

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE ANTONY DOMINIC
&
THE HONOURABLE MR. JUSTICE ANIL K. NARENDRA

FRIDAY, THE 6TH DAY OF MARCH 2015/15TH PHALGUNA, 1936

OP(KAT).No. 983 of 2013 (Z)

AGAINST THE ORDER IN OA 1328/2012 of KERALA ADMINISTRATIVE
TRIBUNAL, ERNAKULAM BENCH DATED 25-01-2013

PETITIONER/RESPONDENT NO.3:

V.S. PHILOMINA, AGED 51 YEARS
D/O. LATE V.P. SION, NURSING SUPERINTENDENT GRADE-II
GOVERNMENT MAHARAJA HOSPITAL, KARUVELIPADY
ERNAKULAM DISTRICT-682 005
RESIDING AT ANJIPARAMBIL HOUSE, CHALIPARAMBIL LANE
THRIKKAKKARA P.O., ERNAKULAM-682 021.

BY ADVS. SRI. O. V. RADHAKRISHNAN (SR.)
SMT. K. RADHAMANI AMMA
SRI. ANTONY MUKKATH
SRI. C. S. ABDUL SAMMAD

RESPONDENTS:

1. K. VIJAYALAKSHMI
W/O. PURUSHOTHAMAN, HEAD NURSE, GENERAL HOSPITAL
ERNAKULAM, RESIDING AT IIIA, 6/34
NGO QUARTERS, THRIKKAKKARA P.O., KAKKANAD
ERNAKULAM-682 030.
2. STATE OF KERALA
REPRESENTED BY ITS SECRETARY
HEALTH AND FAMILY WELFARE DEPARTMENT
GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM.
3. DIRECTOR OF HEALTH SERVICES
DIRECTORATE OF HEALTH SERVICES
THIRUVANANTHAPURAM-682 005.

R1 BY ADV. SRI. S. PARAVINDAKSHAN PILLAY
R1 BY ADV. SMT. N. SANTHA
R1 BY ADV. SRI. K. A. BALAN
R1 BY ADV. SRI. PETER JOSE CHRISTO
R1 BY ADV. SRI. S. A. ANAND
R1 BY ADV. SMT. L. AMMU PILLAI
R2 BY SR. GOVERNMENT PLEADER SRI P. M. SANEER

THIS OP KERALA ADMINISTRATIVE TRIBUNAL HAVING BEEN FINALLY HEARD
ON 11-12-2014 THE COURT ON 06-03-2015, DELIVERED THE FOLLOWING:

PETITIONER(S) EXHIBITS

- EXHIBIT P1. PHOTOCOPY OF THE AMENDED OA NO.1328/2012.
- EXHIBIT P2. PHOTOCOPY OF THE REPLY STATEMENT FILED BY THE PETITIONER.
- EXHIBIT P3. PHOTOCOPY OF THE ADDITIONAL REPLY STATEMENT FILED BY THE PETITIONER.
- EXHIBIT P4. PHOTOCOPY OF THE REPLY STATEMENT FILED ON BEHALF OF RESPONDENTS 1 AND 2 IN THE OA DATED 26/3/2012.
- EXHIBIT P5. PHOTOCOPY OF THE ORDER DATED 25/1/2013 IN OA NO.1328/2012 OF THE KERALA ADMINISTRATIVE TRIBUNAL, THIRUVANANTHAPURAM BENCH.
- EXHIBIT P6. PHOTOCOPY OF THE ORDER NO.A5-22746/2005/DMCH/EKM DATED 17/10/2005 OF THE DISTRICT MEDICAL OFFICER, ERNAKULAM.
- EXHIBIT P7. PHOTOCOPY OF THE G.O.(RT) NO.2727/92/H&FWD DATED 12/11/1992 OF THE 2ND RESPONDENT.
- EXHIBIT P8. PHOTOCOPY OF THE ORDER NO.A6-16990/02/DMCG/EKM DATED 10/1/2003 OF THE DISTRICT MEDICAL OFFICER OF HEALTH, ERNAKULAM.
- EXHIBIT P9. PHOTOCOPY OF THE ORDER NO.A5-1208/2003 DMCH/EKM DATED 3/2/2003 OF THE DISTRICT MEDICAL OFFICER OF HEALTH ERNAKULAM.
- EXHIBIT P10. PHOTOCOPY OF THE MEMO OF CHARGES NO.A6-16990/92 DATED 25/5/2002 OF THE DISTRICT MEDICAL OFFICER HEALTH, ERNAKULAM.
- EXHIBIT P11. PHOTOCOPY OF THE MEMO OF CHARGES NO.A6-16990/92 DATED 25/3/2003 OF THE DISTRICT MEDICAL OFFICER HEALTH, ERNAKULAM.
- EXHIBIT P12. PHOTOCOPY OF THE MEMO OF CHARGES NO.A6-16990/92/DMOH/EKM DATED 14/9/2004 OF THE DISTRICT MEDICAL OFFICER OF HEALTH, ERNAKULAM.
- EXHIBIT P13. PHOTOCOPY OF THE MEMO OF CHARGES NO.A6-16990/92/DMOH/EKM DATED 25/6/2005 OF THE DISTRICT MEDICAL OFFICER OF HEALTH, ERNAKULAM.
- EXHIBIT P14. PHOTOCOPY OF THE RELEVANT PAGE OF GO DATED 600/93/FIN DATED 25/8/1993 OF THE 2ND RESPONDENT.
- EXHIBIT P15. PHOTOCOPY OF THE RELEVANT PAGE OF GO DATED 3000/98//FIN DATED 25/11/1998.OF THE 2ND RESPONDENT.
- EXHIBIT P16. PHOTOCOPY OF THE ORDER NO.K.DIS(ESE)2791/06/DHS DATED 16/5/2006 OF THE ADDITIONAL DIRECTOR OF HEALTH SERVICES, THIRUVANANTHAPURAM.
- EXHIBIT P17. PHOTOCOPY OF THE ORDER NO.EE5-(SPECIAL CELL) 78047/08/DHS DATED 4/10/2008 ALONGWITH 1ST AND LAST PAGE OF ANNEXURE-1 OF THE 3RD RESPONDENT.
- EXHIBIT P18. PHOTOCOPY OF THE RELEVANT PAGE OF THE FINAL SENIORITY LIST OF HEAD NURSES 1/1/1998 TO 23/3/2007 WITH ORDER NO.ES3-59608/2007 DHS DATED 10/2/2009 OF THE 3RD RESPONDENT.
- EXHIBIT P19. PHOTOCOPY OF THE ORDER NO.ES3-96248/10/DHS DATED 28/10/2011 OF THE ADDITIONAL DIRECTOR OF HEALTH SERVICES, THIRUVANANTHAPURAM.

