

10

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH: CUTTACK.

ORIGINAL APPLICATION NO. 143 OF 2001
Cuttack, this the 4th day of November, 2004

MS. GAYATRI MISHRA.

....

APPLICANT.

: VRS :

COMMISSIONER, KVS & ORS.

....

RESPONDENTS.

FOR INSTRUCTIONS

1. Whether it be referred to the reporters or not? *yes*
2. Whether it be circulated to all the Benches of the Central Administrative Tribunal or not? *yes*

[Signature]
(B.N. SOM)
VICE-CHAIRMAN

[Signature]
(M. R. MOHANTY) *04.11.04*
MEMBER (JUDICIAL)

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CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH; CUTTACK

Original Application No.143 of 2001
Cuttack, this the 4th day of November, 2004.

C O R A M

THE HONOURABLE MR. B.N. SOM, VICE- CHAIRMAN

AND

THE HONOURABLE MR. M. R. MOHANTY, MEMBER (JUDL.)

....

MS. GAYATRI MISHRA, 45 years,
D/o. Late Barodakanta Mishra,
No. 3/333, I.R.C. Village Nayapalli,
Bhubaneswar, District-Khurda.

.... Applicant.

-Versus-

1. Commissioner, Kendriya Vidyalaya Sangathan,
18, Institutional Area, Saheedjeet Singh Marg,
New Delhi.
2. Deputy Commissioner,
Kendriya Vidyalaya Sangathan, 18
Institutional Area, Saheedjeet
Singh Marg, New Delhi.
3. Assistant Commissioner,
Regional Office ,
H.P.-7, B.D.A Locality,
Laxmisagar, Bhubaneswar,
Dist. Khurda.

.... Respondents.

For the Applicant :

M/s. A.K. Mishra,
J. Sengupta,
Dinesh Ku. Panda,
Prabhas Ranjan Jeevan Dash,
Gopal Sinha, Advocates.

For the Respondents:

Mr. Ashok Mohanty,
Senior counsel for KVS.

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O R D E R

MR. MANORANJAN MOHANTY, MEMBER (JUDICIAL):

Challenging the vires of Article 81(d) of the Education Code of Kendriya Vidyalaya Sangathan (of India) pertaining to Voluntarily abandonment of Service with prayers to quash the order of punishment (of removal from service) as imposed under Annexure-25 dated 13-03-2001 (with consequential prayer for re-statement in service and for financial benefits), the Applicant (Ms. Gayatri Mishra, the removed Primary School Teacher of the Kendriya Vidyalaya Sangathan) has filed this Original Application under section 19 of the Administrative Tribunals Act, 1985.

Applicant upon being appointed as a Primary School Teacher continued as such in the Kendriya Vidyalaya at F.C.I., Talcher since 17.7.1981. Thereafter, she was transferred to K.V. at Cuttack on 08-12-1982. While she was at K.V., Cuttack, she represented at various intervals, to her authorities

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for her transfer to K.V. Bhubaneswar on her personal grounds, however, instead of considering her said representations favourably (for a transfer to K.V. at Bhubaneswar) when the Applicant was transferred to K.V. No.1 at Kaleikunda in the State of West Bengal, she moved before the Honourable High Court of Orissa under Article 226 and 227 of the Constitution of India; which was, subsequently, came on transfer to this Tribunal and registered as T.A. No.146/2000. On being aggrieved by the orders dated 05-10-2000 delivered by this Tribunal (rendered in the said T.A.No.146/2000), the Applicant approached the Hon'ble High Court of Orissa in a Writ Petition (OJC No.1454 of 2001). It is the case of the Applicant that even though another person (namely Mrs. Sanjurani Mishra) was allowed to join as PRT in KV at Cuttack, and there are many more posts available at KV, Cuttack, she was illegally and with ill intention was asked to go on transfer to Kalaikunda. It is the case of the Applicant that even though (as per the Circulars issued by the Headquarters of the Kendriya Vidyalaya Sangathan, the Applicant, being an unmarried lady was to be allowed to be posted at her choicest posting and that

even though there are/were vacancies, her case was not considered, and the grievance of the Applicant was turned down illegally in letter dated 08-08-1996. However, she had applied for leave from 13-08-1996 to 17-08-1996 in her letter dated 13-08-1996 due to her illness and finally, on 27-08-1996, she was relieved of her duties. After being relieved, she also made a representation on 22-08-1997 to adjust her in KV at Bhubaneswar. In the meantime, as she was not well, she applied to her Authorities for giving her no objection certificate to go to U.S.A. (where her sisters are staying) for her medical treatment. Therefore, the Applicant made protracted correspondence for her adjustment either at Cuttack or at Bhubaneswar; which were rejected (in letter dated 06-08-1998) with a direction to her to report at her new place of posting by 14-08-1998. On 01-12-1998, the request of the Applicant (for permission/leave) was granted with a stipulation that she should not enter into any business/contract/employment etc. for gainful purposes during her stay at abroad. It is stated that though there was direction (in T.A.No.2/99) to adjust the Applicant

