and claiming maternity leave.

19. Mr. Soni relied upon the judgment of Punjab and Haryana High Court dated 04.05.2017, delivered in the case of *Sweetly Devi Vs. Pt. B.D. Sharma, University of Health and Sciences, Rohtak*; S.B. Civil Writ Petition No.9385/2017 and prayed that in light of this judgment, present writ petition be dismissed.

20. Heard.

21. It would be profitable to have a perusal of the provisions of Rule 103 of the RSR, as existing on the date, when the petitioner applied for maternity leave. The same reads as infra:-

"103 :- Maternity leave may be granted to a female Government Servant with less than two surviving children upto a period of 180 days from the date of its commencement. However, if there is no surviving child even after availing it twice, Maternity Leave may be granted on one more occasion.

During such period, she will be entitled to leave salary equal to pay drawn immediately before



proceeding on leave. Such leave shall not be debited to the leave account but such entry should be made in the service book separately."

*** emphasis supplied.**

22. This beneficial provision has been incorporated with a view to recover from post delivery issues and obviate the hardship faced by a mother and observe the mandate of Maternity Benefit

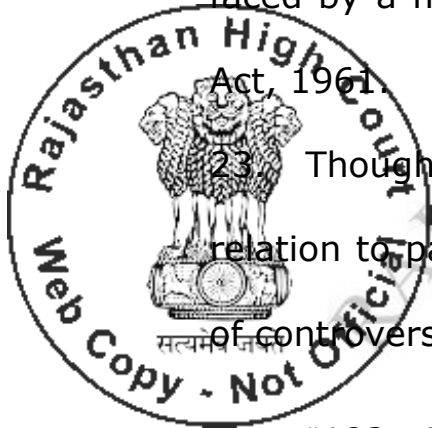
23. Though not directly in issue, but somewhat provisions in relation to paternity leave also calls for a reference in the context of controversy in question. Rule 103A of the RSR reads as under:-

"103 A: Paternity Leave : A male Government servant with less than two surviving children may be granted paternity leave (maximum two times) for a period of 15 days during confinement of his wife i.e. 15 days before to three months after childbirth; and if such leave is not availed of within this period it shall be treated as lapsed.

During the period of such leave, the Government servant shall be paid leave salary equal to the pay drawn immediately before proceeding on leave. Paternity Leave shall not be debited against the leave account but such entry should be made in the service book separately and may be combined with any other kind of leave (as in the case of maternity leave).

Such leave shall not be allowed in case of miscarriage including abortion of the Government servants wife."

24. A bare look at Rule 103 of the RSR shows that it is employee centric. It has no nexus or correlation with the date or event of





child birth. The Rule confers upon a female Government servant with less than two children, a right to avail maternity leave of 180 days. Prerequisite conditions for such availment are- (i) a female should be a Government servant and (ii) she should have less than two surviving children.

25. As against this, if analogous provision contained in Rule 103A of the Rules (which deals with paternity leave) is taken note of, one would find that paternity leave has been linked with or has been given a direct connection with child birth and wife's confinement. A father can avail such leave during period of confinement i.e. 15 days before to 3 months after child birth. In case such leave is not availed, it automatically lapses, is the mandate of Rule 103A of the Rules.

26. A comparative and conjoint reading of Rule 103 and Rule 103A makes legislative intention crystal clear. A female Government servant or a mother can avail maternity leave for the period prescribed irrespective of the date of child birth; whereas a male Government servant can avail paternity leave for a period of 15 days during his wife's confinement. In other words, the date of child birth, is significant in case of paternity leave, whereas it is not of much relevance in case of maternity leave.

27. Another significant aspect is, use of expression - "from the date of its commencement". Use of such expression too has an important bearing on the issue at hands. It is noteworthy that on the date of insertion of these Rules i.e. 06.12.2004, the legislature had considered it appropriate to confer such entitlement immediately. In other words, rule making authority intended to confer such benefit to all those employees, who had already given



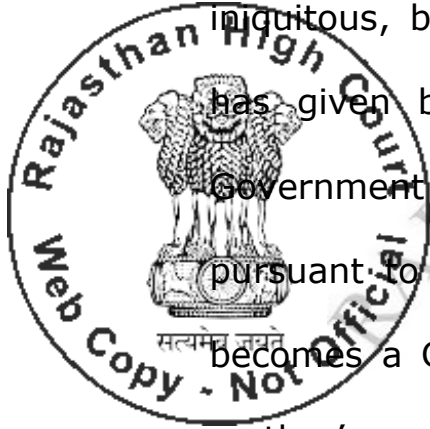


birth to a child on such date (06.12.2004), that is why such stipulation (from the date of its commencement) was made, without giving any reference of occurrence of delivery.

28. In considered opinion of this Court, since on the date of promulgation of these Rules, an employee, who had already given birth, was held entitled to avail maternity leave, it will not only be inequitable, but also discriminatory to exclude an employee, who has given birth to a child a few days ahead of joining the Government service. Needless it is to say, that having joined pursuant to an appointment on substantive post, an incumbent becomes a Government Servant for all practical purposes and a mother's maternity needs cannot eclipse, simply because she has joined the duties.

