

**IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL
MUMBAI BENCH**

ORIGINAL APPLICATION NO 35 OF 2018

DISTRICT : NASIK

Shri Dilip Jagannath Ambilwade)
Working as Chief Administrative Officer,)
In the office of Additional Director)
[Family Welfare], Health Services)
Pune, having office at Behind the)
Pune Railway Station, Pune-1.)
R/o: Flat no. 1, Gayatri Darshan C.H.S,)
Datey Nagar, Gangapur Road,)
Nasik – 13.)...**Applicant**

Versus

1. The State of Maharashtra)
Through Principal Secretary,)
Public Health Department,)
Having office at 10th floor,)
G.T Hospital Campus Building,)
L.T Marg, Mumbai 400 001.)
2. The Director of Health Services,)
[M.S], Mumbai,)
Having office at Aarogya Bhavan,)
In the campus of St. Georges)
Hospital, P.D Mello Road,)
Mumbai 400 001.)...**Respondents**

Shri A.V Bandiwadekar, learned advocate for the Applicant.

Ms Savita Suryavanshi, learned Presenting Officer for the Respondents.

CORAM : **Shri Justice A.H Joshi (Chairman)**

RESERVED ON : **05.09.2018**

PRONOUNCED ON : **11.09.2018**

ORDER

1. Heard Shri A.V Bandiwadekar, learned advocate for the Applicant and Ms Savita Suryavanshi, learned Presenting Officer for the Respondents.

2. Applicant has approached this Tribunal challenging the order of suspension dated 12.10.2017, Exh. 'A', page 26, passed by the Government.

3. In view of the strong contest, the length of the paper book has escalated over 350 pages.

4. Limited points urged are as follows:-

- (i) The Government was not justified in suspending the applicant on account of the charges subject matter and circumstances.
- (ii) The action of the Government in declining to review the suspension after completion of period of 90 days is unjustified and suspension deserves to be revoked.
- (iii) In view of judgments Ajay Kumar Choudhary Vs. Union of India & Others, (2015) 7 SCC 291, State of Tamil Nadu Vs. Promod Kumar, IPS & Anr, Civil Appeal No. 8427-8428 of 2018 and Shri Naresh A. Polani Vs. The State of Maharashtra, O.A 611/2017, continuance of suspension beyond 90 days is contrary to law laid down by the Hon. Supreme Court, as followed by this Tribunal

5. Considering the rival contentions of the parties, this Tribunal has to decide following questions:-

- (a) Whether on the date of issue, the suspension order is justifiable in view of the facts and circumstances as were obtaining at the relevant time on the record of the Government?
- (b) Whether the action of the Government in refusing to review and revoke suspension after completion of 90 days is justified on facts and in view of the judgments in Ajay Kumar Choudhary Vs. Union of India & Others, (2015) 7 SCC 291, Shri Naresh A. Polani Vs. The State of Maharashtra, O.A 611/2017 and judgment of Hon'ble Supreme Court in State of Tamil Nadu Vs. Promod Kumar, IPS & Anr, Civil Appeal No. 8427-8428 of 2018,

6. It would be useful to make a brief reference to the facts of the case:-

- (i) The applicant worked between 2.3.1992 to 12.10.2000 as Assistant Registrar, Class-I in Yeshwantrao Chavan Open University, Nasik.
- (ii) The Respondent no. 1 appointed the applicant in the post of Chief Administrative Officer on probation period of 2 years by way of direct recruitment.
- (iii) On entry in Government service, applicant's initial pay was fixed by the applicant's immediate superior on the basis of last pay drawn by the applicant in his previous employment.
- (iv) The authorities declined to protect applicant's pay on the basis of his last pay drawn in his previous employment. Therefore, applicant approached this Tribunal at Aurangabad Bench and his plea was not entertained and the judgment of the Tribunal has attained finality.
- (v) In the aforesaid premises, the authorities took decision to recover the pay and allowances received by the applicant from the date of entry in the employment in excess of his entitlement, and also found that prima facie, the conduct of the applicant in receiving excess amount than entitlement, amounted to misconduct and proposed to deal with the

applicant for indiscipline and proposed suspension of the applicant.