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without considering her grievance in proper perspective, she was asked to go and join in her new place of posting by an order dated 19-01-2000. The Applicant made a representation, on 18-08-2000, requesting the Authorities to grant no objection certificate to go to USA for medical check-up. On 04-09-2000, the K.V. headquarters issued a notification inserting Article 81(d) 'Voluntary abandonment of service' in case of absence of a teacher. On 19-09-2000, the Applicant intimated to her Authorities that since she had applied for permission to visit USA (for medical check-up) and nothing has been communicated to her; she is leaving for USA in continuation of her earlier application for leave and after returning from USA, she represented on 22-01-2001 to consider her grievance for adjustment at KV at CRPF/Bhubaneswar. The Applicant earlier on 29-09-2000 and on 23-10-2000, was issued with a Memorandum (for her absence) and in continuation of such Memorandum, another Memorandum was issued on 08-02-2001, asking her to show cause as to why it shall not be treated that she has abandoned the employment and that as to why her lien in employment should not be

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cancelled and it was pointed out therein that, on her failure to show cause, it would be treated that she had been removed from service in terms of Article 81(d) of their Education Code. The Applicant accordingly submitted her reply on 19-02-2001 and, without considering her show - cause , a communication was made on 13-03-2001 by the Respondents; in which it was mentioned that the Applicant has voluntarily abandoned the employment and that, she is no longer interested in service of the Sangathan and that, therefore, she has been removed from service with immediate effect. This Original Application has been filed in the said back-ground with prayers as aforesaid.

2. Respondents - Kendriya Vidyalaya Sangathan have filed a counter stating therein that this Original Application is not maintainable; since the Applicant had not availed the Departmental remedies (as provided in the Education Code of the KVS) by way of preferring any appeal to the Appellate Authority. That apart, on merits, it has been submitted by the Respondents that the Applicant

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was not harassed/victimised in any manner in the matter of her transfer. Rather, she had not acted upon the undertakings given by her Advocate in the High Court of Orissa to join within fifteen days in her new place of posting that ~~that~~, as per the averments made in the counter filed in T.A. No.2/99, the competent Authority considered the grievance of the Applicant (for her adjustment at Bhubaneswar) and that, since it was not feasible to adjust her, the grievances of the Applicant were turned down by order dated 19-01-2000. It is the case of the Respondents that she preferred O.A. No.140/2000; which was also dismissed on 15-10-2000 and that, after the rejection of her representation from time to time/after 02-03-1999, she had not even applied for leave. Since no leave was sanctioned in her favour, her absence was treated as unauthorised absence from duty for more than three years. The request of the Applicant for grant of 'no Objection certificate' was duly considered and the same was also rejected vide order dated 29-09-2000 and that was done in absence of a Certificate from Regional Medical Board recommending her treatment at U.S.A. The Respondents have disclosed, further, that the Board

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of Governors of the Kendriya Vidyalaya Sangathan upon considering about the long absence of Teachers (and consequential hampering of Studies of the Pupil) consciously took a decision to impose penalty by inserting Article 81(d) in the Service Code of the Kendriya Vidyalaya Sangathan; which is no way invalid and illegal. It is the case of the Respondents that though the Applicant was duly intimated about the rejection of her grievance (for issuing the no objection certificate vide letter dated 29-09-2000) she left for U.S.A. un-authorisedly/in utter disregard to the orders of the competent authority. Memorandum dated 29-09-2000 having been issued the Respondents also published a notification in the SAMBAD dated 01-02-2001 giving an opportunity to the Applicant to make a representation on the Memorandum dated 23-10-2000 and that on the request dated 03-02-2001 of the Applicant, she was supplied with a copy of the show cause notice (by giving her another opportunity to show-cause) and that the Applicant submitted her explanation on 19-02-2001 and, considering all facts of the matter, she was removed from service on 13-03-2001 in exercise of the

the powers conferred under Article 81(d) of the Kendriya Vidyalaya Sangthan Education Code. It has been prayed by the Respondents that since the impugned order (dated 13-03-2001) passed by the Competent Authority is valid and legal, this Tribunal should not interfere with the same.