29. Rule 103 does not create or confer right on the basis of date of birth. It simply provides that maternity leave may be granted to a female Government servant from the date of its commencement. Hence, if on the date of applying for such leave, if a female employee is in requirement of leave for natal needs and also for rearing or looking after the child, it should not, rather, cannot be denied.

30. Carving out 'pseudo-distinction' by contending that the petitioner was not a Government servant, when the child was born or in other words the child was born prior to joining, is contrary to the provisions of Rule 103 and is in direct conflict with the very purpose of the Rule. Such stance is arbitrary and inequitable, if not, inhumane.





31. Such being the position, this Court is unable to accept the sheet anchor of respondents' arguments, so vociferously advanced by Mr. Soni, learned counsel for the respondent – State.

32. Adverting to the preliminary objection regarding delay and laches, this Court, feels that firstly the same is not available to the State and finds that it is liable to be rejected, in the extant factual backdrop.

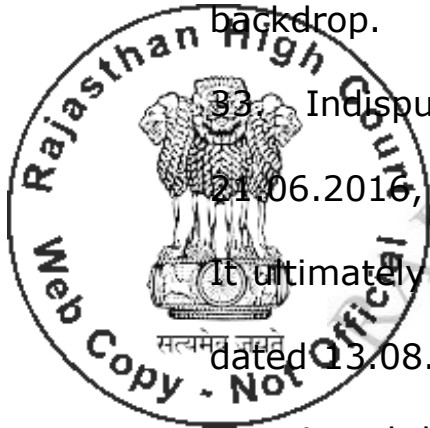
33. Indisputably, petitioner's leave application filed on 21.06.2016, remained unattended/unheeded for about two years. It ultimately came to be dealt with by the respondents vide order dated 23.08.2018 and 17.07.2019 - petitioner's leave came to be sanctioned, but without pay.

34. Leaving that apart, by way of an order passed on 21.11.2019, the respondents even proceeded to defer petitioner's confirmation for a period of 112 days.

35. Being confronted with such situation, petitioner was constrained to take legal recourse.

36. Counting from such date i.e. 21.11.2019, instant writ petition, which has been filed on 19.05.2020, cannot be treated to be belated, by any stretch of argument.

37. Regardless of what has been stated above, in considered opinion of this Court, the State cannot take such technical plea, particularly when an aggrieved party approaches the Court within a reasonable period i.e. three years from accrual of the cause of action. In such event, the Court is required to ascertain that no third party rights are involved and/or other employees are not adversely affected because of inaction of the petitioner. While opposing a petition on the ground of delay, State is also required





to assert that because of the inaction of petitioner for long time, relevant material/evidence to determine the issue has been destroyed/weeded out or not available with it.

38. Unquestionably, present lis or cause neither concerns nor in any manner affects the rights of any other employee. Hence, the doors of Justice can not be slammed on the face of the petitioner, as requested by the respondents.

39. Fact situation of the case at hands reminisces of the following observations made by the Courts :-

(a) In the case of *Kaluram Sitaram Vs. the Dominion of India* (AIR 1954 BOMBAY 50), while deciding the case between an individual citizen and the State, the Bombay High Court made the following observation:-

"Now, we have often had occasion to say that when the State deals with a citizen, it should not ordinarily rely on technicalities and if the State is satisfied that the case of the citizen is a just one, even though legal defence may be open to it, it must act, as has been said by eminent judges, as an honest person."

(b) Further, in the case of *Port Trust vs. Hymanshu International*: (1979) 4 SCC 176, Supreme Court made following remarks:-

"2...The plea of limitation based on this section is one which the court always looks upon with disfavour and it is unfortunate that a public authority like the Port Trust should, in all morality and justice, take up such a plea to defeat a just claim of the citizen. It is high time that governments and public authorities adopt the practice of not





relying upon technical pleas for the purpose of defeating legitimate claims of citizens and do what is fair and just to the citizens. Of course, if a government or a public authority takes up a technical plea, the Court has to decide it and if the plea is well-founded, it has to be upheld by the court, but what we feel is that such a plea should not ordinarily be taken up by a government or a public authority, unless of course the claim is not well-founded and by reason of delay in filing it, the evidence for the purpose of resisting such a claim has become unavailable....”



40. Before raising such an argument, the respondents should have better introspected their own action and posed a question to all concerned, as to why petitioner's application for grant of maternity leave (dated 21.06.2016) was not responded to for two years?

41. It does not behove the respondents (who themselves took two years to decide an application that too callously) to raise fingers towards petitioner's so called inaction, when they themselves are at fault. Preliminary objection, thus, deserves to be and is hereby rejected.

42. This Court feels that it is high time when State should focus on merit of the case and confine itself to the permissibility of right or benefits, to a citizen, instead of raising worthless objections or bogies of delay.