RESPONDENTS' EXHIBITS: NIL

TRUE COPY

P.S.TO JUDGE

"CR"

ANTONY DOMINIC & ANIL K.NARENDRAN, JJ.

O.P.(KAT)No.983 of 2013

DATED THIS THE 06th DAY OF MARCH, 2015

JUDGMENT

ANIL K.NARENDRAN, J.

The petitioner is the 3rd respondent in O.A.No.1328/2012 on the file of the Kerala Administrative Tribunal, Thiruvananthapuram. The said Original Application was filed by the 1st respondent herein, seeking an order to set aside Annexure A1 Government order dated 14/5/2007 in toto and Annexure A8 Government order dated 2/2/2012 and Annexure A9 order dated 28/10/2011 of the Additional Director of Health Services (Medical) to the extent they promote the petitioner to the post of Nursing Superintendent Grade-II and assign higher seniority to her in the category of Head Nurse, respectively. The 1st respondent has also sought a declaration that the petitioner is not entitled to promotion to the category of Nursing Superintendent Grade-II in preference to her, and also an order directing respondents 2 and 3 herein, the State and the Director of Health Services, to promote her to the category of Nursing Superintendent Grade-II with retrospective effect from 2/2/2012, the date on which Annexure A8 order was issued promoting the petitioner as Nursing Superintendent Grade-II.

2. The Tribunal by Exhibit P5 order dated 25/1/2013 allowed O.A.No.1328/2012 quashing Annexure A1 Government order dated 14/5/2007. The Tribunal has also quashed Annexure A8 Government order dated 2/2/2012 and Annexure A9 letter dated 28/10/2011 of the Additional Director of Health Services (Medical) to the extent they concern the petitioner. The Tribunal further ordered that the 1st respondent shall be treated as senior to the petitioner in all grades from Staff Nurse Grade-I onwards. It is aggrieved by Exhibit P5 order passed by the Tribunal the petitioner is before us in this O.P.(KAT).

3. We heard the arguments of the learned Senior Counsel for the petitioner/3rd respondent, the learned counsel for the 1st respondent/applicant and also the learned Senior Government pleader appearing for the 2nd and 3rd respondents/the 1st and 2nd respondents in the O.A.

4. The petitioner joined the Health Services Department as Staff Nurse Grade-II on 21/7/1986, as per order dated 11/7/1986 of the District Medical Officer, Ernakulam. Her probation in that cadre was declared with effect from 5/8/1988, by Exhibit P6 proceedings dated 17/10/2005 of the District Medical Officer, Ernakulam. By Government order dated 27/6/1989, she was granted Leave Without Allowances to take up employment abroad, for a period of five years from the date of

avail after the date of order, subject to the terms and conditions stipulated in Appendix XIIA of Part I Kerala Service Rules (hereinafter referred to as 'KSR'). She availed Leave Without Allowances for 5 years, with effect from 28/6/1989. However, she returned in July, 1991 and requested to cancel the unavailed portion of the sanctioned leave and to permit her to join duty with effect from 15/2/1992. Thereafter, by proceedings of the 3rd respondent dated 31/1/1992 she was permitted to rejoin duty pending cancellation of unavailed portion of leave by the Government and the District Medical Officer of Health, Ernakulam, was directed to issue suitable posting. Accordingly, she joined the post of Staff Nurse Grade II at General Hospital, Njarakkal, on 2/3/1992.

5. The petitioner again applied for Leave Without Allowances for a period of five years to join her husband abroad. By Exhibit P7 Government order dated 12/11/1992, she was granted Leave Without Allowances for five years from the date of avail after the date of order to join her husband abroad, under the terms and conditions stipulated in G.O.(P)No.209/84/Fin. dated 12/4/1984, subject to the condition that the date of avail should not be beyond six months from the date of the order. The petitioner was on eligible leave for the period from 18/8/1992 to 16/11/1992. Though the eligible leave expired on

17/11/1992, she did not join duty and remained absent. On the ground that, the Leave Without Allowances granted by Exhibit P7 order could not be combined with any other kind of leave and as such, the petitioner could not have availed the said leave from 17/11/1992 without joining duty, her absence from 17/11/1992 was treated as unauthorised.

6. On 17/11/1992, the petitioner went abroad in order to join her husband. According to the petitioner, in the 2nd week of September, 1996, when she reported back for duty with a request to cancel the unavailed portion of the leave already sanctioned, she was not permitted to rejoin duty, instead, she was advised to wait till final orders are received from the office of the 3rd respondent. However, in February, 1997, she was issued with a proceedings of the the District Medical Officer of Health, Ernakulam, removing her from service with effect from 17/11/1992. She challenged the said order by filing an appeal petition dated 3/3/1997 before the 3rd respondent. Due to non-disposal of that appeal petition, she moved this Court in O.P.No.5004/1997 and the said original petition was disposed of by judgment dated 19/3/1997, directing disposal of the said appeal petition, with notice to her. The said appeal petition was rejected by proceedings dated 30/9/1999 of the 3rd respondent. She filed a

revision petition before the Government contending, inter alia, that when the charge memo was returned undelivered, it should have been published in two leading dailies and that, before imposing a major penalty of removal from service, a formal enquiry as laid down in Rule 15 of the Kerala Civil Services (Classification, Control and Appeal) Rules, 1960, should have been conducted. The Government noticed certain procedural irregularities and hence disposed of the revision petition by order dated 26/9/2001, directing the disciplinary authority to initiate disciplinary proceedings afresh. Later, the 3rd respondent by letter dated 12/11/2002 directed the District Medical Officer of Health, Ernakulam, to reinstate the petitioner in service pending disciplinary proceedings and she was ordered to be reinstated by Exhibit P8 order dated 10/1/2003 of the District Medical Officer of Health, Ernakulam, and by Exhibit P9 proceedings dated 3/2/2003 she was posted at the T.B. Centre, Palluruthy, where she joined duty on 14/2/2003.