3. Applicant has filed a rejoinder; which has also been duly taken note of.

4. Heard Mr. Aswini Kumar Mishra, Learned Counsel appearing for the Applicant and Mr. Ashok Mohanty, Learned ^{Senior} Counsel appearing for the Respondents and perused the materials placed on record.

5. Mr. Mishra, Learned Counsel appearing for the Applicant, has submitted that first of all Article-81(d) of the Education Code of the K.V.S. is not applicable to the case of the Applicant and the same is applicable to those teachers and employees, whose absences have been commenced prior to the Notification of the said provision and that, by virtue of insertion of clause 81(d); the provisions of CCS(CCA) Rules, 1965 and the

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procedure prescribed therein has been given a complete go-bye. It was further argued by him that when Article-311 of the Constitution of India provides that no Citizen shall be removed without following due authority and due procedure of law, the incorporation of Art. 81(d) is exception to the provisions of Art. 311(2) of the Constitution of India and, therefore, the same is ultra vires to the Constitutional mandate. It was argued by him that since no adequate opportunity was given to the Applicant and since the Applicant, due to her illness went to U.S.A. for medical check-up, the order of punishment is highly illegal and arbitrary. He has further argued that though in the Code it has been provided that an oral hearing should be given, no such opportunity has been provided to the Applicant before taking such a harsh decision to remove the Applicant and that when the Applicant had spent her youth for 20 years in the interest of the Institution and when she remained absent due to her illness (which was beyond her control) punishment of removal is shockingly disproportionate to the judicial conscience and, hence, it requires the intervention of this Tribunal. Learned Counsel for the Applicant during his argument has also, by clarifying certain factual aspects of the matter,

pointed out bias of the Authorities in the of transfer and punishment.

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Learned Counsel appearing for the Respondents while counteracting (during oral hearing) has submitted that the conduct of the Applicant (in not reporting to duty on transfer) was bad, as she intentionally stayed away from duty at her new place of posting, on some pretext or the other and that, therefore, it was rightly held by the Authorities that she is no longer interested to continue in her job and, as a consequence, applying the principles of Art. 81(d) she was thrown out of job. So far as the insertion of Article 81(d) in the Education Code of the KVS, it has been submitted by the learned counsel for the Applicant that studies of the students being the prime consideration and in order to avoid any dis-location of the studies, such a codal provision has consciously been inserted. It is the case of the Respondents, as disclosed by the Counsel for the Respondents that as to how the employees will be disciplined is a matter to be dealt by the employer and no court is competent to interfere in it. Furthermore, it has been argued that since the Applicant did not

ask for any oral hearing before the order of termination, the same was not allowed to her. However, it was clearly stipulated in the Rules that it is a discretion of the Authorities and, therefore, no employee can claim any right to be heard. With regard to allegation of bias, it has been submitted by the Respondents' Counsel that mere allegation of bias is not enough/sufficient to take any cognizance and since the Applicant has utterly failed to substantiate the same by producing any incriminating materials in support of such allegation, the same has no legs to stand.

While arguing the matter touching the allegation of bias and other points, Learned Counsel appearing for the Applicant has relied upon the following decisions:-

- a. BIMLAKANTA vs. STATE OF WEST BENGAL (CAL.) - 1980(2) SLR 232;
- b. DR. ANIL KUMAR CHAKRAVARTY vrs. STATE OF WEST BENGAL AND OTHERS - 1983(2) SLR 306;
- c. UPTRON INDIA LTD. vrs. SHAMMI BHAN AND ANOTHER - AIR 1998 SC 1681;

Like-wise, Mr. Mohanty, Learned ^{Senior} Counsel appearing for the Respondents has relied on the following decisions in support of his argument:-

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- i. SURENDRA KUMAR BWIVEDI -vrs.-UNION OF INDIA AND OTHERS - rendered in OA No. 1174/2001 on 03.06.2003 (ALLAHABAD BENCH);
- ii. SHANKAR SHARMA -Vrs.-THE COMMISSIONER KVS AND ANOTHER -CWP No.1700/2003 dtd.05.03. 2003 of the High Court of Delhi).
- iii. PREM JUNEJA vrs. UNION OF INDIA & ORS- Vs. COMMISSIONER KVS AND ANOTHER (CWP No. 1700 of 2003 dated 5.3.2003 of the High Court of Delhi).

