

---

**(2020) 02 BOM CK 0008**  
**In the Bombay High Court**  
**Case No : Writ Petition No. 7493 Of 2018**

|                                                    |            |
|----------------------------------------------------|------------|
| St. John's English Primary School And Anr          | APPELLANT  |
| Vs                                                 |            |
| Education Officer (Primary) Zilla Parishad And Anr | RESPONDENT |

---

**Date of Decision :** 04-02-2020

**Acts Referred:**

Maharashtra Employees Of Private Schools (Conditions Of Service) Rules, 1981 — Rule 16, 16(1), 16(2), 16(3), 16(28), 16(12)(b)(1), 16(12)(b)(2), 16(12)(b)(3), 16(12)(b)

**Citation :** (2020) 02 BOM CK 0008

**Hon'ble Judges :** Manish Pitale, J

**Bench :** Single Bench

**Advocate :** R.M. Bhangade, G.G. Mishra, D.G. Philip

**Final Decision :** Allowed

---

## Judgement

1. Heard.
2. Rule. Rule made returnable forthwith. The writ petition is heard finally with the consent of the learned counsel for the rival parties.
3. The management and school are before this Court as petitioners challenging order passed by the respondent No.1-Education Officer, whereby the said respondent has directed the petitioners to pay salary to the respondent No.2 for the entire period of almost one academic year, during which the respondent No.2 did not attend duties in petitioner No.1-School. The respondent No.1 has come to the conclusion that the petitioners ought to have treated his absence as being on medical leave and since she had leave to her credit, she was entitled to salary for the said period.
4. The respondent No.2 was working as an Assistant Teacher with the petitioner No.1-School, which is an unaided minority institution. The respondent No.2 was in employment of the petitioners since the year 1994. The material placed on record shows that the respondent No.2 had remained absent without prior permission between 03/02/2004 and 07/02/2004 and in this context, she had

submitted an undertaking on 09/08/2004 that henceforth she would obtain permission for leave as per Rules. Thereafter, again the respondent No.2 remained absent from 25/07/2005 to 03/08/2005, on medical ground, without any supporting documents and on this occasion also, the petitioners warned respondent No.2 not to remain absent without prior permission.

5. It is the case of the petitioners that despite such warnings being given and undertakings being submitted by the respondent No.2, she remained absent for the entire academic session from 26/06/2012 to 24/04/2013, without prior permission and in violation of the relevant Rules. The petitioners sent communication dated 27/05/2013, directing the respondent No.2 that she must join duty from 26/06/2013 i.e. the first day of academic year 2013-2014. She was also informed that the head of the institution was contemplating action to be taken against her for such unauthorized leave for the entire academic year 2012-2013 and also for an issue relating to use of derogatory language and making false allegations against the head of the institution. When the petitioner-management resolved to issue charge-sheet to the respondent No.2 for unauthorized absence, on 06/07/2013, the respondent No.2 submitted her resignation. On 06/08/2013, the petitioners issued statement of allegations to the respondent No.2. It is in this backdrop that the respondent No.2 submitted letters to the petitioners claiming not only release of salary for the past academic year, but also for grant of annual increment. On 27/08/2013, the respondent No.2 replied to the statement of allegations.

6. The respondent No.2 filed Writ Petition No.6841 of 2013 before this Court seeking direction against the petitioners for release of her salary for the leave period and also for grant of benefit of the Sixth Pay Commission. This writ petition was opposed by the petitioners and on 06/07/2017 the writ petition was dismissed. In the meanwhile, the respondent No.2 had also filed a complaint before the respondent No.1-Education Officer, regarding her claim of non-payment of annual increments and gratuity. On 18/05/2016, the petitioners released gratuity of respondent No.2, which she accepted under protest. On 03/08/2016, the respondent No.1 passed an order holding that he did not have power to decide the grievance raised by the respondent No.2, because the school was an unaided school. But, thereafter, the respondent No.1 reviewed his own order on 29/10/2016 and directed the petitioners to decide the claim of respondent No.2 within 15 days. On 26/02/2017, the respondent No.2 filed an application before the Education Officer for derecognizing the petitioner-School.