7. Pursuant to Government order dated 26/9/2001, the petitioner was issued with Exhibit P10 memo of charges dated 25/5/2002, for unauthorised absence from 17/11/1992 onwards, to which she submitted a written statement of defence dated 25/6/2002. Later, the petitioner was issued with Exhibit P11 memo of charges dated 25/3/2003 with self-same allegations, to which she submitted

another written statement of defence dated 14/4/2003. As evident from Exhibit P12 proceedings dated 14/9/2004 of the District Medical Officer of Health, Ernakulam, during the personal hearing held on 2/8/2003 the petitioner, after reiterating her grievances, prayed to excuse the fault committed by her, as she was ignorant of those requirements. The District Medical Officer of Health, Ernakulam, found that the gravity of the misconduct and insubordination from the part of the petitioner justified punishment. But, extending a humanitarian approach, it was ordered in Exhibit P12 to regularise the period of absence of the petitioner from 17/11/1992 to 13/2/2003, treating the said period as Leave Without Allowances, subject to the sanction of the Government, on condition that the period of Leave Without Allowances will not count for any service benefits. Later, the District Medical Officer of Health, Ernakulam, by Exhibit P13 order dated 25/6/2005 (same as Exhibit R3(1) produced before the Tribunal) finalised the disciplinary action initiated against the petitioner, regularising the aforesaid period of absence treating it as Leave Without Allowances, subject to the sanction of the Government and on condition that, the said period will not count for any service benefits. Thereafter, the petitioner submitted an application for Leave Without Allowances for the period from 17/11/1992 to 13/2/2003 and the same was

forwarded to the Government, along with letter dated 14/2/2007 of the 3rd respondent. The Government by Annexure A1 order dated 14/5/2007 regularised the said period of absence as Leave Without Allowances under Rule 88 of Part 1 of the Kerala Service Rules (hereinafter referred to as 'KSR'), subject to the condition that the period of Leave Without Allowances will not count for increment, pension, higher grade or accumulation of earned leave. In the meanwhile, the petitioner was ordered to be promoted to the category of Head Nurse by Annexure A2 proceedings dated 28/3/2007 of the 3rd respondent.

8. On the other hand, the 1st respondent/applicant joined Health Services Department as Staff Nurse Grade-II on 4/6/1988. She was promoted to the category of Staff Nurse Grade-I on 21/1/2000, with effect from 1/11/1999. Later, she was promoted to the category of Head Nurse by proceedings dated 29/4/2003 of the 3rd respondent and she joined duty on 29/5/3003. She satisfactorily completed her probation in the category of Head Nurse with effect from 29/5/2004. In the reply affidavit filed on behalf of the State in O.A.No.1328/2012 it stated that, the petitioner and the 1st respondent entered service on 21/7/1986 and 4/6/1988 respectively and they were assigned rank with rank Nos.988A and 1264 respectively in the final seniority list of

Staff Nurse Grade II. Though the 1st respondent was promoted as Staff Nurse Grade I with effect from 1/11/1999, the petitioner was promoted as Staff Nurse Grade I only with effect from 14/2/2003, since she was on Leave Without Allowances from 17/11/1992 to 13/2/2003. It was on that basis, the petitioner and the 1st respondent were assigned with rank Nos.1554 and 757 respectively in the final seniority list of Staff Nurse Grade I. Thus the 1st respondent became senior to the petitioner and accordingly the 1st respondent was promoted as Head Nurse with effect from 29/5/2003 whereas, the petitioner was promoted as Head Nurse only on 10/5/2007. While so, by Annexure A1 order dated 14/5/2007, the Government have regularised the aforesaid period of absence of the petitioner by granting Leave Without Allowances under Rule 88 of Part I KSR without affecting her seniority position. Thus the seniority of the petitioner in the cadre of Staff Nurse Grade I and Head Nurse were restored to 514 and 631 respectively, based on her seniority in the cadre of Staff Nurse Grade II.

9. By Annexure A3 proceedings of the 3rd respondent dated 10/2/2009 the final seniority list of Head Nurses in the Health Services Department, for the period from 1/9/1998 to 28/3/2007, was published. In the said final seniority list, the name of the petitioner

was shown at rank No.631 as well as rank No.1628 and the name of the 1st respondent was shown at rank No.865. Against the seniority assigned to the petitioner in Annexure A3 seniority list, the 1st respondent along with others filed representations before the 3rd respondent. By Annexure A4 judgment in W.P.(C)No.30374/2010, this Court directed the 3rd respondent to consider and pass appropriate orders on those representations as expeditiously as possible, at any rate, within 3 months from the date of receipt of a copy of the judgment, after affording an opportunity of being heard to the 1st respondent and other affected parties. Complaining of non-compliance of Annexure A4 judgment, the 1st respondent and others filed Cont. Case (Civil) No.411/2011 before this Court. During the pendency of that contempt proceedings, the 3rd respondent had issued Annexure A5 proceedings dated 7/6/2011, stating that, it is provisionally decided to reassign the rank of the 1st respondent and others by lowering the rank of ineligible candidates as pointed out in the representations and that, final seniority list assigning the actual rank of eligible persons among 1st respondent and others will be issued shortly. Thereafter, the 3rd respondent issued Annexure A6 notice dated 6/9/2011, stating that, the point raised in the representation submitted by the 1st respondent and others were examined in detail with all connected

service details and certain anomalies have been found in Annexure A3 seniority list. In the said circumstances, it was provisionally decided to reassign the rank number of the petitioner and 6 others, who are included in Annexure A3 seniority list. From the list appended to Annexure A6 notice, the present rank of the petitioner in the final seniority list of Staff Nurse Grade-II, Staff Nurse Grade-I and Head Nurses is 988(A), 514 and 631 respectively and it is proposed to reassign the rank of the petitioner in the final seniority list of Staff Nurse Grade-I and Head Nurse as 1554 and 1628 respectively. The reasons stated in Annexure A6 to reassign the rank of the petitioner in the category of Staff Nurse Grade-I and Head Nurse is that, she was on Leave Without Allowances from 29/6/1989 to 2/3/1992 and from 17/11/1992 to 13/2/2003 and rejoined duty only on 14/2/2003.

