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**CENTRAL ADMINISTRATIVE TRIBUNAL
JODHPUR BENCH AT JODHPUR**

O.A.No. 57/2011

Reserved on: 13.7.2012

Date of decision: 03.08.2012.

CORAM:

HON'BLE DR. K.B.S. RAJAN, JUDICIAL MEMBER

HON'BLE MR. B.K. SINHA, ADMINISTRATIVE MEMBER

Smt. M.F. Rhine W/o late Shri J.H. Rhine,
Kudi Bhagtasni Housing Board, Jodhpur (Raj)
Presently working as TGT (Sanskrit) at K.V. BSF
Jodhpur.

.....Applicant

(By Advocates Mr. K.K. Shah, Mr. Vivek Shah & Mr. B.L. Choudhary)

Vs.

1. The Commissioner, Kendriya Vidyalaya Sangathan,
18, Institutional Area, Shaheed Jeet Singh Marg,
New Delhi-110 016.

2. Assistant Commissioner,
Kendriya Vidyalaya Sangathan (R.O)
K. Kamaraja Road, Bangalore-560 042.

3. Assistant Commissioner,
Kendriya Vidyalaya Sangathan (RO)
92, Gandhi Nagar, Marg, Bajaj Nagar,
Jaipur-302015.

4. The Principal, Kendriya Vidyalaya, BSF
Jodhpur.

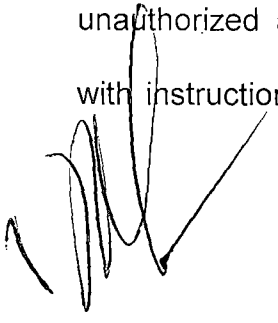
...Respondents

(By Advocate Mr. V.S. Gurjar)

ORDER

Per: B K Sinha, Administrative Member

The instant OA is directed against Memorandum No.F.13044-42/2009/KVS (BGR)16201 dated 13.1.2010 of the Assistant Commissioner, Kendriya Vidyalaya Sangathan, Bangalore directing to regularize the period of unauthorized absence from 18.7.2005 to 4.6.2009 into EOL on private affairs with instruction that in future the instructions of authority should be adhered to



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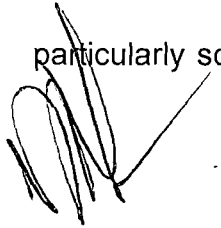
strictly failing which action will be initiated against the applicant as per CCS (CCA) Conduct Rules, 1965.

2. The applicant has prayed for the following relief(s):-

"In view of the above submissions, the applicant most respectfully prays that this Original Application may kindly be allowed with costs and by issuance of an appropriate order or direction the impugned order dated 13.01.2010 (Anenxure.A/1) may kindly be quashed and set aside and the entire period from the date of loss of lien ie., 1.10.2005 till 4.6.2009 may kindly be directed to be treated as on duty and the applicant may kindly be paid all consequential benefits including arrears of 6th Pay Commission with interest @ 18% per annum on the entire amount due. The respondents may further be directed to consider the absence from 18.7.2005 to 30.9.2005 sympathetically and regularize the same against the available leave of the applicant. Any other order favourable to the applicant may also kindly be passed."

Facts of the case in brief:

3. While working as TGT (Sanskrit) the applicant was removed from service w.e.f. 1.10.2005 vide Kendriya Vidyalaya Sangathan, (KVS) Regional Office, Bangalore letter dated 15.11.2006 for unauthorized absence from duties. The Appellate Authority (R1) suo motu took the cognizance of the matter vide order dated 16.4.2008 [A3] and set aside the order of confirmation of loss of lien against the applicant issued vide letter dated 15.11.2006, reinstating the applicant and giving liberty to R2 to initiate action against applicant for unauthorized absence. Following this the R2 issued letter dated 2.5.08 directing the applicant to join duties at K.V. Bambolim (Goa) which she eventually did on 6.6.2009. It had also been directed vide letter dated 2.5.2008 to submit a representation for her unauthorized absence from 18.7.2005 to 4.6.2009. Applicant submits that she underwent prolonged mental agony on account of being removed from service and loss of her only grown up son 27 years of age particularly so when her husband had expired when she was aged 28. Hence,



