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CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH: CUTTACK

ORIGINAL APPLICATION NO.534 OF 2002
Cuttack this the 4th day of October, 2004

Smt. Mukti Biswas ... Applicant(s)

- VERSUS -

Union of India & Others ... Respondent(s)

FOR INSTRUCTIONS

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

Mo
04.10.04
(M.R.MOHANTY)
MEMBER (JUDICIAL)

Abu
(B.N. SRI)
VICE-CHAIRMAN

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CENTRAL ADMINISTRATIVE TRIBUNAL
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Cuttack this the 4th day October, 2004

CORAM:

THE HON'BLE SHRI B.N. SQM, VICE-CHAIRMAN
AND
THE HON'BLE SHRI M.R.MOHANTY, MEMBER(JUDICIAL)

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Smt.Mukti Biswas, W/o. Sri Debabrata Mandal
Music Teacher, Kendriya Vidyalaya No. 1
Bhubaneswar, Unit-IX

...

Applicant

By the Advocates

M/s.J.M.Mohanty
D.Samal
N.K.Das
K.C.Mishra

- VERSUS -

1. Asst.Commissioner, Kendriya Vidyalaya Sangathan, H.P. 7, B.D.A., Housing Locality, Laxmisagar, Bhubaneswar-VI, Bhubaneswar-751006
2. Principal, Kendriya Vidyalaya No.1, Bhubaneswar, Unit-IX, Bhubaneswar
3. Enquiry Officer, J.L.Gandhi, Asst.Superintendent, K.V.S.Regional Office, H.P. 7, B.D.A. Housing Locality, Laxmisagar, Bhubaneswar-VI, Pin Code-751006
4. Principal-cum-Enquiring Officer, Kendriya Vidyalaya No.2, At-C.R.P.F., Bhubaneswar

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Respondents

By the Advocates

Mr.Ashok Mohanty

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O R D E R

MR.B.N.SQM, VICE-CHAIRMAN: Smt.Mukta Biswas (applicant) has filed this Original Application under Section 19 of the A.T.Act,1985, being aggrieved by the action of the Respondent No.2 directing recovery of the amount of pay and allowances paid to her for the period of maternity leave that she had taken from 12.12.1988 to 13.3.1989, as well as the charge memo dated 29.8.2001(Annexure-17) issued to her.

2. The facts of the case in a nut shell are that the applicant, while working as Music Teacher at K.V.S. No.1, Bhubaneswar, suffered from infective hepatites, vomiting and pyrexia towards the end of 1988. It has been submitted by the applicant that during that period she was pregnant and on ^{the} advice of her attending physician, she took three months' maternity leave to avoid the risk of abortion. The leave was sanctioned from 12.12.1988 to 11.3.1989. After availing of leave she joined the duty. She gave birth to a male baby on 25.9.1989. While there was no problem of any sort, all on a sudden, the applicant was served with a memorandum dated 27.11.1997 by Res. No.2 to submit copy of the medical certificate for leave period, and birth certificate of her son and thereafter, she was called upon to refund the pay and allowances paid to her for the period of leave. Inspite of the applicant's submitting medical certificates on 16.12.1997 and explaining her stand point through representation dated 16.10.1998, the Respondents remained unconvinced and the pay and allowances paid to her for the leave period were recovered from her salary (Annexure-3). It was disclosed by the Respondents vide Memorandum dated 26.3.1999 that maternity leave application of the applicant was not available in her personal file and therefore, as per the remarks of the audit party, they had taken action against her, as stated above. The applicant has been repeatedly representing before the Res. No.2 for refund of the amount so realised from her pay (Annexure-8) and her representation submitted to the Asst. Commissioner, KVS and other authorities