10. Later, the 1st respondent submitted Annexure A7 representation dated 16/11/2011 before the Government, requesting that the lowered rank of the petitioner in the final seniority list of Staff Nurse Grade-I and Head Nurse shall not be restored and that she may not be given promotion to the category of Nursing Superintendent overlooking the seniority of the 1st respondent. While the said representation was pending before the Government, the petitioner was promoted to the category of Nursing Superintendent Grade-II, by

Annexure A8 Government order dated 2/2/2012. In the list appended to Annexure A8, the petitioner is Sl.No.4 and her rank in the final seniority list of Head Nurse is mentioned as rank No.631. The petitioner would justify her promotion to the category of Nursing Superintendent Grade-II, by relying on Annexure A9 proceedings of the 3rd respondent dated 28/10/2011. A reading of Annexure A9 proceedings would show that, pursuant to Annexure A6 notice dated 6/9/2011, the petitioner had submitted a request dated 7/10/2011. On consideration of such request made by the petitioner, the 3rd respondent came to the conclusion that, though the petitioner was absent from service during the period from 17/11/1992 to 13/2/2003, the Government by Annexure A1 order dated 14/5/2007 regularised her period of absence under Rule 88 Part I KSR. According to the 3rd respondent, since the said period was regularised under this rule, it will not affect the seniority position of the petitioner. So the 3rd respondent cancelled the provisional decision in Annexure A6 notice to reassign the rank number of the petitioner in the cadre of Staff Nurse Grade-I and Head Nurse. It is pertinent to note that, in the case of other 6 Head Nurses included in the appendix to Annexure A6 notice, who were also on Leave Without Allowances for different spells, the 3rd respondent reassigned their seniority in the category of Staff Nurse

Grade-I and/or Head Nurse, after excluding the period during which they were on Leave Without Allowances, and the provisional decision in Annexure A6 notice to reassign their rank number was finalised accordingly.

11. As we have already noticed, during the personal hearing conducted by the District Medical Officer of Health, Ernakulam, for finalising the disciplinary action initiated against the petitioner on the charge of unauthorised absence from service, her main prayer was to excuse the fault committed by her. Therefore, the fact that the petitioner was unauthorisedly absent from service during the period from 17/11/1992 to 13/2/2003 is not in dispute. Though the gravity of the misconduct and insubordination on the part of the petitioner justified punishment, the District Medical Officer of Health, Ernakulam, extended a humanitarian approach and decided to let her off, without causing any loss to the Government. It was in such circumstances, the disciplinary action initiated against her for unauthorised absence for the period from 17/11/1992 to 13/2/2003 was finalised by regularising the period of absence, by treating it as Leave Without Allowances, subject to the sanction of the Government and on condition that, the period of Leave Without Allowances will not count for any service benefits. As seen from Annexure A1 Government order dated

14/5/2007, the 3rd respondent, vide letter dated 14/2/2007, forwarded the application for regularisation of the period of unauthorised absence of the petitioner, for the period from 17/11/1992 to 13/2/2003 as Leave Without Allowances without counting the said period for any service benefits and the Government by Annexure A1 ordered regularisation of the period of absence of the petitioner for the aforesaid period by granting Leave Without Allowances under Rule 88 Part I KSR subject to the condition that the period of Leave Without Allowances will not count for increment, pension, higher grade or accumulation of earned leave.

12. As we have already noticed, the Leave Without Allowances granted to the petitioner by Exhibit P7 Government order dated 12/11/1992 for a period of 5 years from the date of avail after the date of the order to join her husband abroad is one granted under the terms and conditions stipulated in G.O.(P)No.209/84/Fin. dated 12/4/1984, which deals with grant of Leave Without Allowances to join husband/wife abroad or within the country. Going by Clause (iii) of the aforesaid Government order, permanent officers and officers who have completed probation in their entry cadre in the regular service of the Government will be granted Leave Without Allowances to join husband/wife outside the country as well as inside. In such cases,

during the currency of the leave period, the officers shall lose all service benefits, half pay leave benefits, etc., and also promotion chances as may arise with reference to their seniority in the posts from which they left on leave. In other words, the period spent by such officers on Leave Without Allowances to join husband/wife shall be treated as 'dies-non' for all kind of service benefits. They shall also lose seniority in the grade with reference to those who might get promoted before they rejoin duty.

13. On the other hand, going by Rule 88(i) of Part I KSR, Leave Without Allowances may be granted to any officer in regular employment in special circumstances, when no other leave is by rule admissible; or when other leave is admissible, but the officer concerned applies in writing for the grant of Leave Without Allowances. Vide Circular No.24780/R4/99/Fin. dated 22/4/1999, the Government have clarified that all leave sanctioning authorities shall specify, invariably in their orders/proceedings granting Leave Without Allowances to their subordinates under Rule 88 and Rule 91 Part I KSR, whether the Leave Without Allowances so granted will count for service and retirement benefits or not. Later, by Annexure A10 circular dated 8/6/2002, the Government have clarified that, Leave Without Allowances granted under Rule 91 Part I KSR for study purpose and

Leave Without Allowances granted under Rule 88 Part I KSR except (i) Leave Without Allowances granted on medical certificate; (ii) Leave Without Allowances for a period up to 60 days in continuation of maternity leave in accordance with the proviso to Rule 102 Part I KSR; and (iii) Leave Without Allowances taken by teachers for completion of training course such as B.Ed., HTT, LTT and TTC as provided in Rule 33 (b)(2) Part I KSR, will not count for any service benefits including pension. By Annexure A10 circular, all leave sanctioning authorities were directed to adhere strictly to the above conditions while sanctioning leave to their subordinates.