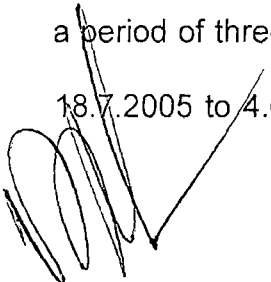
she could not submit representation as directed. The applicant was asked to show cause for not submitting the representation for regularization of her absence Vide Memorandum dated 10.11.2009 [A4]. The applicant requested for regularization of her absence vide representation dated 20.11.2009 [A5]. However, R2 ordered vide order dated 13.1.2010 [A1] to treat the absence of applicant from 18.7.2005 to 4.6.2009 as EOL on private affairs. The applicant again filed a representation on 4.2.2010 [A6] stating that since the then R2 had compelled her to resign from post her unauthorized absence could only be construed from 19.7.2005 to 30.9.2005 and that the period under termination cannot be treated as EOL as the order of removal from service was found to be illegal ab initio. Once the order of removal had been quashed, it goes without saying, the entire period had to be necessarily treated as on duty as she had been illegally restrained from attending to her duties. She has made another representation dated 13.4.2010 [A7] stating that he has not been paid the TTA, pay not fixed on the basis of 6th Pay Commission Report which caused financial loss to her. In view of the direction in A3 the R.2 could have initiated action and confine itself regarding the absence of the applicant from 18.7.2005 to 30.9.2005.

Case of the respondents

4. The respondents have contested the OA by filing a counter affidavit. The respondents have taken a preliminary objection of maintainability of the OA in view of Section 20 of the AT Act as the applicant has not exhausted the alternate remedy of appeal against the impugned order. They have raised the point of limitation also as the period in question is from 1.10.2005 to 4.6.2009. As per office records the applicant was absent from duty with effect from 18.7.2005. She was granted leave up to 30.9.2005 and she again applied for leave up to 22.12.2005 and again she applied for leave without proper application. Hence, she was served with the Memorandum dated 30.1.2006 stating that her overstay attracts disciplinary action under CCS (CCA) Rules, but the applicant never

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responded to this nor did she join her duties. The unauthorized absence of the applicant was referred by the Principal concerned to the Assistant Commissioner, KVS (RO) Bangalore vide letter dated 28.1.2006, who in turn requested the Assistant Commissioner, KVS (RO) Jaipur to arrange medical examination of the applicant. Applicant was directed to appear before the Regional Medical Board at Jaipur. The applicant, however, did not report for medical examination. The Assistant Commissioner, KVS (RO) Bangalore ordered for another medical examination and applicant was directed to resume duty in the school on 26.6.2006, failing which her absence from duty from 1.10.2005 would be treated as unauthorized absence vide another letter dated 8.5.2006. The applicant failed to report for duty. This was intimated to the Bangalore Regional Office vide letter dated 26.6.2006. The applicant was informed that since she remained absent for a period of 15 days or more from 1.10.2005 without sanctioned leave or beyond the period of leave originally granted /extended in terms of sub clause (i) of Clause (d) of Article 81 of Education Code, she was deemed to have voluntarily abandoned her service and thereby provisionally lost her lien on her post, giving ten days time to give a representation, if any. Since there was no response to this also, order of confirmation of loss of lien of her abandoned post of TGT was issued and she had been removed from service of KVS w.e.f 1.10.2005. It is true that the applicant was reinstated on the post of TGT (Social Studies) but the order dated 16.4.2008 would reveal that the same was set aside on account of technical grounds and taking a lenient view, with liberty to initiate action. The respondents have argued that the claim of the applicant for salary for the period of absence is contrary to the settled principles of law declared by Hon'ble Supreme Court. The direction to file representation was not followed by the applicant within time. Annexure A5 representation was made after a lapse of a period of three years. There is willful absence of duty, hence the period from 18.7.2005 to 4.6.2009 has been treated as on Extra Ordinary Leave on private



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affairs. The unauthorized absence of the applicant adversely affected the functioning of the institution and the students of the Vidyalaya. Regarding unauthorized absence, they have referred to a decision of the Hon'ble Supreme Court in **State of Punjab Vrs Dr PL Single (2008) 8 SCC 469**-page 474.