6. (a) Before starting to answer various points raised by the respective parties, we would like to answer on the point of maintainability of this O.A. as raised by the Respondents. In this connection we would like to observe that it has been provided in the Administrative Tribunals Act, 1985 that 'ordinarily' the Tribunal should not entertain an application of a party, if he/she comes without exhausting the Departmental remedies and this point was examined by various courts at various points and it has been observed that there is no bar to entertain an application in the present manner. In fact in the case of KISHORE CHANDRA PATNAIK vrs. STATE OF ORISSA & ORS (reported in (1987) 4 ATC 812), this Tribunal held a similar Original Application to be entertainable; although alternative remedy (in appeal) was not exhausted.

Therefore, it can safely be held that this Original Application is maintainable in the present form.

(b) That apart, it is seen that Allahabad Bench of this Tribunal entertained the case of Surendra (supra); where an employee did not obey the orders of transfer and stayed away without any intimation. The case of Shankar Sharma (supra) is also another case that deals with a similarly placed employee; who did not bother to join the new station on his transfer; for which, by applying Article 81(d) of the K.V. Education Code, the employee/Applicant therein was removed. In the case of Prem Juneja (supra) while considering the matter of a similarly placed employee, it was held that Article 311 of the Constitution of India is not applicable to employees of KVS, as they are not in employment of Government of India.;

(c) However, the distinguishing feature of the instant case is that the notification inserting/introducing of Article 81(d) "Voluntary Abandonment of Service" in the Education Code of the Respondents-Sangthan came into effect from 4th

September, 2000. By virtue of promulgation of Art. 81(d), all the Teachers/Employees of the Sanghathan were informed that in case of unauthorised absence of any teacher/employee, will render an individual liable to lose his lien on his post and other penal consequences would follow; if the employee's explanation for such unauthorised absence is not acceptable to the Authority. Needless to say that the applicability of the notification was prospective; because nowhere in the notification, the application of the provision of Article 81(d) was made from a retrospective date. In the instant case, since the Applicant was on leave prior to the notification dated 4th September, 2000 and had travelled to USA after obtaining 'no objection certificate' from the employer for medical treatment and her request for transfer to KV stationed at Bhubaneswar instead of Kalaikunda was subject matter of a writ petition (OJC No. 15013/1998) before the Hon'ble High Court of Orissa and which was subsequently transferred to this Tribunal and renumbered as TA No. 2/1999 and in the counter filed by the Respondents in that case, the Respondents had stated that her representation to be posted at Bhubaneswar would be considered in the next academic

-16-

session; that TA was disposed of with a direction to the Respondents to consider her representation within a period of ninety days from the date of that order. Thereupon, the Respondent No. 3 by its order dated 19.1.2000 disposed of the representation stating that it was not possible to adjust her at KV No. 1, Bhubaneswar and advised her to join the post at Kalaikunda. Applicant had also filed another O.A. No. 146/2000; which was disposed of by this Tribunal by their order dated 15.10.2000. It has been alleged by the Respondents in their counter that the Applicant never applied for leave after 2.3.1999 and that the competent leave sanctioning authority had decided to treat her absence from duty as unauthorised. No doubt, the Respondents have the full authority to take action against the Applicant to ensure compliance of the order of her posting and had they taken the decision in the matter in the year 1999 or soon thereafter, they would have taken action under CCS(CCA) Rules, 1965. It is not open to reason as to why on the one hand they had issued her no objection certificate to travel abroad for medical treatment and on the other hand they decided to treat the period as one of unauthorised absence and applied the rigors of Article 81(d) of the Education code.

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From the facts of the case, it would appear that the representation of the Applicant to post her in one of the KVs in Bhubaneswar out of bias was declined more to ensure compliance of the order issued) rather than on administrative ground like absence of any vacancy in Bhubaneswar. This impression becomes unavoidable when we see that after committing in their reply in TA 2/99 that her representation for posting to Bhubaneswar would be considered in the next academic session, the same was rejected soon thereafter by their order dated 19.1.2000. This shows nonapplication of mind on the part of the Respondents;

(d) It stands ^{to} no reason as to why, when the cause of action against the Applicant had arisen long before the insertion of Article 81(d) the provisions of CCS(CCA) Rules, 1965 and the procedure prescribed therein should not be followed by the Respondents. Every rule/instruction has prospective effect; unless otherwise it is specifically made retrospectively. This is also fortified by the the decisions of the Hon'ble Supreme Court rendered in the case of Y.V. RANGAIAH AND OTHERS VRS. J. SRENIVAS RAO AND OTHERS (AIR 1983 SC 852) and in the case of P. MAHENDRAN AND OTHERS VRS. STATE OF KARNATAKA AND OTHERS (AIR 1990 SC 405).

