MAHARASHTRA ADMINISTRATIVE TRIBUNAL
NAGPUR BENCH NAGPUR
ORIGINAL APPLICATION NO. 138/2016.

Shri Manohar Omkarappa Mudnaik,
Retired Govt. Servant
R/o Gajana Prasad, Ladekar Layout,
Manewada Road,
Nagpur. ------------- **Applicant.**

Versus

The State of Maharashtra,
Through its Secretary,
Jalsampada Department
Mantralaya, Mumbai

2. The Executive Engineer,
Quality Control Division (Ajani),
Vainganga Nagar, Nagpur.

3. The Accountant General,
Maharashtra II, Civil Lines,
Nagpur.

4. Shrimati V.V. Sawant,
Desk Officer , Room No. 2,
1st Floor, Rural Development and
Water Resources Department,
Mantralaya, Mumbai. ----**Respondents.**

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1. Shri Uday Dastane, Advocate for the applicant.
2. Shri S.A. Sanis, Presenting Officer for the Respondent No. 3.
3. Shri S.P. Palshikar, Advocate for R/1, 2 and 4.

CORAM : S.S. Hingne: Member (J)
DATE : 16th January, 2017

O R D E R

The retired Sectional Engineer has filed the O.A. challenging the communication dtd. 26/10/2005 (Annexure-A-2, page 32), by which his absence from duty is treated by adjusting the leave period.

2. Heard Shri Uday Dastane, ld. Counsel for the applicant, Shri S.A. Sanis, ld. P.O. for R/3 and Shri S.P. Palshikar, ld. Counsel for R/1 and 2 and 4. Perused the record.

3. The litigation has chequered facts. The applicant was appointed as a Junior Engineer somewhere in 1976. He was promoted as Sectional Engineer in 1981. He joined at Nagpur on 1/10/1992 on transfer. It reveals from the record that he was transferred vide order dtd. 30/3/1995 from Nagpur to Chandrapur. The ld. Counsel for the applicant has relied on the observations made in Dr. ***Ramesh Motilal Khandelwal –vs. Zilla Parishad, Akola (1992 Mh.L.J.)325 and Diwakar Pundilkrao Satpute Vs- Zilla Parishad, Wardha and others (2004 II CLR***

946) wherein it is held that if the transfer order is illegal and the employee's absence during the intervening period on that ground cannot be treated as unauthorized absence. However, the transfer order is not under challenge. It appears that this is the root cause which has given rise to the spate of litigations.

4. To appreciate the controversy it will be desirable to give the list of cases :-

Sr No	Page No.	Litigations	Decided on	Prayer Clause	Re-marks
1.		O.A.1029/1993 Review Appn.98/94	3/6/2002		
2.	51	O.A. 315/1998	28/1/2000		
3.	165	C.A.184/2000 in Rev.Appn.655/ 2000 in O.A.315/1998	28/1/2000		
4.	102	W.P.No.2246/2001 (int.order)(against order dtd.28/1/2000 in O.A.315/98)	23/6/2005		
5.	81	" (decided)	20/12/2007		
6.	166 177	C.A.9338/2007 in Review 14/2003 O.A.84/2003	12/11/2003 27/4/2004	Rejected	

7.		C.A.101/2008 in Cont.Pent.No.450/ 2008			
8.	182	W.P/2506/2004	20/12/2007		
9.	177	W.P.4911/2010	22/2/2016		

5. In the present O.A. the prayer clauses of the applicant are as under :-

a) To quash and set aside the impugned, false, fraudulent claims order dated 26/10/2005 Annexure A-2 passed by the Respondent No. 4 and against High Court order dated 23/6/2005 passed in Writ Petition No.2246/01.