14. Till the insertion of Appendix XIIC to Part I KSR, the grant of Leave Without Allowances to join husband/wife abroad or within the country was governed by the terms and conditions stipulated in G.O. (P)No.209/84/Fin. dated 12/4/1984. Going by the said Government order, the petitioner who availed Leave Without Allowances to join her husband abroad shall lose, during the currency of the leave period, all service benefits, half pay leave benefits, etc., and also promotion chances as may arise with reference to her seniority in the posts from which she left on leave. She shall also lose seniority in the grade with reference to those who might get promoted before she rejoin duty. Identical provisions are also there in Appendix XII C of Part I KSR,

inserted with effect from 12/4/1984 by G.O.(P)No.1002/97/Fin. dated 6/11/1997. The petitioner who left abroad on 17/11/1992, on strength of Exhibit P7 Government order, is bound by the terms and conditions for such grant contained in Government order dated 12/4/1984, and she cannot be permitted to wriggle out of the aforesaid conditions. Therefore, during the currency of the leave period she shall lose all service benefits and also promotion chances that may arise with reference to her seniority in the post of Staff Nurse Grade II from which she left on leave. She shall also lose seniority in the grade of Staff Nurse Grade II with reference to those who might get promoted before she rejoin duty.

15. The petitioner who committed misconduct and removed from service once, was permitted to rejoin duty on humanitarian grounds, and she could rejoin duty only on 14/2/2003. On finalising the disciplinary proceedings initiated for unauthorised absence for the period from 17/11/1992 to 13/2/2003, she cannot be put on a better position than a person who went on Leave Without Allowances to join spouse abroad in terms of Government order dated 12/4/1984. Since the Leave Without Allowances granted to the petitioner under Rule 88 Part I KSR, does not fall within any one of the three exceptions enumerated in Annexure A10 circular, the said period cannot be

counted for any service benefits including pension. Further, Annexure A1 Government order regularising the period of absence of the petitioner from 17/11/1992 to 13/2/2003, by granting Leave Without Allowances under Rule 88 Part I KSR, would not and cannot wipe off or obliterate the conditions on which she went on Leave Without Allowances to join her husband abroad. Therefore, on regularisation of the period of absence of the petitioner from 17/11/1992 to 13/2/2003, by granting Leave Without Allowances under Rule 88 Part I KSR, she will lose seniority in the grade of Staff Nurse Grade II with reference to those who might get promoted before she rejoin duty, i.e., before 14/2/2003. It is not in dispute that, by the time the petitioner could rejoin duty as Staff Nurse Grade II, the 1st respondent was already promoted as Staff Nurse Grade I on 21/1/2000, with effect from 1/11/1999.

16. The petitioner joined service as Staff Nurse Grade II on 21/7/1986 and her probation in that cadre was declared with effect from 5/8/1988. Later, with effect from 28/6/1989, she availed Leave Without Allowances for five years, under Appendix XIIA of Part I KSR, to take up employment abroad. Pending cancellation of unavailed portion of leave, she was permitted to rejoin duty as Staff Nurse Grade II on 2/3/1992. Later, she was on eligible leave for the period from

18/8/1992 to 16/11/1992. By Exhibit P7 Government order, the petitioner was granted Leave Without Allowances to join her husband abroad. Without rejoining duty after the expiry of the eligible leave, the petitioner went abroad on 17/11/1992 and thereafter, she could rejoin duty as Staff Nurse Grade II only on 14/2/2003. Therefore, during the period from 21/7/1986 to 13/2/2003, i.e., for more than 16 years, the petitioner had worked in the department only for a total period of 3 years.

17. In the O.A., the 1st respondent has raised a specific allegation that, the petitioner was working as Staff Nurse in Amrutha Institute of Medical Sciences Hospital for three years from 1999 onwards. The 1st respondent has also contended in the O.A. that, Rule 88 Part I KSR is not at all meant for a person like the petitioner who has, on her volition, absented herself unauthorisedly from service for a long period of 11 years and worked during that period in a private hospital without any intimation to the Government. In Exhibit P2 reply statement or in Exhibit P3 additional reply statement filed before the Tribunal, the petitioner did not dispute the statement made in the O.A. that, during the period of unauthorised absence she had worked as Staff Nurse for three years from 1999 onwards, in Amrutha Institute of Medical Sciences Hospital. In **State of Assam v. Union of India**

(2010 (10) SCC 408) the Apex Court had held that, "the respondents must deal specifically with each allegation of fact which, it does not admit true. The allegation of fact, if not denied or controverted in the counter affidavit, normally it shall be taken to be admitted by the respondents." Therefore, in the absence of any denial in Exhibit P2 reply statement or in Exhibit P3 additional reply statement filed before the Tribunal, it can be taken that, the petitioner has admitted the allegation that, during the period of unauthorised absence she had worked as Staff Nurse in a private hospital, for three years from 1999 onwards. The denial of the aforesaid allegation for the first time in the reply affidavit filed before this Court in the O.P.(KAT) on 10/12/2014, in answer to the averments in the counter affidavit filed by the 1st respondent, cannot be treated as a denial of the allegation in question.