vide Annexure-10 dated 12.2.2000 did not yield any fruitful result. On the other hand, the Respondents vide their letter dated 20.12.2001 proposed to initiate disciplinary proceeding against her and appointed inquiry officer and present officer to harrass the applicant, without any rhyme or reason. It is the case of the applicant that inspite of the fact that she has not been confronted with the act of misbehaviour or misconduct that she had committed, she has been subjected to disciplinary proceeding. The plea of the applicant is that the maternity leave can be taken at any stage of pregnancy and in her case, she had taken the maternity leave at the early stage of her pregnancy on the advice of her attending physician in order to avoid the threat of abortion. She has further stated that the birth of her baby on 26.9.1989 cannot be disputed by any authority as she has already produced a certificate of birth of her baby on that day, being issued by the Registrar of Birth and Death and Executive Officer, Jatani Municipality dated 24.7.2001. With regard to the allegation that she had not taken any leave during the time of birth of her baby, and that she was on duty on 26.9.1989, the applicant has retorted that she had carried out her duties in the school during her pregnancy period and that on 25.9.1989, after the school hours, she got labour pain whereafter she got herself admitted in hospital and gave birth to a male baby which was a case of normal delivery, and therefore, she was able to attend her duty in the school on 26.9.1989 also.

It is in this background, the applicant has prayed for direction to Res. Nos. 1 and 2 to : pay back the salary and allowance for the maternity leave period from 12.12.1988 to 11.3.1989 and to regularise her service. She has also at the same time prayed for quashing the departmental proceeding initiated against her by the Respondents.

2. The Respondents have filed a detailed a counter by opposing the prayer of the applicant. They have stated that the application is not maintainable either on fact or in law, that the applicant's prayer to quash the order under Annexure-15, which is an order passed in course of departmental inquiry cannot be challenged as per Rule-22 of CCS(CCA)Rules. On the facts of the case, the Respondents have submitted that the applicant had applied for grant of maternity leave from 12.12.1988 to 11.3.1989, by giving a medical certificate from a physician stating that she was in early stage of pregnancy, that there was risk of abortion and in the circumstances, three months' leave was granted. It was only during the internal audit of the school records in the year 1998, it was detected that the date of birth of the child as recorded in the birth certificate was 25.9.1989, i.e., after six months 14 days on completion of the maternity leave. It also revealed that during the period of birth of the child, the applicant had not availed of any leave. The audit party having found that the applicant had not availed leave during the period when she had given birth to her baby, they directed that the entire amount of pay and allowances (Rs.5740/-) paid

to her in respect of three months' maternity leave should be recovered from the applicant. Further, as the applicant had availed of the maternity leave prior to the birth of the baby, it was decided to initiate disciplinary action against her for the alleged misconduct. They have also pointed out that the medical certificate, on the basis of which maternity leave was granted, had not been obtained from a competent Gynaecologist and that if the medical certificate dated 12.12.1988 was taken as valid, then the baby was born after a total period of pregnancy of 10 months 15 days, which was not a credible situation. They have also disclosed that the applicant had submitted a medical certificate dated 26.9.1989 wherein it had been mentioned that she had delivered a normal male child on 25.8.1989 at 6.00 P.M. and that the applicant could join normal duty on 26.9.1989. This created a doubt on the conduct of the applicant, which resulted in initiating disciplinary action against her and on the ground that she had availed the maternity leave by misleading the sanctioning authority.

3. We have heard the learned counsel for both the parties and perused the materials placed before us. The applicant has filed a rejoinder.

4. The main prayer of the applicant in this O.A. is to direct Respondent Nos. 1 and 2 to pay back the salary and allowance for the period from 12.12.1988 to 11.3.1989 and to quash the disciplinary proceeding initiated against her.

The applicant's contention is that birth of

of the male child is not only a fact but is also supported by a birth certificate from the competent authority set up by law in this regard. Further, that she was entitled to maternity leave and that maternity leave could be taken at any time during the period of pregnancy. The Respondents on the other hand, have stated that as the applicant had given birth to the child after six months of taking maternity leave and that on the ground of threatened abortion one is not entitled to maternity leave, she had misled the sanctioning authority and therefore, was liable to refund the amount of pay and allowances received by her for this purpose.