b) And to grant consequential reliefs of Pay, Pensionary benefits by ignoring order dated 26/10/2005 and to pay arrears to applicant with interest thereon @ 12% per Annam w.e.f. 23/6/2005 in view of High Court order onwards, as already ordered by M.A.T. vide dated 28/01/2000 in O.A. No.315/98 and also confirmed by Hon'ble High Court vide order dated 23/06/2005 in Writ Petition No. 2246/01.

c) To direct the Respondent to produce memo or show cause notice issued to the applicant with receipt of acknowledgement calling explanation above absence or abandonment from duty w.e.f. 27/05/1995 to 5/3/1996 and 29/10/1996 to 2/11/1996 (before effecting voluntary retirement deemed automatically on 3/11/1996 under rule 66(2) of M.C.S. (Pension) Rule 1982 following the provision of rule 63(6) and 66(2) of M.C.S. (Leave) Rule 1981 and resolution dated 9/1/1998, 2/6/2003 and 23/8/2005.

d) To direct the Respondent to produce the extra ordinary leave application made in writing by applicant under rule 63(1)(b) of M.C.S. (Leave) rule 1981 to sustain the certificate incorporated in the false illegal order dated 26/10/2005 Annexure A-2 demanding extra ordinary leave w.e.f. 27/5/95 to 5/3/1996 and 29/10/1996 to 2/11/1996.

e) To direct the respondents to produce the copy of show cause notice issued under rule 47(i) of M.C.S. (Pension) rule 1982

as per provision made in Resolution dated 13/1/2003 vide Para 2.2.

f) Grant any such relied as thought expedient and proper in the fact and circumstances of the case in the interest of justice."

6. Perusal of the impugned order enunciates that it is as good as a replica of the earlier order passed on 28/9/2001 (Annex-R-1, page-165). If these two order are juxtaposed, it is crystal clear that both orders decided the nature of the absence of the applicant by passing the identical order regarding the period of his absence from 27/5/1995 to 2/11/1996. Both orders are passed subject to the final decision in W.P. No.2246/2001 which is decided on 23/6/2005. That W.P. was preferred against the O.A. No.315/1998. The difference of the order dtd. 28/9/2001 and 26/10/2005 is that the former was decided pending the W.P. and latter is decided after the O.A. is decided.

7. It is worthwhile to note that the first order dtd. 28/9/2001 was challenged by filing the O.A. No.84/2003 which is decided on 12/11/2003 (Annex.R-2, page-166) . The O.A. was dismissed.

8. The ld. Counsel for the respondents has ardently argued that the aspects which are raised in the present O.A. mainly challenging the order dtd. 26/10/2005 are already decided by the Tribunal in O.A. No.84/2003 because both the orders passed on 28/9/2001 and 26/10/2005 are decided identically. However, only because the order dtd. 26/10/2005 is issued, the applicant dragged the respondents to the litigation. The ld. Counsel for the respondents proceeded to argue that on this ground alone the O.A. deserves to be dismissed.

9. The applicant claimed that he has not applied and therefore his absence for that period cannot be treated as leave. However, it reveals from the record that the applicant has submitted an application on 6/3/1996 on the ground that his mother suffered

heart attack. It reveals from the record that he has also submitted the leave application on 24/1/2001.

10. According to the applicant he was working as a Presenting Officer at Nagpur and therefore after the mention that the applicant was relieved on 26/5/1995 is not correct because the applicant had handed over the charge of the cases as a Presenting Officer to Mr. Naidu on 15/3/1996. The applicant was holding the technical post as Engineer. No documents are filed that he was how and for which period and in which cases he was appointed as a Presenting Officer. That was the subsidiary work if any . It cannot be said that only because he had not handed over the charge of that work, he was not relieved.

11. There is also dispute between the parties about the fact that the applicant appeared at Nagpur and submitted the bills after travelling from Chandrapur which were not released. The D.E. was also proposed against the applicant. The applicant has also

submitted the application for voluntary retirement twice. The first is on 26/5/1995 and second on 31/7/1996. All the above aspects were carried out in different courts and review petition, C.As, W.Ps , Cont. Petn. etc. were also filed.

