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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 11.08.2023

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THE HONOURABLE MRS.JUSTICE L.VICTORIA GOWRI

W.P.(MD).No.19561 of 2023

and

W.M.P(MD)Nos.16159, 16160, 16161 of 2023

B.Saravanan

... Petitioner

Vs

1. The Deputy Inspector General of Police,
Tirunelveli Region, Tirunelveli.

2. The Superintendent of Police,
Tenkasi District.

3. The Inspector of Police,
Kadayam Police Station,
Tenkasi District.

... Respondents

Prayer : Writ Petition filed under Article 226 of the Constitution of India, praying this Court to issue a Writ of Certiorarified Mandamus by calling for the entire records pertaining to the order passed by the first respondent in Na.Ka.No. A2/ 1941/2023 Sa.A.Aanai No. 236/2023, dated 22.06.2023 and quash the same and consequently direct the respondents to reinstate the petitioner as Inspector of Police, Kadayam Police Station, Tenkasi District.

For Petitioner : Mr.R.Anand

For Respondents : Mr.M.Prakash
Additional Government Pleader



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ORDER

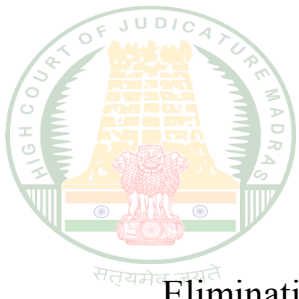
The present writ petition has been filed seeking to quash the order passed by the first respondent in Na.Ka.No. A2/ 1941/2023 Sa.A.Aanai No. 236/2023, dated 22.06.2023 and consequently direct the respondents to reinstate the petitioner as Inspector of Police, Kadayam Police Station, Tenkasi District.

“ONE WHO GIVES BIRTH, ONE WHO INITIATES, ONE WHO IMPARTS KNOWLEDGE, ONE WHO PROVIDES FOOD AND PROTECTS FROM FEAR – THESE FIVE ARE CONSIDERED AS FATHERS”

- *Neeti Sastra :80*

1.Prelude:

1.1.It was during the first International Labour Conference (ILO) in 1919 that, the first convention on maternity protection (Convention No.3) was adopted. Significantly, the adoption of the International Labour Organisation (ILO) workers with Family Responsibilities Convention, 1981 marked the recognition that *“a change in the traditional role of men as well as the role of women in society and in the family is needed, to achieve full equality between men and women”*, as stated in the United Nations Convention on the



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Elimination of All Forms of Discrimination against Women, 1979. Over the past 20 years, paternity leave provisions have also become more common, which is an indicator of the growing importance attached to the presence of the father around the time of child birth. In 1994, statutory paternity leave provisions existed in 28% of the 141 countries for which data were available at the International Labour Organisation. As on date, a majority of countries have established legislative provisions to protect and support maternity and paternity, even if those provisions do not always meet the ILO standards.

1.2. Maternity protection is a fundamental human right and an indispensable element of comprehensive work family policies. The 1948 Universal declaration of Human Rights states that motherhood and childhood are entitled to special care and assistances as well as to social security. In providing the mother and child with utmost attention, the role of father is imminent. Father and mother are the inevitable instruments of parenting partnership. There is no law in India mandating the private sectors in India to provide paternity leave for working fathers. However, the Central Civil Services (Leave) Rules, 1972 provides with paternity leave and the relevant provision is extracted as follows:



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“43-A. Paternity leave

(DOPT Notification No. 13026/1/99-Estt. (L), dated 18.04.2002)

(1) A male Government servant (including an apprentice) with less than two surviving children, may be granted Paternity Leave by an authority competent to grant leave for a period of 15 days, during the confinement of his wife for childbirth, i.e., up to 15 days before, or up to six months from the date of delivery of the child.

(2) During such period of 15 days, he shall be paid leave salary equal to the pay drawn immediately before proceeding on leave.

(3) The paternity Leave may be combined with leave of any other kind.

(4) The paternity leave shall not be debited against the leave account.

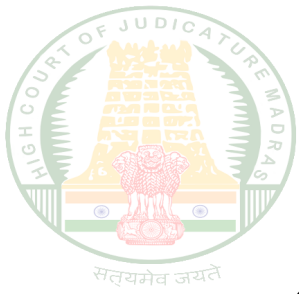
(5) If Paternity Leave is not availed of within the period specified in subrule (1), such leave shall be treated as lapsed.