(e) This is a case of absence/overstayal of leave. Honourable Supreme Court of India in the case of UNION OF INDIA & ORS. Vrs. GIRIRAJ SHARMA (AIR 1994 SC 215); in the case of MANAGEMENT OF NILPUR TEA ESTATE Vrs. STATE OF ASSAM AND OTHERS (AIR 1996 SC 737); in the case of STATE OF PUNJAB AND OTHERS vrs. BAKSHISH SINGH (AIR 1997 SC 2696); in the case of SHRI BHAGWANLAL ARYA Vrs. COMMISSIONER OF POLICE DELHI AND OTHERS ((2004) SCC (L&S) 661) and in the case of RAM AUTAR SINGH vrs. STATE PUBLIC SERVICE TRIBUNAL AND OTHERS (AIR 1999 SC 1542) have held that dismissal from service on the ground of absence/overstayal of leave is too harsh and is un-called for;

(f) Though it has been provided under the rules/instructions that a personal hearing is a must before taking a decision for removal of an employee from service and no such hearing having been given to the Applicant, the order of punishment is a nullity as has been held by the Hon'ble Apex Court in the case of RAMCHANDER VRS. UNION OF INDIA & ORS. (AIR 1986 SC 1173);

(g) In the end we would like to observe that from the fact of this case, it appears that with the insertion of the provisions of Article 81(d), the KVS employees/Teachers are now governed by two set of Rules for the purpose of maintenance of discipline;

viz.:(i) under Article 81(d) of the Education Code and (ii) under CCS(CCA) Rules, 1965/CCS(Conduct) Rules, 1964; where for unauthorised absence from duty, an employee may be proceeded against by the Disciplinary Authority as per his discretion under either of these two provisions. Respondents by drawing our notice to various judgments of the co-ordinating Benches of this Tribunal and the decision of the Delhi High Court in the case of Prem Juneja(supra) stated that the provisions of Article 81(d) has been found to be good and therefore, the conclusion is inevitable that employees of the Respondents Department are now subject to the rigor of the both these regulations in case of absence in duty without previous permission. This does not, however, mean that Respondents-Department would behave arbitrarily in choosing which ^{of the} regulations to use in respect of an employee who is absent without authority. It, in fact, imposes heavy burden on the disciplinary Authority to apply its mind to decide whether the instance of absence attracts the provision of Article 81(d) of the Education Code or not; because provisions of Article 81(d) are only to be applied very selectively where the employee fails to

explain his/her absence from duty on bona fide ground. In this case, the Applicant was away from duty for reasons which are known to both the sides and the grievance of the Applicant is that the competent authority had not sanctioned her leave on one pretext or the other.

Having regard to the totality of the facts and circumstances of this case, we hold that the circumstances in which the Applicant was away from duty does not appear to be covered under the conditions governing the application of Article 81(d) of the Kendriya Vidyalaya Education Code which came into force with effect from 4th September, 2000.

7. Viewed the matter from that angle and having regard to the peculiar facts and circumstances of the case, we hold that the provisions of Article 81(d) of the K.V. education code was not applicable in this case as the period of absence; for which the Applicant was


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31

-21-

being proceeded against relates to a period prior to promulgation of this Article and, therefore, the order of punishment dated 13-03-2001 under Annexure-25 is hereby quashed. However, the Respondents are at liberty to initiate action, if so advised, against the Applicant under CCS (CCA) Rules, 1965 after ascertaining whether the Applicant's case for transfer to KV in Bhubaneswar was actively considered but she could not be accommodated only on account of absence of a post against which she could have been adjusted and that her journey to U.S.A. was not actually to receive medical treatment (no where it has been averred by the Respondents that they had enquired and found out that she had taken permission to go to U.S.A. under false pretext of medical treatment). In the result, this Original Application is allowed. No costs.


(B.N. SOM)
VICE-CHAIRMAN


04/01/2004
(MANORANJAN MOHANTY)
MEMBER (JUDICIAL)