(vi) Accordingly, impugned order of suspension has been passed.

7. In order to examine whether the suspension was justified only viewing window available to this Tribunal is to see the office note and record.

8. During the course of hearing the office note which proposed to suspend and on which the decision to suspend is reached, is tendered for perusal.

9. The said office note and record reveals that:-

(a) The applicant was selected as Administrative Officer in the process of direct recruitment.

(b) His earlier employment with Health Services, Nasik had already come to an end due to his dismissal which he has challenged before the Hon'ble High Court and in the Writ Petition the order of dismissal was set aside and applicant was permitted to resign the said post for enabling him to join new employment in the Government.

(c) Prima facie, it is not a case of transfer or appointment of an in-service candidate where continuation of earlier employment or computation of employment could be permitted.

(d) The Government has treated the conduct of the applicant to be an act of grave misconduct and hence on facts of the case the Government has chosen to deal with the

applicant for gave misconduct in the matter of employment.

(e) On the basis of material that was placed before the Government, the Government took decision to suspend the applicant.

10. The question as to whether on facts of the case as were available on record, whether the facts of case warrant suspension of a Government servant in contemplation of disciplinary enquiry is a matter of exclusive domain of the employer. The decision to suspend has to be based and is to be guided by subjective satisfaction based on record, as to whether the conduct subject matter is likely to lead to major penalty inter alia other grounds.

11. The conduct of recovering pay in the scale which a Government servant is not entitled to his own knowledge does, prima facie, amount to conduct which is a major misconduct and may entail to major penalty.

12. Moreover, applicant belongs to administrative cadre and he was fully conversant with the rules and regulations and it appears that he was himself instrumental and responsible for getting his initial basic pay to correspond to his last pay drawn.

13. Therefore, in the given facts of the case, whether suspension is justified is always a matter of exclusive and absolute discretion of the authority, and on facts of the case. From whatever has transpired from admitted facts, it is seen that the competent authority has after considering facts of the case and applying its mind thereto took a decision to order the suspension.

14. Therefore, on whatever has prima facie emerged, which may attain finality in either way, only after completing the disciplinary enquiry, cannot and ought not be a matter of scrutiny for judging as to whether on the day when the suspension was ordered, it was at all proper or justified.

15. It is not the applicant's case that the suspension has been ordered in absence of any material whatsoever with the Government. All that applicant pleads and has orally argued is that excess payment could be recovered, and receiving higher pay did not amount to misconduct.

16. Therefore, the present case does not fall within the class of cases where a decision is taken without there being any material on record. Adequacy or sufficiency of material before the Government at the time of taking decision does not fall within the scope and ambit of judicial review, unlike cases of absence of material whatsoever or a decision on irrelevant consideration or malafides at the level of decision making authority.

17. Therefore, the question as to whether suspension was justified on facts cannot be gone into in the present set of facts for the matters discussed hereinabove.

18. Next question to be considered is as to whether on facts it is justified on the part of the State Government to have continued the suspension on the ground that the misconduct is of very serious nature.

19. Though the suspension was ordered on 12.10.2017, and the charge sheet was finally issued on 21.2.2018. It is urged by learned P.O that the charge sheet was sent for service. Service

Report was awaited almost for over six months and since the report of service was not received, the Enquiry Officer was not appointed, which was done on 16.8.2018. It is pertinent to note that this Tribunal passed a sort of eye opening order, drawing the attention of the Secretary to the fact that there appears to be a deliberate delay in serving the charge sheet or securing report of service as if a trojan horse is planted in the office of Public Health Department and someone occupying some position in the department wants to help the applicant. Though Secretary, Public Health Department has filed affidavit and denied existence of trojan horse or secret agenda of someone to help the applicant, fact remains that no efforts were made to trace whether charge sheet is served and to process the file for initiation of D.E, particularly in the background that applicant is due for superannuation in 2018 itself. Be it that, as exists, when according to the Government, the matter is very serious, no reply has come forward showing or justifying reason or cause of delay in institution of D.E, and even an expression of remorse has not come forward. Affidavit of Principal Secretary Shri Pradeep Vyas is consciously scant on the points raised by this Tribunal in its order dated 10.8.2018.