NOTE:- the Paternity Leave shall not normally be refused under any circumstances.

43-AA. Paternity Leave for Child Adoption

(DOPT Notification No. 110 12/1/2009-Estt. (L), dated 01.12.2009)

(1) A male Government servant (including an apprentice) with less than two surviving children, on valid adoption of a child below the age of one year, may be granted Paternity Leave for



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a period of 15 days within a period of six months from the date of valid adoption.

(2) During such period of 15 days, he shall be paid leave salary equal to the pay drawn immediately before proceeding on leave.

(3) The Paternity Leave may be combined with leave of any other kind.

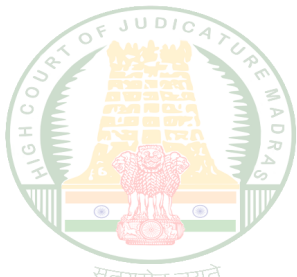
(4) The Paternity Leave shall not be debited against the leave account.

(5) If Paternity Leave is not availed of within the period specified in sub-rule (1), such leave shall be treated as lapsed.

NOTE 1.— The Paternity Leave shall not normally be refused under any circumstances.

NOTE 2.— "Child" for the purpose of this rule will include a child taken as ward by the Government servant, under the Guardians and Wards Act, 1890 or the personal law applicable to that Government servant, provided such a ward lives with the Government servant and is treated as a member of the family and provided such Government servant has, through a special will, conferred upon that ward the same status as that of a natural born child. (DOPT Notification No. 13026/5/2011-Estt. (L), dated 04.04.2012) ”

But such a welfare measure is not provided by the various states in India, including the state of Tamil Nadu. This case marks the need for paternity leave legislation in India.

**2.Facual Matrix:**

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2.1.The petitioner is the Inspector of Police, Kadayam Police Station, Tirunelveli District. The petitioner's wife got conceived through In Vitro Fertilization (IVF) method. In Vitro Fertilization (IVF) is a complex series of procedure used to aid with fertility or prevent genetic problems and assist a childless couple with the conception of a child. IVF is a high risk pregnancy procedure, which caters to the needs of infertile couple. The procedure involves stimulating a woman's ovulatory cycle, where the process of fertilization occurs outside the body and after the egg is fertilized, the zygote formed is sent for embryo culture, after which it is carefully implanted in the uterus of the female to initiate a successful pregnancy. Hence, the women undergoing IVF procedure, needs complete attention and wholistic care for a risk free delivery. Hence, the petitioner, apart from serving his post, was also in a compulsion to give special care to his pregnant wife at that point of time. Therefore, he gave a leave letter to the second respondent seeking paternity leave from 01.05.2023 to 29.07.2023 for a period of 90 days.

2.2.Considering the same, the second respondent, vide order dated 25.04.2023, granted leave for the said period. But shockingly, even before the commencement of the paternity leave period, the second respondent had sent a



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communication on the previous date of his leave period ie., on 30.04.2023, by a cryptic order cancelling his leave, citing law and order problem prevailing in the locality of Kadayam.

2.3.Since the date of delivery of the petitioner's wife was fixed by the Doctors on 30.05.2023, the petitioner left with no other option, approached this Court by filing W.P(MD)No.11862 of 2023, assailing the order of cancellation of his leave, dated 30.04.2023. This Court, disposed of the said writ petition directing the petitioner to report duty by 16.06.2023 and permitted the petitioner to give a representation to the first respondent and consequently directed the first respondent to re-visit the issue and issue appropriate orders favourably by considering his representation.

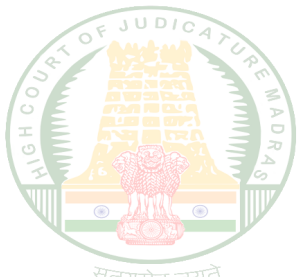
2.4.Complying the order of this Court, the petitioner duly submitted a representation, dated 12.05.2023, which was received by the first respondent's office on 15.05.2023, seeking to extend his Unearned Leave on private affairs for a period from 01.05.2023 to 15.06.2023. The first respondent also, in compliance of order passed by this Court, by revisiting the cancellation order, on 23.05.2023, sanctioned leave to the petitioner for a period of 30 days from 01.05.2023 to 30.05.2023.