7. In this backdrop, the respondent No.2 filed another writ petition bearing Writ Petition No.1581 of 2017, praying for setting aside the statement of allegations and charges levelled against her and for payment of all outstanding dues. The said writ petition was disposed of by this Court by order dated 05/09/2017, directing the respondent No.1 to take a decision on the grievances raised by respondent No.2. It is after the said direction was given by this Court that the respondent No.1 passed the impugned order dated 03/05/2018, whereby the

aforesaid directions were granted in favour of respondent No.2.

8. On the present writ petition being filed by the petitioners challenging the said order of respondent No.1, this Court issued notice for final disposal at admission stage on 31/10/2018.

9. Mr. R.M.Bhangde, learned counsel appearing for the petitioners, submitted that the respondent No.1 committed a grave error in granting relief to respondent No.2. According to the learned counsel, the said order was based on erroneous appreciation of the material on record and in the teeth of law laid down by the Hon'ble Supreme Court. Attention of this Court was invited to the documents on record, particularly resolution of the petitioner-management dated 15/08/2012, whereby it was unanimously decided that the period of leave of respondent No.2 for the academic year 2012-2013, without permission and even information to the petitioners, was to be treated as extraordinary leave i.e. leave without pay. It was submitted that although the process of initiating enquiry against the respondent No.2 for unauthorized absence for such a long period, was started, it was not taken to its logical end, because the respondent No.2 resigned from service. It was only for completion of record and ensuring correct record that the aforesaid resolution was passed and in the service book of the respondent No.2 also an entry was made that the period of absence from 26/06/2012 to 24/04/2013 was unauthorized leave. On this basis, it was submitted that the respondent No.2 was certainly not entitled to salary for the said period.

10. The learned counsel for the petitioners invited attention of this Court to Rule 16 of the Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 pertaining to "leave". Emphasis was placed on sub-rules 1 to 3 and 12(b) of Rule 16 to contend that it was incumbent upon the respondent No.2, to have applied for leave along with supporting medical documents for the aforesaid period of absence. Emphasis was placed on Rule 16(12)(b) to point out that if such application for medical leave with supporting documents was made in advance or immediately after proceeding on such leave, the petitioner establishment would have had an opportunity to secure second medical opinion in order to verify the claims made by respondent No.2. It was emphasized that respondent No.2 went on leave without intimation and thereafter she sent series of telegrams simply stating that she was sick and she requested for extension of leave for one month in each such telegram. It was submitted that the said actions of the respondent No.2 violated the mandatory requirements of Rule 16 of the said Rules and that therefore, she was not entitled to salary for the period of absence. The learned counsel emphasized on letter dated 22/04/2013 submitted by the respondent No.2, wherein she stated that she would be reporting for duty on 22/04/2013, after availing leave on the grounds of medical and mental stress. In the said letter, it was specifically stated that leave application with supporting medical reports will be submitted soon for sanction of leave. In the backdrop of the said letter, it was submitted that the application on

which the respondent No.2 was relying, purportedly dated 23/06/2012, was an antedated document, which was never submitted to the petitioners. It was stated that, other than an endorsement made by respondent No.2 on the said document herself that it was personally handed over to the manager, there was nothing to show that the said application had been ever submitted to the petitioners. On this basis, it was submitted that there was clear violation of Rule 16 of the said Rules. It was submitted that the petitioners had even initiated departmental enquiry proceedings as per Rules against the respondent No.2, but since she resigned from service, the same was not proceeded with and her unauthorized absence was treated as such in the service book and she was not entitled to salary for the said period. It was submitted that there was no substance in the contention raised on behalf of the respondent No.2 that since the petitioners did not proceed with the departmental enquiry, she was entitled to salary for the period of absence. The learned counsel also emphasized that only because she had leave to her credit, she could not claim salary for the period of unauthorized absence and that the respondent No.1 had committed a grave error in holding in favour of respondent No.2 on the said ground. The learned counsel relied upon judgments of the Hon'ble Supreme Court in the cases of S.C.Saxena v. Union of India, reported in (2006) 9 SCC 583, Mithilesh Singh v. Union of India, reported in (2003) 3 SCC 309, State of Uttar Pradesh v. Madhav Prasad Sharma, reported in (2011) 2 SCC 212 and Delhi Transport Corporation v. Sardar Sigh, reported in (2004) 7 SCC 574.