43. Before reaching to a final conclusion, it is imperative rather incumbent upon this Court to dilate upon the judgments cited by rival counsel. Firstly, it would be appropriate to go through the



adjudication made by this Court in Harshita Yadav's case (supra), wherein following has been held:-

"During the course of argument, it is not denied that grant of salary and other monetary benefits to the employee and joining of service are entirely different. Petitioner, in fact, had joined government service on 08.11.2011. At that time, she was a mother of eight days old child. Petitioner had proceeded on leave in the month of November, 2011. Maternity Benefit Act, 1961 is a beneficial legislation. The State Government is committed that newly born child being a future of the nation, is not only reared well, but grow as a healthy child.

Shri Sanjay Sharma, learned Government Counsel, has no quarrel with the assertion made by the learned counsel for the petitioner that eight days old child require care, attention and nursing by the mother. Shri Sanjay Sharma has also not denied that State Government is bound by the provisions of Maternity Benefit Act and has also provided in State Government rules grant of maternity leave. However, this court cannot become oblivious of the fact that the petitioner had not completed minimum 80 days in preceding twelve months. This is a case where this court should balance the equities.

Hence, it is ordered that the period from 09.11.2011 till 27.04.2012 will be considered as a leave of kind in due and for the said period, petitioner shall not be paid any salary or allowances, but said period shall be treated as the one on which petitioner was on duty. Thus, for all intent and purposes, services of the petitioner shall be reckoned w.e.f. 08.11.2011."

44. True it is, that above judgment of this Court in Harshita Yadav's case (supra) is premised upon the provisions of Act of





1961 and Rule 103 of the RSR was not brought to notice of the Court. But the mere fact that Rule 103 has not been referred in the case of Harshita Yadav (supra), does not render the said judgment per incuriam. Having regard to the fact that this Court has now considered and dealt with the respondents' argument regarding Rule 103 of the RSR, respondents' action cannot be countenanced.

45. Moving on to the judgment of Punjab and Haryana High Court in *Sweetly Devi's* case (supra), suffice it to observe that the same has no application on the present case. Because, the relevant Rules in Punjab Service Rules are clearly distinguishable.

It will not be out of place to reproduce para 8.127 (a) of the Punjab Service Rules, referred in the judgment of *Sweetly Devi's* case (supra):

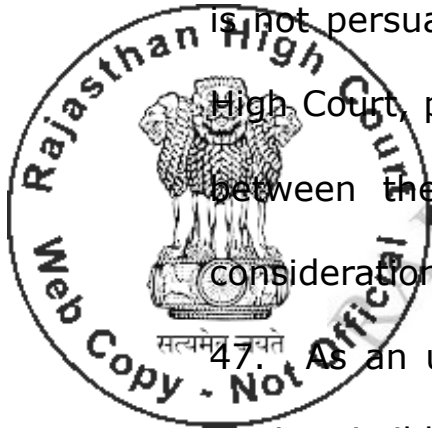
"8.127 (a). The competent authority under Rule 8.23 may grant to a female Government employee maternity leave on full pay for a period not exceeding 180 days without the necessity of production of a medical certificate and the grant of such a leave, shall be so regulated that the date of confinement falls within the period of this leave and the leave so granted shall not be debited against the leave account of the female Government employee:

Provided that no leave under this sub-rule shall be granted to a female Government employee who has three or more living children."

46. While denying benefits of maternity leave, Punjab & Haryana High Court was of the view that since the date of confinement happened to be a date prior to petitioner's joining, the petitioner



cannot claim maternity leave. Punjab & Haryana High Court has construed the date of birth to be the date of confinement; which in opinion of this Court, with due respect, is not a correct position and proper interpretation. Confinement cannot be confused with date of child birth or delivery. That apart, date of confinement is not an expression used in Rule 103 of the RSR. Hence, this Court is not persuaded to tow the line drawn by the Punjab & Haryana High Court, particularly when there is stark and striking difference between the provisions in Punjab Rules and the Rules under consideration.



47. As an upshot of discussion aforesaid, this Court reaches to an irresistible conclusion that petitioner is entitled for grant of maternity leave in terms of Rule 103 of the RSR, irrespective of the fact that she had given birth to the child prior to her joining Government service.

48. Impugned orders dated 13.08.2018; 17.07.2019; and 21.11.2019, thus, deserve to be, and are hereby quashed.

49. Petitioner's sanctioned leave of 142 days shall be treated as maternity leave.

50. As a necessary corollary, petitioner shall be entitled to salary for the period of such leave, in accordance with Rule 103 of the RSR and shall be deemed confirmed w.e.f. 05.06.2018 (on completion of two years' service from the date of her joining).

51. Consequences to follow; needful be done within three months from today.

52. With a view to harmonize the provisions, upon combined reading of Rule 103 and 103A of the RSR, it is declared that a female Government servant is entitled to avail maternity leave, if



she joins within the period of confinement, i.e. 15 days before to three months after the child birth, regardless of the fact that the child was born prior to joining or before issuance of appointment order.

53. Petition allowed. Cost made easy.

54. Stay application also stands disposed of.



(DINESH MEHTA),J



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