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2.5.However, unfortunately the delivery date of the petitioner's wife was extended and finally, she gave birth to the child only on 31.05.2023. As a result of which, the petitioner was not able to report duty on 31.05.2023. However, he had sent a WhatsApp message to the Superintendent of Police, Tenkasi District, stating that due to the critical condition of his wife, he was not able to reach in person and submit an application seeking extension of leave. The condition of his wife required absolute attention and full care as a result of which, he could not move ahead from his wife. He was fully taking care of his wife and the new born IVF child.

2.6.Shockingly, on 22.06.2023, the impugned desertion order came to be passed. The petitioner was directed in the impugned order to appear before the Deputy Inspector General of Police, Tirunelveli Circle within 60 days from the date of commencement of desertion ie., 31.05.2023 and submit his explanation. The said 60 days expired on 29.07.2023. Under such circumstances, assailing the impugned desertion order, this writ petition came to be filed.



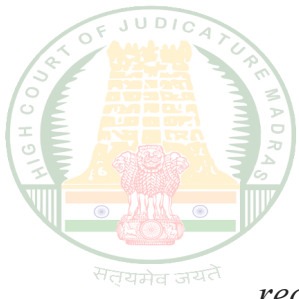
3. Legal Matrix of the case and analysis:

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3.1. The impugned order has been passed under Police Standing Order 95(1). For clarity, the Police Standing Order 95(1)(2) is extracted as follows:

“95. Desertion (1) Absence without leave for 21 days completes the delinquency of desertion, after which the name of member of subordinate service shall invariably be struck off from the date of absence. (G.O. 186, Judicial, 21st January 1984)

(2) An application for reinstatement from an officer, who has been struck off as deserter, shall not be entertained unless, it reaches the Superintendent of Police or an officer of equal rank under whom the subordinate officer was serving within two months from the date of the commencement of the absence without leave. The Superintendent of Police or the corresponding officer of equal rank, as the case may be, shall not reinstate a deserter (a) until the deserter has attended in person which he should do, not later than the date prescribed by the officer dealing with the case, and has given his explanation for his absence without leave and (b) unless the Superintendent of Police or an officer of equal rank, as the case may be, is satisfied after such enquiry as may be necessary that the case deserves reconsideration. At the end of the two months, if no application for reinstatement is

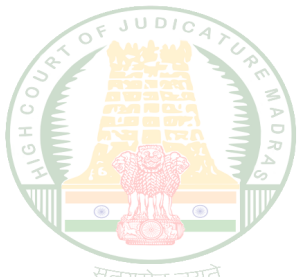


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received and if the whereabouts of the deserter are not known, the officer dealing with the case will record in writing the reason for his being satisfied that it is not reasonably practicable to give the deserter an opportunity of showing cause against his dismissal and then confirm the dismissal. In other cases, a charge should be framed and the procedure prescribed in Order No. 80 complied with, before confirming the dismissal or reinstating the deserter confirming with or without punishment”.

3.2.As per Police Standing Order 95(2), an application for reinstatement of an officer, who has been struck off as deserter, shall not be entertained unless it reaches the Superintendent of Police or an officer of equal rank under whom he worked, if the application did not reach in time, within a period of two months from the date of commencement of absence without leave. In this case, the petitioner has not been struck off from the force as a deserter, however, the impugned order has been passed, as a preliminary measure.

3.3.Considering the unusual nature of this case, where a dutiful husband has sought for paternity leave before the competent authority, only for



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the purpose of taking care of his pregnant wife, at the time of complicated delivery procedure by IVF treatment, the competent authority ought to have granted leave as sought by him in his application from 01.05.2023 to 15.06.2023. However, such an order was not passed, but he was permitted to avail Unearned Leave on private affairs only for a period from 01.05.2023 to 30.05.2023. Though the Superintendent of Police was aware that the petitioner was not able to join duty, only because of the reason that he was attending the complicated delivery of his wife, impugned desertion order has been passed by him.