11. On the other hand, Mr. D. G. Philip, learned counsel appearing for respondent No.2, submitted that the order passed by respondent No.1 in the present case was justified, because the petitioners themselves had resolved to treat the absence of the respondent No.2 as extraordinary leave and even in the service book, it was recorded as unauthorized leave. It was submitted that when the petitioners themselves abandoned the departmental enquiry, initiated against respondent No.2 and passed such resolution and further took such an entry in the service book of respondent No.2, there was no basis for the petitioners to have deprived the respondent No.2 of salary for the period of absence. It was submitted that in any case, the respondent No.2 had sufficient leave to her credit and that therefore, the same could have been adjusted and salary disbursed to the respondent No.2. The learned counsel for the respondent No.2 placed much emphasis on the purported application for sanction of leave on 23/06/2012 submitted by her, which according to the learned counsel was sufficient to demonstrate that the petitioners had been informed well in advance that respondent No.2 would be on leave, initially for the marriage of her son and subsequently for medical treatment at Mumbai. It was emphasized that the office bearers of the petitioner-management had themselves attended the marriage of the son of respondent No.2 and that therefore, they were clearly aware about the leave sought by the respondent No.2 in terms of the application dated 23/06/2012. It was emphasized that since the medical treatment of respondent No.2 continued for a considerable period of time, she had sent telegrams every

month to the petitioners informing them about the same and seeking extension of leave every month. On this basis, it was submitted that the petitioners were not justified in claiming that there was violation of Rule 16 of the aforesaid Rules. It was further submitted that respondent No.2 had specifically sent communication dated 22/04/2013, expressing her intention to join duties on the same day and she further stated that she would be placing on record the medical reports. According to the learned counsel for respondent No.2, all these factors were correctly taken into consideration by the respondent No.1, while passing the impugned order. It was further submitted that judgments relied upon by the learned counsel for the petitioners did not apply to the facts of the present case.

12. Mr. G.G.Mishra, learned counsel appeared for the respondent No.1.

13. Heard learned counsel for the rival parties and perused the material on record. As per the relevant Rules, particularly Rule 16 of the said Rules, 'leave' cannot be claimed by an employee as a matter of right. The discretion to grant, refuse or cancel leave is reserved with the management and school committee. Thus, there cannot be any doubt about the fact that when an employee intends to go on leave, or when he/she is required to avail leave in emergent circumstances, there is a specific procedure prescribed under the Rules, which needs to be followed. The relevant extracts of Rule 16 read as follows:

"16. Leave.

(1) Leave shall not be claimed as a matter of right. Discretion to grant, refuse or cancel leave (other than casual leave) is reserved - (i) in the case of the teaching and non-teaching staff (other than the Head), with the School Committee and (ii) in the case of the Head, with the Management.

(2) An application for leave other than casual leave or extension of leave or to proceed on leave after vacation shall ordinarily be made in good time before the date from which the leave or its extension is sought. Even in exceptional cases where it is not possible to apply beforehand because of circumstances beyond the control of the employee, the application shall be made within 7 days from the date of absence. A non-permanent employee shall be deemed to have abandoned his service if he fails to apply for leave within seven days from the date of absence.

(3) In the case of a permanent employee who, without sufficient cause, fails to apply for leave within 7 days from the date of absence, it shall be treated as breach of discipline and he shall be liable for suitable disciplinary action after due inquiry. A permanent employee who is absent from duty [without leave continuously for a period exceeding three years], shall be deemed to have voluntarily abandoned his Services.

(4) ....

(5) ....

(6) ....

(7) ....

(8) ....

(9) ....

(10) ....

(11) ....

(12) (a)....