12. It is worthwhile to note that no specific pleadings are made and documents are filed about the factual aspects and on the points raised. Without making specific averments and raising challenge on particular points the maize is created and the easy matter has been made mazy by creating litigation. The order of recovery was also challenged. However, fact remains that all the aspects which are in the present O.A. are considered and decided in the O.A. No. 84/2003. The review petition No. 14/2003 preferred against that order was also rejected vide order dtd. 27/4/2004.

13. It is also contended that the impugned order is against the order passed by the Hon'ble High Court dtd. 23/6/2005 (Annex.A-13, Page-102) in W.P.

No.2246/2001. By this order, the W.P. was partly allowed. In the O.A. No.315/1998 (Annex.A-10, page-51), it was held that the applicant was continued to work till 5/4/1997 despite of the fact that in the application of voluntary retirement, the applicant had sought the voluntary retirement from 3/11/1996. The Hon'ble High Court held that the applicant stood retired on that date and his service period cannot be extended to 5/4/1997 and the Maharashtra Administrative Tribunal's order to that extent was quashed. Their Lordships further declared that the employee stood retired voluntarily from service with effect from 3/11/1996 and is entitled in all consequential benefits which are applicable in this regard. By no stretch of reasoning it can be said that the impugned order is against the High Court's order made by Their Lordships as narrated above.

14. Unless the period of absence is determined , no pension case of the applicant could have been prepared. No doubt the applicant has come with the case that he worked during that period but in absence

of any cogent and clinching material his contention cannot be relied on. Moreover, the respondents had no reason to pass the orders contrary to the factual aspects. No such malice is attributed so as to hold that the applicant is victimized. During long span of such dispute several officers must have changed. It cannot be heard that everyone has acted against the interest of the applicant. It is the applicant's case that one Mr. Deshpande, Executive Engineer has passed his bill but subsequently that was turned down. Due to the paucity of the material on record such aspect does not take to anywhere or to lead any conclusion.

15. Moreover when the applicant has submitted three leave applications i.e. dtd. 26/5/1995, 6/3/1996 and 24/1/2001 and the same are not forthcoming , it cannot be said that the order deciding the nature of the leave is illegal. When that aspect not only shakes the edifies of the applicant's claim but holds such items become feeble, the rest of the prayers do not survive. No documents about the explanation

and the resolutions dtd. 9/1/1998, 2/6/2003 and 23/8/2005 referred in the prayer clause 'C' are filed. Moreover when the applicant is litigating continuously from two decades, he cannot now reopen the old aspects in this O.A. The present O.A. is filed on 5/3/2016. The impugned order dtd. 26/10/2005 was already challenged in W.P. No.4911/2010. The said W.P. is decided on 22/2/2016 (Annex.A-1, page-29) and that now the matter came up before the Tribunal.

15. The ld. P.O. proceeded to argue that twice the matter was decided by the judicial orders. The observations in the latter in time hold the field. Per contra, is the contention of the ld. counsel for the applicant that whatever the observations are made in the first decision, the same stand endorsed by the higher courts when the matter was carried before the higher courts. However, it is manifest that the aspect of illegality and validity of the transfer was not in any way directly an issue even in the first case. Therefore the observations if any made therein cannot be said to

be based on the decision on merit by Tribunal. If the higher court only endorsed the order without considering the aspects discussed in the order that does not mean that the higher court had also stamped the decision in entirety. At the most it can be said that the higher or appellate court had endorsed the final order which was under challenge. Meaning thereof whatever the secondary aspects are considered by the Tribunal do not mean that those aspects are also upheld by the judicial verdict by the Hon'ble High Court.