For proper adjudication of the matter, we shall now refer to the provisions of Maternity leave as provided in the CCS(Leave) Rules, 1972. Maternity leave, as defined under Rule-1 of said Rules is as under:

"A female Government servant(including an apprentice) with less than two surviving children may be granted maternity leave by an authority competent to grant leave for a period of 80 days from the date of its commencement".

From a reading of the relevant rule, it is clear that maternity leave is granted only from the date of commencement of maternity, i.e., on giving birth to a child. In view of the said rule position, there is no doubt that the applicant could not have asked for maternity leave at the early stage of her pregnancy. It is also a fact that the Respondents granted her maternity leave based on the medical

certificate produced by her. It appears, while granting maternity leave the Respondents had not referred to the terms and conditions of granting maternity leave and till the audit party had pointed out the error, they were not aware that they have taken a wrong decision. In effect both the sides were at fault in this case, and therefore, it would not be just and proper, if on this ground alone the applicant is taken to task. We also find that the suggestion given by the audit party to recover the amount of pay and allowances from the pay of the applicant was not a proper one. Having pointed out that it was not a case of maternity leave, it should have been left to the administration to issue notice to the applicant to show cause and after giving her an opportunity of hearing, to pass an order that maternity leave which was granted to her not being due is cancelled and thereafter calling upon her to apply for leave of kind as due and admissible. It is also to be noted that recovery of pay and allowances disbursed to an official erroneously cannot be recovered after a long time, in view of settled position of law as enunciated by the Hon'ble Supreme Court in the case of Sahib Ram v. State of Haryana and ors. (Civil Appeal No.6868 of 1994 decided on 19.9.1994). Following the ratio of that judgment, we would direct the Respondents to refund the amount of Rs.5740/- recovered from the applicant. We also give an opportunity to the Respondents to ask the applicant to apply for leave of the kind as was due and admissible at that point of time. With regard to the disciplinary action taken by the Respondents

against the applicant, it is an admitted fact that the same is based on the allegation that "she submitted false declaration with regard to date of birth of her son Master Samit Kr.Mandal as 25.9.1989 in the family history in the service book. She also submitted fake date of birth of the child at the time of admission in Kendriya Vidyalaya Khurda Road during 1994-95". It is, however, not clear from the records placed before us whether the allegation that the birth certificate produced by the applicant (at Page-24 of her application) issued by the Registrar of Birth and Death and Executive Officer of Jatani Municipality dated 27.4.2001 has been found to be fake on an inquiry by the Respondents, with the concerned authority. Without satisfying, *prima facie* of the genuineness or otherwise of the certificate issued under Section 7 of the Registration of Birth and Death Act, 1959, the article of charge as levelled against the applicant, in our considered opinion, cannot be allowed to stand the scrutiny of law, and therefore, the same is liable to be set aside, being based on suspicion. The final plea of the Respondents is that the declaration made by the applicant about the starting point of her pregnancy and the date of delivery of child as well as the fact that after birth of the child she needed no maternity leave do not lead to credence, which calls for disciplinary action. But that is a separate issue which the Respondents will be well-advised to find out making inquiries into it. But whether such an inquiry, if instituted now after a lapse of 13 years of the date of occurrence would be of

any value, it is for the Respondents to take a view. However, in the present state of things, the article of charges brought against the applicant being vague and grounded upon conjecture and surmises, the same cannot be allowed to stand, and accordingly, we quash those article of charges, levelled against the applicant under Annexure-17 dated 29.8.2001.

With these observations and directions, this Original Application is disposed of. No costs.

M.R. Mohanty
04.10.04
(M.R. MOHANTY)
MEMBER (JUDICIAL)

B.N. SGM
(B.N. SGM)
VICE-CHAIRMAN

BJY