(b) The authority competent to sanction leave may, at its discretion secure a second medical opinion by requesting the Superintendent in Government Medical Hospitals in Bombay, or Civil Surgeon or District Medical Officer, or Medical Officer of Zilla Parishads, Municipal Councils or Municipal Corporations to have the applicant medically examined. If the authority decides to do so, it shall arrange for the second medical examination to be made on the earliest possible date after the date on which the first medical opinion was given. It shall forward the original medical certificate produced by the applicant to the Medical Officer by whom he is to be re-examined.

(13) ....

(14) ....

(15) ....

(16) ....

(17) ....

(18) ....

(19) ....

(20) ....

(21) ....

(22) ....

(23) ....

(24) ....

(25) ....

(26) ....

(27) ....

(28) An employee on extraordinary leave shall not be entitled to any leave salary."

14. The material available on record needs to be examined in the backdrop of the above quoted Rule and the correctness of the impugned order passed by the respondent No.1 needs to be examined on application of the aforesaid Rules to the facts and circumstances of the present case.

15. The material on record shows that the respondent No.2 was indeed absent from the petitioner-school between the period 26/06/2012 to 22/04/2013. Such absence is not even disputed by the respondent No.2. But, it is claimed by the respondent No.2 that such absence was on justified grounds, initially for the marriage of her son and subsequently on medical grounds. Much emphasis has been placed on the document dated 23/06/2012, on the basis of which the respondent No.2 claims that she had requested for sanction of earned leave and that the aforesaid reasons were specifically stated therein. The petitioners have completely denied receipt of the said letter/application dated 23/06/2012. A perusal of the said document shows that it bears an endorsement at the bottom stating that it was personally handed over to the Manager of the petitioner-management. This endorsement has been made by the respondent No.2 herself. There is nothing on record to show that the said letter/application dated 23/06/2012, was in fact submitted to the petitioners.

16. The other relevant document is the letter dated 22/04/2013 submitted by respondent No.2 before the headmistress of the petitioner-school, referring to telegram dated 16/04/2013, and all previous telegrams given every month. In this letter, the respondent No.2 has stated that she would be attending duty from the said day and most significantly she stated that leave application with medical reports will be submitted soon for favour of sanctioning leave. This letter is admitted by the petitioners and according to them, this was the first communication received from the respondent No.2 after her unauthorized absence, except for the above referred telegrams sent every month for a few months by the respondent No.2. The language used in the said letter by the respondent No.2 is crucial, because it is clearly stated that leave application with medical reports "will be submitted soon". There is also no reference to the purported letter/application for leave dated 23/06/2012, said to have been submitted by respondent No.2 to the Principal of the petitioner-school. Thus, it is not possible to accept the contentions raised on behalf of the respondent No.2 by relying upon the letter/application dated 23/06/2012. As noted above, there is nothing to show that the said letter/application was indeed submitted before the petitioners.

17. The other material on which the respondent No.2 has placed reliance are telegrams sent by her on 28/09/2012, 31/10/2012, 22/11/2012, 21/01/2013 and 06/04/2013. In each of these telegrams, the respondent No.2 simply stated that she was sick and she made a request for extension of leave by one month. Thus, since the purported letter/application dated 23/06/2012 cannot be believed, the only material on record is in the form of the aforesaid telegrams sent by respondent No.2 to the petitioners and then the letter dated 22/04/2013,

wherein she stated that she was reporting for duty and further stated that leave application with supporting medical reports will be submitted soon. There is no material on record to show that any advance intimation was given by the respondent No.2 when she remained absent and any application with supporting medical documents was ever submitted during the entire period of absence from 26/06/2012 to 24/04/2013.

18. The contentions raised on behalf of the parties are required to be considered on the basis of such material and application of Rule 16 of the said Rules.