18. By Annexure A9 order, the disciplinary action initiated against the petitioner for unauthorised absence for the period from 17/11/1992 to 13/2/2003 was finalised by regularising the period of absence, by treating it as Leave Without Allowances, subject to the sanction of the Government and on condition that, the period of Leave Without Allowances will not count for any service benefits. The aforesaid order was not under challenge in an appeal or revision filed by the petitioner under the provisions of the Kerala Civil Services

(Classification, Control and Appeal) Rules, 1960. Instead, the petitioner had accepted the said order of the disciplinary authority and submitted an application for Leave Without Allowances for the period from 17/11/1992 to 13/2/2003 and the 3rd respondent forwarded the same to the Government on 14/2/2007. On regularising the period of absence for the aforesaid period, the petitioner cannot be put on a better position than a person who went on Leave Without Allowances to join spouse abroad in terms of Government order dated 12/4/1984, and thereafter worked in a private hospital without any intimation to the Government. Since any regularisation of the aforesaid period of absence, by granting Leave Without Allowances under Rule 88 Part I KSR, would not and cannot wipe off or obliterate the conditions on which the petitioner went on Leave Without Allowances, on such regularisation she will lose seniority in the grade of Staff Nurse Grade II with reference to those who might get promoted before she rejoin duty, i.e., before 14/2/2003. At any rate, in the absence of an appeal or revision, the Government could not have modified the order of the disciplinary authority. In such circumstances, the Tribunal cannot be found fault with in concluding that Annexure A1 Government order is vitiated and liable to be quashed.

19. It is not in dispute that the petitioner was never promoted

as Staff Nurse Grade I and as such, she had no occasion to complete the period of probation in that post. She was assigned seniority in the final seniority list of Staff Nurse Grade I notionally and later, she was promoted as Head Nurse only by Annexure A2 proceedings dated 28.3.2007. The learned Senior Counsel for the petitioner, placing reliance on Exhibit P15 pay revision order produced along with this OP (KAT) would contend that, the placement of Staff Nurse Grade I is based on a ratio of 1:1 between the Staff Nurse Grade II and Grade I and therefore the Tribunal ought not to have set aside Annexures A8 and A9 orders for that reason. We notice that neither in Exhibit P2 reply statement nor in Exhibit P3 additional reply statement filed in O.A.1328 of 2012, the petitioner, has raised such a contention. Having failed to do so, she cannot be permitted to raise such a contention for the first time before this Court in an OP(KAT) filed under Articles 226 and 227 of the Constitution of India. Moreover, the documents on record clearly indicate that, in the Health Services Department, separate seniority lists are being maintained for the post of Staff Nurse Grade II, Staff Nurse Grade I and Head Nurse. The posts of Staff Nurse Grade I are being filled up by promotion post of Staff Nurse Grade II, based on seniority. Similarly, the posts of Head Nurse are being filled up by promotion of Staff Nurse Grade I on the

basis of their seniority. The very same method is being followed in the matter of promotion to the post of Nursing Superintendent Grade II and for further promotion to the post of Nursing Superintendent Grade I. It is not in dispute that even before the petitioner could rejoin duty as Staff Nurse Grade II, the 1st respondent and others were promoted as Staff Nurse Grade I, which is a higher post carrying a higher scale of pay for which a separate seniority list is being maintained by the Department. In such circumstances, the petitioner who could rejoin duty only on 14/2/2003 shall lose her seniority in the Grade of Staff Nurse Grade II with reference to those who have already been promoted before she rejoined duty. In such circumstances, the reasoning of the 3rd respondent in Annexure A9 proceedings dated 28/10/2011 that, since the period of absence of the petitioner from 17/11/1992 to 13/2/2003 has been regularised under Rule 88 Part I KSR, it will not affect her seniority position is per se arbitrary and erroneous. For the very same reason, her inclusion in Annexure A8 Government order dated 2/2/2012 for being provisionally promoted to the cadre of Nursing Superintendent Grade II is also not legally sustainable. Therefore, the Tribunal cannot be found fault with in interfering with Annexures A8 and A9 proceedings to the extent the petitioner is concerned.

20. We also notice that, when the 1st respondent and others have approached this Court in a contempt of court case, complaining non-compliance of Annexure A4 judgment of this Court in W.P.(C) No.30374/2010, the 3rd respondent had issued Annexure A5 proceedings dated 7/6/2011 stating that, it was provisionally decided to reassign the rank of the 1st respondent and others by lowering the rank of the ineligible candidates, as pointed out in their representations, and that the final seniority list assigning the actual ranks of eligible persons among the 1st respondent and others will be issued shortly. A copy of the said order was also marked to the 1st respondent and others through the Head of Institution. Later, the 3rd respondent has issued Annexure A6 notice to the petitioner and others, after taking a provisional decision to reassign their rank in the final seniority list. Going by Annexure A6 notice, it was decided to reassign the rank of the petitioner in the final seniority list of Staff Nurse Grade 1 and Head Nurse as 1554 and 1628 respectively, for the reason that she was on Leave Without Allowances from 29/6/1989 to 2/3/1992 and from 17/11/1992 to 13/2/2003 and she rejoined duty only on 14/2/2003. Similarly, in the case of other 6 Head Nurses included in the list appended it was decided to reassign their rank for the very same reason. It was thereafter, the 3rd respondent has issued

Annexure A9 proceedings dated 28/10/2011, cancelling the aforesaid provisional decision in the case of the petitioner alone, stating that, since the period of absence of the petitioner was regularised by Annexure A1 Government order dated 14/5/2007 under Rule 88 Part I KSR, it will not affect her seniority position. It is curious to note that, though a copy of Annexure A5 proceedings of the 3rd respondent was marked to the 1st respondent and others, who have submitted representations against the seniority assigned to the petitioner, a copy of Annexure A9 proceedings dated 28/10/2011 of the 3rd respondent was marked only to the petitioner and 6 others, who were issued with Annexure A6 notice proposing to reassign their seniority. The action of the 3rd respondent in issuing Annexure A9 order behind the back of the 1st respondent and others who have submitted representations against the seniority assigned to the petitioner, which resulted in the issuance of Annexure A5 proceedings and Annexure A6 notice, is per se arbitrary and vitiated by malafides.