20. Record shows that Secretary, Medical Education and Research, wrote in his own hand that 'suspension need not be revoked because matter is very serious' but did not bother to see as to whether Enquiry Officer was not appointed.

21. Prima facie, misconduct is committed, and prima facie it is serious as well. However, the serious is more told than actually perceived and treated by the Government.

22. The question of law as to whether continuation of suspension beyond 90 days is justified is now not any more open for debate being a matter which is judicially concluded.

23. This Tribunal took a view in Shri Naresh Alwandar Polani Vs. State of Maharashtra, O.A 611 of 2017, by order dated 23.10.2017, relying on the judgment of Hon'ble Supreme Court in the case of Ajay Kumar Choudhary Vs. Union of India & Ors, (2015) 7 SCC 291 and also in view of observations contained in Dr. Narender Omprakash Bansal Vs. The State of Maharashtra & Ors, W.P 11987/2015 as follows:-

“9. It is now well settled by virtue of judgment in Ajay Kumar Choudhary (supra) that notwithstanding the language as may have been employed in the conditions of service, now it is not open to the Government to continue the suspension beyond three months as a mandatory rule of precedent.”

(Quoted from page 10 of Paper Book)

24. Learned advocate for the applicant has in addition placed reliance on the judgment of Hon'ble Supreme Court in State of Tamil Nadu Vs. Promod Kumar IPS & Anr, Civil Appeal No. 8427-8428 of 2018, wherein it is held as follows:-

“ 23. This Court in Ajay Kumar Choudhary Vs. Union of India, (2015) 7 SCC 291 has frowned upon the practice of protracted suspension and held that suspension must necessarily be for a short duration.....”

25. Thus, now the ratio laid down in Ajay Kumar Choudhary's case is reiterated in case of State of Tamil Nadu Vs. Promod Kumar supra and the view taken by this Tribunal in Shri N.A. Polani's case (O.A 611/2017) is required to be followed without making an exception, being based on a mandatory precedent.

26. The point of view of the Government and Secretary of Public Health Department that applicant's suspension need not be revoked because misconduct subject matter is a very serious, is heavily watered down by department's own act of failure in its neglect in serving the charge sheet and inordinate delay in appointing an Enquiry Officer. Appointment of Enquiry Officer was eventually done only after this Tribunal passed a long and eye opening order on 10.8.2018, and also made stern observations.

27. Learned Presenting Officer tried to put last grain of weight in the balance by bringing to the notice of the Tribunal subsequent development. The said subsequent development is that by order dated 20.8.2018 applicant has been compulsorily retired in the matter of misconduct for which charge sheet was served on 11.4.2011.

Be it, as it exist, because by virtue of revocation of suspension on completion of 90 days thereof, as would only mean in the present scenario, entitlement to the applicant for salary and allowances as if he was not suspended or the suspension is deemed to have been revoked.

28. In view of the subsequent development of compulsory retirement of the applicant, it follows that virtual reinstatement of the applicant is now an event not to occur. Therefore, the subsequent development of compulsory retirement of the applicant does not have any effect on the deemed revocation of suspension.

29. In the result, Original Application is partly allowed as follows:-

- (a) The challenge to the suspension is rejected.
- (b) Continuation of suspension beyond 90 days is disregarded and it is directed that applicant shall be deemed to have been reinstated after completion of 90 days of actual suspension and all consequential benefits thereof shall follow treating that suspension ceased to exist 90 days after the date of order of suspension.
- (c) In the facts and circumstances of the case, parties are directed to bear their own costs.

Sd/-
(A.H. Joshi, J.)
Chairman

Place : Mumbai
Date : 11.09.2018
Dictation taken by : A.K. Nair.