19. Rule 16(1) of the Rules specifies that leave shall not be claimed as a matter of right and that the management or the school committee shall have discretion to grant, refuse or cancel leave. Rule 16(2) of the Rules states that an application for leave shall ordinarily be made in good time before the date from which the leave or its extension is sought. It is further specified that even in exceptional cases, if the application cannot be made beforehand, it has to be made within 7 days from the date of absence. Rule 16(3) of the Rules provides that if an employee without sufficient cause fails to apply for leave within 7 days from the date of absence, it shall be treated as breach of discipline and such an employee shall be liable for disciplinary action after due enquiry. Rule 16(12)(b) of the Rules provides for the option available for the Competent Authority sanctioning leave to secure a second medical opinion on leave which is sought on medical ground. Rule 16(28) provides that an employee on extraordinary leave shall not be entitled to any leave salary.

20. In the present case, the respondent No.2 clearly violated the mandatory requirements of Rule 16. Since there is nothing on record to show that the purported letter/application dated 23/06/2012 was indeed submitted by the respondent No.2 before the petitioners, there is nothing on record to show that either an application was submitted by the respondent No.2 beforehand or that she had submitted such an application within seven days of her remaining absent from duties i.e. from 26/06/2012. By operation of Rule 16(3) of the Rules, the respondent No.2 was liable to be proceeded against for disciplinary action and in fact the petitioners had issued charge-sheet and initiated the process of such an enquiry. Therefore, violation of Rule 16 on the part of respondent No.2 is clearly made out by the material on record. It is also an admitted position that the respondent No.2 herself tendered her resignation on 06/07/2013. According to the petitioners, although they did proceed departmentally against the respondent No.2, since she resigned from service, the petitioners thought it fit not to continue the disciplinary action and instead resolved by resolution dated 15/08/2012, to grant extraordinary leave i.e. leave without pay to respondent No.2 for the aforesaid period of absence. In the service book also entry was made to the effect that the respondent No.2 had been on unauthorized leave from 26/06/2012 to 24/04/2013. In this backdrop, the contention raised on behalf of the petitioners is worth acceptance that the entry in the service book and the said resolution was taken by the petitioners to complete the service

record of respondent No.2, as she had resigned from service and for that very reason the petitioners decided not to proceed further with the enquiry.

21. In these circumstances, the contention raised on behalf of respondent No.2 cannot be accepted that since the petitioners did not proceed to complete the departmental enquiry they had initiated against her for unauthorized absence and when they had made the aforesaid entry and taken the said resolution regarding her absence, they could not withhold salary payable to her for the entire period of her absence in the academic year 2012-2013.

22. The learned counsel appearing for the petitioners is justified in relying upon decision of the Hon'ble Supreme Court in the case of Delhi Transport Corporation v. Sardar Sing (supra), wherein it is held, after referring to an earlier judgment in the case of State of M. P. v. Harihar Gopal, reported in (1969) 3 SLR 274 (SC), that treating absence as leave without pay after passing an order of termination is for the purpose of maintaining correct record of service. It is further mentioned in the said judgment that treating leave as leave without pay is not the same as sanctioned or approved leave. The learned counsel for the petitioners is also justified in relying upon judgment of the Hon'ble Supreme Court in the case of State of U. P. v. Madhav Prasad Sharma (supra), which in turn relied upon earlier judgment in the case of Mansing v. Union of India, reported in (2003) 3 SCC 464. Therefore, the said entry in the service book of respondent No.2 and the resolution taken by the petitioners to treat her absence as extraordinary leave i.e. a leave without pay, was a sustainable action, in the facts and circumstances of the present case. This is particularly so because the respondent No.2 has not been able to show how her absence for the period between 26/06/2012 to 24/04/2013, could be said to be authorized leave.

23. The contention raised on behalf of respondent No.2 that since she had leave to her credit, the same was correctly taken into account by respondent No.1 towards the said period of absence, can also not be accepted, because this would give premium to such behaviour on the part of employees. This would lead to a situation where leave availed in violation of Rule 16 of the Rules would still result in liability on the part of the employer to pay salary to an employee during the period of unauthorized absence. The learned counsel for the petitioners was justified in relying upon judgment of the Hon'ble Supreme Court in the case of S.C. Saxena v. Union of India (supra), wherein the Hon'ble Supreme Court held as follows:

"8. A final, if we may say so, desperate argument was made that the appellant had sufficient leave to his credit and, therefore, the respondents should have taken a liberal view in the matter and permitted him to resume duty when he attempted to resume in the year 1992 by sanctioning the leave that was available to his credit. In our view, the argument cannot be countenanced. Acceding to such an argument by courts, particularly this Court, has led to and will continue to lead to gross indiscipline in public service. We are unable to accept such an argument."