21. The learned Senior Counsel for the petitioner would contend that since Annexure A3 seniority list of Head Nurse for the period from 1/1/1998 to 28/3/2007 is not under challenge, the 1st respondent cannot maintain an original application challenging Annexure A9 consequential order passed by the Government. As we

have already noticed, the seniority assigned to the petitioner in Annexure A3 was challenged by the 1st respondent along with others by filing representations before the 3rd respondent. Pursuant to the direction of this Court in Annexure A4 judgment in W.P.(C) No.30374/2010, the 3rd respondent issued Annexure A5 proceedings, which was followed by Annexure A6 notice in which it was provisionally decided to reassign the rank number of the petitioner and six others in the final seniority lists of Staff Nurse Grade II, Staff Nurse Grade I and Head Nurse. It was thereafter, the 3rd respondent issued Annexure A9 proceedings, behind the back of the 1st respondent and others who have objected to the seniority assigned to the petitioner. Since Annexure A9 order was under challenge before the Tribunal, the contention of the learned Senior Counsel for the petitioner that Annexure A3 final seniority list is not under challenge can only be repelled and we do so.

22. The learned Senior Counsel for the petitioner further contended that the 1st respondent has no locus standi to challenge the final order passed by the Government in a disciplinary proceedings initiated against the petitioner. The learned Senior Counsel, relied on the the judgment of the Apex Court in **Rajnit Prasad v. Union of India and others (2000(9) SCC 313)** in order to contend that

disciplinary proceedings are essentially a matter between the employer and the employee and a stranger like the 1st respondent cannot said to have any interest in them. A reading of the aforesaid judgment of the Apex Court would show that, that was a case in which disciplinary proceedings were initiated against one Dr.U.M.Biswas who was the Joint Director of the Central Bureau of Investigation, Calcutta. He approached the Central Administrative Tribunal for quashing the article of the charge, but that application was dismissed. He then approached the High Court by a writ petition which was allowed and the charge sheet issued to him was quashed. The said order was challenged before the Apex Court by one Mr.Rajnit Prasad, who is a practising Advocate at Patna and who is not a party either before the Central Administrative Tribunal or before the High Court. It was in such circumstances, the Apex Court held that "in respect of departmental proceedings, which are initiated or sought to be initiated by the Government against its employees, a person who is not even remotely connected with those proceedings cannot challenge any aspect of the departmental proceedings or action by filing a writ petition in the High Court or in the Apex Court." Therefore, the judgment of the Apex Court in **Rajnit Prasad's case (supra)** is entirely on a different factual matrix and the principle laid down in that decision cannot be

extended to the facts of the case on hand.

23. **In Lakhi Ram v. State of Haryana 1981 (2) SCC 674**, the Apex Court held that "the effect of expungement of adverse remarks in the confidential report of respondent No.6 is to prejudice the chances of promotion and if the appellant is able to show that expungement is illegal and invalid the adverse remark would continue to remain in the confidential report of respondent No.6 and that would improve the chances of promotion of the appellant vis a vis, respondent No.6. The appellant had, in the circumstances, locus standi to maintain the writ petition." Para.1 of the judgment reads thus:

" The only ground on which the writ petition filed by the appellant has been dismissed by the High Court is that the appellant has no locus standi to maintain the writ petition. The appellant filed the writ petition challenging the action of the Government expunging the adverse remarks made in the annual confidential report of respondent No. 6. The High Court took the view that the appellant was not entitled to complain against the expungement of adverse remarks made in the confidential report of another officer. But this view is, in our opinion, erroneous because the effect of expungement of adverse remarks in the confidential report of respondent No. 6 is to prejudice the chances of promotion of the appellant and if the appellant is able to show that the expungement of the remarks was illegal and invalid, the

adverse remarks would continue to remain in the confidential report of respondent No. 6 and that would improve the chances of promotion of the appellant vis-a-vis respondent No. 6. The appellant was, therefore, clearly entitled to show that the Government acted beyond the scope of its power in expunging the adverse remarks in the confidential report of respondent No. 6 and that the expungement of the adverse remarks should be cancelled. The appellant had, in the circumstances, locus standi to maintain the writ petition and the High Court was in error in rejecting it on the ground, that the appellant was not entitled to maintain the writ petition."

24. In the case on hand, on the basis of Annexure A1 Government order, the petitioner is put on a better position than a person who went on leave without allowance to join spouse abroad in terms of Government order dated 12/4/1984. The petitioner who could rejoin duty as Staff Nurse Grade II, only on 14/2/2003 will have to lose her seniority in that grade with reference to the 1st respondent and others who got promoted to the post of Staff Nurse Grade I before she rejoined duty. In such circumstances, the 1st respondent has locus standi to challenge Annexure A1 Government order and the contentions to the contra raised by the learned Senior Counsel for the petitioner can only be rejected and we do so.

25. Lastly, it was contended on behalf of the petitioner that the challenge made against Annexure A1 Government order dated

14.5.2007 is highly belated and therefore, the Original application is barred by limitation. Section 20 and 21 of the Administrative Tribunals Act, 1985 (hereinafter referred to as 'the Act') read thus;

"20. *Application not to be admitted unless other remedies exhausted:-*

(1) A Tribunal shall not ordinarily admit an application unless it is satisfied that the applicant had availed of all the remedies available to him under the relevant service rules as to redressal of grievances.

(2) For the purposes of sub-section (1), a person shall be deemed to have availed of all the remedies available to him under the relevant service rules as to redressal of grievances, -

(a) if a final order has been made by the Government or other authority or officer or other person competent to pass such order under such rules, rejecting any appeal preferred or representation made by such person in connection with the grievance; or

(b) where no final order has been made by the Government or other authority or officer or other person competent to pass such order with regard to the appeal preferred or representation made by such person, if a period of six months from the date on which such appeal was preferred or representation was made has expired.

(3) For the purposes of sub-sections (1) and (2), any remedy available to an applicant by way of submission of a memorial to the President or to the Governor of a State or to any other functionary shall not be deemed to be one of the remedies which are available unless the applicant had elected to submit

such memorial."