3.4.Though paternity/paternal leave are a kind of labour law benefit, the same has stemmed up from the right of a child to be protected under Articles 14, 15(3) and 21 of the Constitution of India. The Constitution provides with specific provisions in Chapter III and IV under Fundamental Rights and Directive Principles of State Police respectively, recognising the significance of child welfare, protection and development. Article 39(f) directs the State to evolve a policy towards security – that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and abandonment. The right to life of a child is



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guaranteed under Article 21 of the Constitution of India. The development of a child commences from the pre-natal care days, that is from the day one of the mother's pregnancy and continues all along the post natal care days, till the age of attaining majority. The role of both the mother and father during the pre-natal care and post-natal care days gains importance from the perspective of the child's right to survive. A welfare state is at the bounden duty to provide the foetus with a dignified pre-natal care and the child with proper health care, hygiene and sanitation in the post-natal care days. Perhaps grant of maternity/paternity leave to the biological parents and paternal leave to the adoptive parents is to ensure proper pre-natal/post-natal care, upholding the child's right to protection of life as guaranteed under Article 21 of the Constitution of India. The right to protection of life guaranteed to every child by Articles 21 and 15(3) of the Constitution of India, culminates in the fundamental human right of the biological parents/adopting parents seeking maternity/paternity/parental leave. Thus, the action of the respondents cancelling and refusing paternity leave to the petitioner would amount to violation of Article 21 of the Constitution of India.



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4.Submissions:

4.1.The learned counsel for the petitioner submitted that the first respondent must have considered the petitioner's case on humanitarian angle about the fact that the petitioner's wife got conceived after prolonged treatment and that only on inevitable circumstances, with no others to take care of his wife, the petitioner sought for paternity leave. And on the same being cancelled he was left with no other option rather to attend his wife in such emergency condition and sought to quash the desertion order.

4.2.Per contra, the learned additional Government Pleader submitted that the petitioner never complied with the undertaking given by him in W.P(MD)No.11862 of 2023, that he would report duty on 15.06.2023. He further submitted that the petitioner never ever tried to extend his leave officially and he deserted his office without notice and pressed for dismissal of the writ petition.

5.Epilogue:

5.1.In the context of Indian life, though the words Maternity and Paternity sounds synonymous to motherhood and fatherhood, the survival of a



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child vests with the joint responsibility of the family as a whole. Since the days of joint family system has almost diminished/eroded and when the challenges of nuclear families are unprecedented in India, it is high time for the policy makers to recognise right to paternity leave/parental leave to the biological/adoptive parents, as the basic human right of the respective pre-natal/post natal child.

5.2.Considering the peculiar nature of the case and plight of the petitioner, who has knocked the doors of this Court seeking mercy, I am inclined to gracefully consider the petitioner's IVF child's right to life and protection of life as guaranteed under Article 21 of the Constitution of India. The petitioner's child's right to live, survive, health and development of childhood which flows from Article 21 of the Constitution of India, guarantees the petitioner's right to seek paternity leave to attend his wife's delivery. Hence, this Court concludes this case in favour of the petitioner quashing the impugned desertion order passed by the first respondent vide proceeding in Na.Ka.No.A2/1941/2023 Sa.A.Aanai No.236/2023, dated 22.06.2023 and consequently directs the first respondent to re-visit the impugned order, thereby, extending the time given to the petitioner to submit explanation for his unauthorized absence during the period from 31.05.2023 to 29.07.2023, for



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another period of 15 days from the date of receipt of a copy of this order.

Thereafter, the petitioner is directed to appear before the first respondent and submit necessary explanation along with the medical records of his wife and an apology letter. The first respondent is also directed to consider the case of the petitioner with a considerate mind and pass appropriate orders reinstating the petitioner, as Inspector of Police, Kadayam Police Station, Tenkasi District, within a period of four weeks, from the date of receipt of copy of this order.

6. With such observations, this writ petition stands disposed of.

There shall be no order as to costs. Consequently, connected miscellaneous petitions are closed.

11.08.2023

NCC : Yes / No
Index : Yes / No
Internet : Yes

Note: Issue order copy on 18.08.2023

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To

1. The Deputy Inspector General of Police,
Tirunelveli Region, Tirunelveli.
2. The Superintendent of Police,
Tenkasi District.
3. The Inspector of Police,
Kadayam Police Station,
Tenkasi District.



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VERDICTUM.IN



W.P.(MD).No.19561 of 2023

L.VICTORIA GOWRI, J.

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ORDER IN
W.P.(MD).No.19561 of 2023
and
W.M.P(MD)Nos.16159, 16160, 16161 of 2023

11.08.2023