24. Even other wise, Rule 16(28) of the said Rules, specifically states that an employee on extraordinary leave shall not be entitled to any leave salary. In the present case, the aforesaid resolution passed by the petitioners specifically resolved to treat the absence of the respondent No.2 during the aforesaid period as extraordinary leave i.e. leave without pay. This action of the petitioners was clearly in consonance with the aforesaid Rule and, therefore, the respondent No.1 erred in holding against the petitioners in the impugned order. Another aspect of the present case is that according to respondent No.2, submission of purported letter/application dated 23/06/2012 and subsequent telegrams was sufficient to show that her leave could not be treated as unauthorized. It is already held by this Court herein above that the letter/application dated 23/06/2012 cannot be relied upon by the respondent No.2. Even if the telegrams were taken into consideration, they were merely dispatched by the respondent No.2 stating that she was sick further requesting for extension of leave for one month on medical grounds. The same was also in violation of Rule 16 of the said Rules and in any case, merely by sending such telegrams and giving intimation, it could not be said that the respondent No.2 had satisfied the requirement of law to claim that her absence could be treated as authorized leave. The learned counsel for the petitioners is justified in relying upon the judgment of the Hon'ble Supreme Court in the case of *Mithilesh Singh v. Union of India* (supra), wherein it is held that mere application for leave cannot be construed as proper intimation for absence. In fact, in the present case the very letter/ application dated 23/06/2012, is not shown to have been received by the petitioners and therefore, there is no substance in the contentions raised on behalf of respondent No.2.

25. There is also no doubt about the fact that the respondent No.2 never worked for the said period of absence. As it is held that the leave to her credit could not have been taken into account by the respondent No.1 while passing the impugned order, she was clearly not entitled to salary for the said period of unauthorized absence.

26. The learned counsel for the respondent No.2 sought to rely upon judgment of the Hon'ble Supreme Court in the case of *MCD v. State of Delhi*, reported in (2005) 4 SCC 605, to contend that since the petitioner had withheld relevant documents, it amounted to a fraud played on the Court. But, in this case, it cannot be said that any vital document was withheld by the petitioners. In fact, as noted above, the document relied upon by respondent No.2 i.e. letter/application dated 23/06/2012 could not be said to have been submitted by respondent No.2 before the petitioners. In fact, they specifically denied receipt of any such document. It was for the respondent No.2 to place on record material to prove that the said document was indeed submitted to the petitioners. This Court has come to the conclusion that the said document could not be relied upon and that there was much substance in the contention of the petitioners that the said document was created and it was an antedated document prepared by the respondent No.2, only in hindsight to claim that her absence for the aforesaid

period could not be treated as unauthorized absence. Therefore, reliance placed on the said judgment on behalf of the respondent No.2 is wholly misplaced. The other judgment on which the learned counsel for the respondent No.2 placed reliance i.e. Genpact India Private Limited v. Deputy Commissioner of Income Tax, reported in 2019 (11) JT SC 488, is wholly irrelevant to the controversy that arises in the present case. Therefore, the same can also not be relied upon by the learned counsel for the respondent No.2 for supporting contentions raised on her behalf.

27. In this backdrop, when the impugned order dated 03/05/2018, passed by the respondent No.1 is perused, it becomes clear that the said respondent completely failed to appreciate the material on record in the correct perspective while holding in favour of respondent No.2. In the facts and circumstances of the present case and by applying the relevant position of law, it is found that the respondent No.2 was not entitled to salary for the period of her unauthorized absence between 26/06/2012 and 22/04/2013. Therefore, the impugned order passed by the respondent No.2 is found to be unsustainable.

28. In view of the above, the writ petition is allowed. The impugned order passed by the respondent No.1 is quashed and set aside.

29. Rule is made absolute in the above terms. No order as to costs.