"21. Limitation:-

(1) A Tribunal shall not admit an application, -

(a) in a case where a final order such as is mentioned in clause (a) of sub-section (2) of section 20 has been made in connection with the grievance unless the application is made, within one year from the date on which such final order has been made;

(b) in a case where an appeal or representation such as is mentioned in clause (b) of sub-section (2) of section 20 has been made and a period of six months had expired thereafter without such final order having been made, within one year from the date of expiry of the said period of six months.

(2) Notwithstanding anything contained in sub-section (1), where –

(a) the grievance in respect of which an application is made had arisen by reason of any order made at any time during the period of three years immediately preceding the date on which the jurisdiction, powers and authority of the Tribunal becomes exercisable under this Act in respect of the matter to which such order relates ; and

(b) no proceedings for the redressal of such grievance had been commenced before the said date before any High Court, the application shall be entertained by the Tribunal if it is made within the period referred to in clause (a), or , as the case may be, clause (b), of sub-section (1) or within a period of six months from the said date, whichever period expires later.

(3) Notwithstanding anything contained in sub-section (1) or sub-section (2), an application may be admitted after the period of one year specified in clause (a) or clause (b) of sub-section

(1) or, as the case may be, the period of six months specified in sub-section(2), if the applicant satisfies the Tribunal that he had sufficient cause for not making the application within such period."

26. As per Sub-section (1) of Section 20 of the Act, the Tribunal shall not admit an application unless it is satisfied that the applicant had availed of all the remedies available to him under the relevant service rules as to redressal of grievances. Going by clause (a) of Sub-section (2) of Section 20 of the Act, for the purposes of Sub-section (1), a person shall be deemed to have availed of all the remedies available to him under the relevant service rules as to redressal of grievances, if a final order has been made by the Government or other authority or officer or other person competent to pass such order under such rules, rejecting any appeal preferred or representation made by such person in connection with the grievance. Similarly, going by clause (a) of Sub-section (1) of Section 21 of the Act, the Tribunal shall not admit an application, in a case where a final order such as is mentioned in clause (a) of Sub-section (2) of Section 20 has been made in connection with the grievance unless the application is made, within one year from the date on which such final order has been made. But, going by Sub-section (3) of Section 20, notwithstanding anything contained in Sub-section (1) or Sub-section

(2), an application may be admitted after the period of one year specified in clause (a) or clause (b) of Sub-section (1) or, as the case may be, the period of six months specified in Sub-section (2), if the applicant satisfies the Tribunal that he had sufficient cause for not making the application within such period.

27. In **D. Saibaba v. Bar Council of India (2003 (6) SCC 186)** the Apex Court held that, where the law provides a remedy to a person, the provision has to be so construed in case of ambiguity as to make the availing of the remedy practical and the exercise of power conferred on the authority meaningful and effective. A construction which would render the provision nugatory ought to be avoided. So far as the commencement of period of limitation for filing the review petition is concerned the expression 'the date of that order' as occurring in Section 48AA of the Advocates Act, 1961, has to be construed as meaning the date of communication or knowledge of the order to the review-petitioner. Paragraphs 13 and 14 of the judgment read thus;

"13. In Raj Kumar Dey v. Tarapada Dey (1987) 4 SCC 398 this Court pressed into service two legal maxims guiding and assisting the Court while resolving an issue as to calculation of the period of limitation prescribed, namely, (i) the law does not compel a man to do that which he could not possibly perform,

and (ii) an act of the court shall prejudice no man. These principles support the view taken by us hereinabove. Any view to the contrary would lead to an absurdity and anomaly. An order may be passed without the knowledge of anyone except its author, may be kept in the file and consigned to record room or the file may lie unattended, unwittingly or by carelessness. In either case, the remedy against the order would be lost by limitation though the person aggrieved or affected does not even know what order has been passed. Such an interpretation cannot be countenanced.

14. How can a person concerned or a person aggrieved by expected to exercise the right of review conferred by the provision unless the order is communicated to or is known to him either actually or constructively? The words the date of that order, therefore, mean and must be construed as meaning the date of communication or knowledge, actual or constructive, of the order sought to be reviewed."

28. In **Chhattisgarh SEB v. Central Electricity Regulatory Commission (2010 (5) SCC 23)** the Apex Court has reiterated that, for seeking the remedy the limitation starts from the date on which the order was communicated to the parties affected or the date on which it was pronounced or published under such circumstances that the parties affected by it have a reasonable opportunity of knowing of passing of the order and what it contains. The knowledge of the party affected by such a decision, either actual or constructive is thus an

essential element which must be satisfied before the decision can be said to have been concluded and binding on him. Otherwise the party affected by it will have no means of obeying the order or acting in conformity with it or of appealing against it or otherwise having it set aside.

29. In the case on hand, it is not in dispute that, Annexure A1 Government order dated 14/5/2007 by which the period of absence of the petitioner from 17/11/1992 to 13/2/2003 was regularised by granting leave without allowance under Rule 88 Part I KSR is one passed without notice to the 1st respondent. Admittedly, a copy of the said order was never circulated or communicated among the employees concerned whose chances of promotion are prejudiced. Since the knowledge of the party affected by an order being an essential requirement of fair play and natural justice, the affected persons like the 1st respondent who was never communicated with a copy of Annexure A1 Government order dated 14/5/2007 can challenge the same before the Tribunal, within one year from the date of knowledge of such order being passed by the Government. In such circumstances, the contention raised by the learned Senior Counsel for the petitioner that the challenge made in the Original Application against Annexure A1 Government order dated 14/5/2007 can only be

rejected and we do so.

30. In the result, we find no grounds to interfere with Exhibit P5 order passed by the Tribunal dated 25/1/2013 in O.A.No.1328/2012, setting aside Annexure A1 order and also Annexures A8 and A9 to the extent they concern the petitioner. The direction of the Tribunal in Exhibit P5 order that, the 1st respondent shall be treated as senior to the petitioner in all grades from Staff Nurse Grade I onwards is also perfectly legal, warranting no interference.

In the result, the O.P.(KAT) fails and the same is dismissed.

Sd/-

ANTONY DOMINIC, JUDGE

Sd/-

ANIL K.NARENDRAN, JUDGE

dsn