5. The punishments order dated 16.4.2008 has not been cancelled, revoked or withdrawn. The order dated 30.1.2010 [A1] did not condone the unauthorized absence or wipe out the punishment imposed as per rule. Hence, the respondents assert that the claim of the applicant for treating the period of unauthorized absence from duty for consequential benefits is without substance. The applicant failed to report for duties despite the ample opportunities given to her and there is nothing on record to show that R.2 compelled to resign her from the post and not resigned from her own volition. The applicant was fully paid the retirement benefits as per KVS Rules and since she has been re-employed she has been given initial basic pay on the post applicable.

6. The respondents have also cited a judgment of the Hon'ble Supreme Court (**State of Orissa Vs. Mamta Mohanty (2011) 3 SCC 436 para 29 to 34**) which reminded about the importance of teachers in the country: "***The excellence of instruction provided by an educational institution mainly depends directly on the excellence of the teaching staff. We have to be very strict in maintaining high academic standards and maintaining academic discipline and academic rigour if our country is to progress. Teaching cannot be improved without competent teachers. Future hopes and aspiration of the country depends on the education, hence proper and disciplined functioning of the educational institutions should be the hallmark.***" The respondents have also cited yet another case decided by the Hon'ble Supreme Court vide **Chandigarh Administration & Others Vs. Rajni Vali and others, AIR 2000 SC 634** in which Hon'ble Supreme Court held as

under:



"It is a constitutional mandate that the State shall ensure proper education to the students on whom the future of the society depends. In line with this principle, the State has enacted statutes and framed rules and regulations to control/regulate establishment and running of private schools at different levels. The State Government provides grant-in-aid to private schools with a view to ensure smooth running of the institution and to ensure that the standard of teaching does not suffer on account of paucity of funds. It needs no emphasis that appointment of qualified and efficient teachers is a sine qua non for maintaining high standards of teaching in any educational institution."

7. The respondents prayed for dismissal of the application.

Case of applicant in the rejoinder:

8. Applicant in her rejoinder stated that her representation was pending since January 2010 and till date the same has not been decided and the applicant filed the OA in April, 2011. Section 20 will not attract in her case as the representation filed has had not been disposed of for more than a year leaving the applicant with no alternative remedy except to approach this Tribunal. The averment in the counter that a memorandum has been served on the applicant is not correct. The applicant was on medical leave from 19/7/2005 to 30/09/2005 and subsequent application for extension of leave was also granted by the respondents. The applicant further asserts that during the entire period of her service, she was never punished for any misconduct thereby belying the contention of the respondents that the studies of students suffered on account of the act of applicant is not correct. The KVS Rules does not specify that if a person is re-employed, after being illegally removed by respondents he/she will be given initial basic pay on the post applicable. The applicant has reiterated in the rejoinder most of the contentions taken by her in the OA.

Facts in issue:

9. After having gone through the pleadings of the parties, their written arguments and having heard the learned coun9els for the parties the following facts in issues emerge:

(i) **What will be the consequences of the suo motu order dated 16.4.2008 of Joint Commissioner (Administration) and Appellate Authority striking down the order of the Assistant Commissioner dated 15.11.2006 directing a loss of lien to the applicant upon the impugned order at A1 granting her EOL from 8.7.2005 to 4.6.2009?**

(ii) **Whether the decision of granting EOL to the applicant on private affairs confirms to the doctrine of proportionality?**

(iii) **What relief(s) can be provided to the applicant, if any?**

What will be the consequences of the suo motu order dated 16.4.2008 of Joint Commissioner (Administration) and Appellate Authority striking down the order of the Assistant Commissioner dated 15.11.2006 directing a loss of lien to the applicant upon the impugned order at A1 granting her EOL from 8.7.2005 to 4.6.2009?