16. The ld. counsel for the applicant urged that the verdict of the trial court if upheld by the higher courts, the principle of merger comes into play and the observations made by the trial court became the observations made by the higher courts. It will be fetched to say that the aspects which were not at stake for decision but the trial court has considered those ancillary aspects and the higher court has only upheld the final order does not mean that the higher court had endorsed or accepted the ancillary

observations also. Not only that but the matter which was not at stake, not decided on merit and passing observations are made, the same cannot be held to have been upheld by the higher courts. Under such circumstances, the principle of merger is not attracted because there is no judicial verdict by the trial court on that aspect and the trial court was not called upon to decide that issue.

17. The Id. counsel for the applicant has relied on several cases, one of that is ***Kishorilal –vs- Sales Officer, District Land Development Bank and Others (2006) 7 SCC 496***. In the said case, the aspect of service of notice and age were in issue. The point was not raised before the court below and the finding of fact was not challenged before the Hon'ble High Court and hence it is held at this stage the said plea was not available. In the ***Kunhayammed and others- Vs- State of Kerala and another [(2000) 6 SCC 359]*** case, Their Lordships had enunciated the doctrine of merger. However, in the case in hand for the reasons

adumbrated above, it has to be held that the doctrine is not attracted at all. In the ***Chandi Prasad and others –vs.- Jagdish Prasad and others [(2004) 8 SCC 724],*** it is laid down that when the appellate court passes the decree, the order of the trial court merges in it. There cannot be quarrel with the said proposition. However at the cost of repetition it is to be held that in the instant case, the observations made by the Tribunal are ancillary in nature and the Hon'ble High Court had not touched on that point and aspects in the order. Reliance is also placed on the case of ***Shri Umed –Vs- Raj Singh and others [(1975) 1 SCC 76].*** In that case the earlier decision was not considered and therefore Their Lordships observed that the said points need not have been decided but that matter was to be considered by the Hon'ble Apex Court. In the case in hand, both the two cases are decided long back and this Tribunal is not sitting as an appellate authority over the earlier matters decided by the Tribunal. Reliance is also placed on a case of ***B.N. Upadhyay –vs. Union of India and 4***

others (2016 SCC OnLine Bom 9211). As observed earlier, the observations made by the Apex Court of the Land in this case are also to be followed provided the matter is decided factually and completely by the Tribunal in the earlier case. In case in hand the Tribunal had made the observations incidentally and therefore such observations cannot be said to have attained finality as a judicial verdict. It is worthwhile to note that the Hon'ble High Court had not touched those aspects so as to hold now this Tribunal is barred by constructive res-judicata to hold otherwise. Support is sought from ***K. Sivaramaiah –Vs- Rukmani Ammal [(2004) 1 SCC 471]*** . In this case the permission was sought to withdraw the suit at the appellate stage and therefore it is held that thereby even the judgments passed by the trial court are wiped out. In the case of ***Managing Director, Madras Metropolitan Water Supply and Sewerage Board and another -vs- R. Rajan and others [(1996) 1 SCC 338],*** it was held that the principle of obiter decta was

invited by the appellant himself and therefore it was not open him to challenge.

18. For the reasons discussed above, the applicant cannot get a sigh of relief from the cited cases also. When the applicant was continuously agitating his matters, he ought to have challenged the said transfer order and got it decided to be illegal. Thereafter he could have got the benefit as made by Their Lordships in the case of ***Dr. Ramesh Chandra Tyagi –vs. Union of India and others*** and etc. cases (cited supra). However, he had not adopted that recourse and went on to challenge the same orders of deciding nature of period of absence and adjusting it towards leave, only because due to the litigation on the same aspect the orders are issued from time to time. Had the transfer order held to be illegal, the matter could have been considered otherwise. However in the absence of the same, there can be no substance in the submission of the applicant.

19. Having considered the matter in all its ramifications and in the light of the above reasons, the O.A. deserves to be rejected and it can be decent barial of the matter.

Consequently the O.A. is rejected with no order as to costs.

(S.S. Hingne)
Vice-Chairman.

Skt.

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