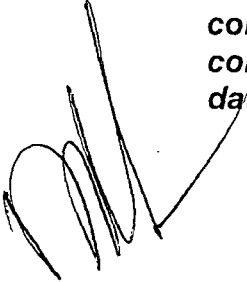
10. In so far as the first issue is concerned a simple narration of the sequence of events will serve to illuminate the legal aspect of the action under assail. Admittedly the applicant was transferred on request from KV No.II AFS Jodhpur Rajasthan to KV ASC Bangalore and was relieved on 5.4.2003. She reported for duty on 9.4.2003 at KV ASC Bangalore. According to the respondents she had applied for 5 days EL from 18.7.2005 to 23.7.2005 and subsequently applied for extension on medical grounds upto 30.9.2005 followed by another application of extension upto 22.12.2005. The counter affidavit of the respondents mentions: **"Again and again, the applicant applied for extension of leave without proper application. The applicant, a Trained Graduate Teacher (TGT for short) was served with Memorandum No.F.PF/MFR/KV/ASC/2005-06/1283-84 dated 30.1.2006 and was reminded that her overstay of the leave beyond the sanctioned period attracts disciplinary action under CCS(CCA) Rules and was directed to join the duty immediately. But the applicant had neither responded nor joined her duties and did not compliance of orders issued by the competent authority."** It is evident that the applications of the applicant for extension of her medical leave were not considered beyond 10.2005. It appears from the counter affidavit filed by the respondents that she was asked to join by 26.6.2006 failing which her absence of duty would be

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treated as unauthorized with effect from 1.10.2005. The counter affidavit of the respondents further states that a medical board was arranged at Jaipur which the applicant failed to appear as a result of which it was deemed under Art.81 of the Education Code that the applicant had voluntarily abandoned her service leading to the letter of termination communicated vide letter No.F.54/Estt/2006/KVS (BGR) 10984 dated 15.11.2006. The applicant in her rejoinder application has rebutted the contention of the respondents (para 4 of RA). The applicant states that admittedly her leave was sanctioned from 19.7.2005 to 30.9.2005 and thereafter " **she applied for the extension of the leave and the same was granted to the applicant, so there can be no denial. Moreover, no memorandum was ever served to the applicant as mentioned by the respondents, before her reinstatement. Even otherwise not a single document or copy of any order has been placed on record by the respondents to substantiate the same. Therefore, the statement made by them cannot be taken as true because without producing the documents on record nothing can be verified.**" In face of this denial the onus lay upon the respondents to produce the necessary documents in support of their contention which as pointed out in the RA the respondents have failed to produce. This leads to a presumption of facts that there was no communication or even if there was it was not received by the applicant. The fact remains that the services of the applicant stood terminated with effect from 1.10.2005.

11. It has also to be seen here that what would be the effect of the order of the Joint Commissioner (Administration & and the Appellate Authority) upon the impugned order confirming the loss of lien of the applicant dated 15.11.2006. In this regard it is apt to quote from the order even at the cost of repetition:

"Whereas the officiating Assistant Commissioner, has conclusively decided the matter and passed an order of confirmation of loss of lien against Mrs. Rhine vide order dated 15.11.2006.



Whereas the officiating Assistant Commissioner was not the Appointing Authority for the Group 'B' and 'C' employees as per the provisions of Education Code and extant rules. Therefore, the order issued by the officiating Assistant Commissioner is not valid in the eyes of law and liable to be quashed.

Now, therefore, I, Pragya Richa Srivastava being the Appellate Authority under the provisions of Article 91(3) of the Education Code for Kendriya Vidyalayas taking the suo motu cognizance of the matter, set aside the order of confirmation of loss of lien against Mrs. Rhine issued on 15.11.2006 by officiating Assistant Commissioner, Bangalore Region. I also order that the said teacher be reinstated within the region by the Assistant Commissioner. The Assistant Commissioner will be at liberty to initiate action against the teacher for her unauthorized absence as per the codal provisions and in a manner known in law. The period of suspension (if any) and unemployment will be decided by the Assistant Commissioner in view of the facts of the case and provisions of the rule for such issue."

The effect of the order is that the earlier impugned order of the Assistant Commissioner dated 15.11.2006 is treated as void ab initio on account of lack of jurisdiction and the status quo ante is restored. Hence, it shall be presumed that this order has never come into effect and all the mischief done by this impugned order stands to be undone. This is the simple position of law from which there is no escape.

Whether the decision of granting EOL to the applicant on private affairs confirms to the doctrine of proportionality?

12. The doctrine simply put means that a punishment should not be disproportionate to the quantum and gravity of the offence. It is also an established fact that while passing an order of punishment the attenuating and the preceding circumstances have to be necessarily taken into account. No punishment can be disproportionate to the gravity of the act after having taken the precedent and attenuating circumstances into account. It has to be remembered that the applicant lost her husband at a comparatively young age of 28 and her only son when he was aged 27. It has also to be considered that the

applicant is a TGT and who has rendered 40 years of unblemished service, something which has not controverted by the respondents otherwise than for the present incident. Further, admittedly it is not that the applicant did not apply for the extension of her leave but instead the same was not sanctioned beyond 30.9.2005. The authority had the option to either further extend her leave or to take the course that it has taken. When viewed under the backdrop of personal tragedies suffered by the applicant one feels that the action of the competent authority should have taken this into account and the services rendered by the applicant. Definitely the order, the action needed to be tempered with sympathy and understanding, which one finds missing otherwise. When we take the subsequent action of the respondents in issuing an outright illegal order of loss of lien the act of the respondents in converting the entire period of absence into EOL appears all the more harsh. EOL has been defined in the leave rules as under:

“Extra Ordinary Leave is granted to a Government Servant—

- (a) when no other leave is admissible.***
- (b) When other leave is admissible, but the Government servant applies in writing for extra ordinary leave.***

Extra Ordinary Leave cannot be availed concurrently during the notice period, when going on voluntary retirement.”

There is no payment made for the EOL and it leaves to a break in service, thereby effecting the pension and other post retiral dues. It is an euphemism for punishment and is definitely disproportionate to the circumstances of the act. The normal practice is to adjust against the leave due. Hence, we find that the impugned order of the respondents dated 13.1.2010[A1] does not confirm to the doctrine of proportionality of punishment. Surely, we feel, the applicant deserved a better deal.

What relief scan be provided to the applicant, if any?

13. The total period of absence is broken into two parts – the absence from 18.7.2005 to 15.11.2006 the date of issue of order and the absence beyond upto 4.6.2009. The second part is covered as an effect of the illegal order dated 15.11.2006 of the Officiating Assistant Commissioner which has rendered a nullity on account of the order issued by the Joint Commissioner quashing the same. Hence, that period must be treated as the period on duty.

14. In view of the afore discussions the undersigned order as follows:

- (i) ***The impugned order dated 13.1.2010 is hereby found disproportionate to the gravity and circumstances of the act and is hence quashed.***
- (ii) ***The period of absence from 18.7.2005 to 15.11.2006 the date of issue of the illegal order .is ordered to be adjusted against the leave due to the leave account of the applicant.***
- (iii) ***The period from 18.7.2005 to 15.11.2006 is covered by the term of the illegal order which has been undone by the order of the Joint Commissioner dated 16.4.2008[A3] and it has to be treated as if the order of termination had never taken place.***
- (iv) ***The parties must bear their costs.***



(B K SINHA)
ADMINISTRATIVE MEMBR



(DR. K B S RAJAN)
JUDICIAL MEMBER

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R. J. and Carol
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