

**IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL,
MUMBAI**

ORIGINAL APPLICATION NO.493 OF 2021

**DISTRICT: MUMBAI
SUBJECT: LEAVE PERIOD**

Shri Sanjay Govind Parab,)
Age : 45 Yrs., Working as Police Head Constable)
(Wireless) (Buckle No.11934) in the office of)
East Region Wireless Control Room, Chembur,)
Mumbai – 70, R/o. L/3/C, Flat No. 703, Sankalp)
C.H.S., Pratiksha Nagar, Sion, Mumbai-22.)...**Applicant**

Versus

The Deputy Commissioner of Police,)
Wireless Division, Mumbai. Having office at)
New Administrative Building, 20th Floor,)
M.K. Road, Mumbai - 32.)...**Respondents**

Shri Arvind V. Bandiwadekar, learned Advocate for the Applicant.

Smt. Archana B. Kologi, learned Presenting Officer for the Respondents.

CORAM : M.A. Lovekar, Member (J)

RESERVED ON : 28.04.2022.

PRONOUNCED ON : 02.05.2022.

JUDGMENT

1. Heard Shri A.V. Bandiwadekar, learned Advocate for the Applicant and Smt. Archana B.K., learned Presenting Officer for the Respondents.

2. In this application the Applicant is seeking following relief.

“By a suitable order / direction, this Hon'ble Tribunal may be pleased to set aside the impugned order dated 22.4.2021 passed by the Respondent [EXHIBIT-A] under which he denied to the Petitioner the pay and allowances of the period between 2.6.2019 to 27.2.2020 by treating the same as without pay and accordingly the Petitioner be granted all

the consequential service benefits, as if the impugned order had not been passed.”

3. Case of the Applicant is as follows:-

The Applicant was working as Police Head Constable in Police Control Room. He was transferred by order dated 30.05.2019 from Mumbai to Dhule. He challenged this order in O.A. No.524/2019. The order dated 30.05.2019 qua the Applicant was quashed and set aside. The Respondents were directed to reinstate the Applicant on the post from which he was transferred, within two weeks from the Date of the Judgment i.e. 20.01.2020 (Exhibit B). By filing representation (Exhibit C) dated 04.03.2020, the Applicant prayed that the period between 01.06.2019 to 20.09.2020 be treated as duty period and salary and allowances for this period be paid in view of Judgment dated 20.01.2020 passed by this Tribunal in O.A. No.524/2019. He made two more representations (Exhibit D & E) dated 29.09.2020 and 06.12.2020, respectively seeking the same relief. His representations went unheeded. He ought not to have been deprived of pay and allowances for the aforesaid period since this Tribunal had, while allowing O.A. No.524/2019, quashed and set aside order of his transfer whereby the said order was rendered *non-est*. The order of transfer was quashed and set aside on the ground of competency of the authority / body to pass the same. Hence, the doctrine of “NO WORK NO PAY” could not have been invoked. Hence, this application for the aforesaid relief.

4. Affidavit-in-Reply of the Respondent is at pages 23 to 28. To this Reply the Respondent has attached order dated 12.06.2019 passed in O.A. No.524/2019 (Exhibit R-1). By this order this Tribunal issued notices to the Respondents and by making specific observation declined to grant interim relief.

5. By communication dated 12.10.2020 (Exhibit R-2) steps were taken to forward original service book of the Applicant to the establishment of Deputy Commissioner of Police, Wireless, Mumbai. By this communication the Deputy Commissioner of Police, Wireless, Mumbai was informed by the office of Superintendent of Police, Dhule that the Applicant had not joined on the transferred post at Dhule.

6. The Respondent has also attached copy of the impugned order dated 22.04.2021 (Exhibit R-3).

7. By order dated 16.06.2021 (Exhibit R-4) Joint Commissioner of Police (Administration), Mumbai declined to interfere with the impugned order dated 22.04.2021.

8. Rejoinder of the Applicant is at pages 34 to 37. In this Rejoinder the Applicant asserted.

“1. At the outset I say that, admittedly the Hon'ble Tribunal while allowing my earlier O.A. recorded the positive findings to the effect that the impugned order of transfer passed by the Respondent in that matter was without any authority and without any competence and as such non-est, void-ab-initio meaning thereby that as if the said order was never passed. Thus for all legal and practical purposes I must be deemed to have discharged my duties at the place from where I was transferred, namely, at Mumbai.

2. I say that admittedly the Hon'ble Tribunal was pleased to decide my earlier O.A. on merits. Thus the legality of the impugned order of transfer was tested judicially and the same came to be set aside. Thus here is a case where I can justifiably invoke the doctrine of "nativity" with a request to the Hon'ble Tribunal to appreciate my contention that my earlier order of transfer was bad from its inception.

3. I say that in such circumstances, only because initially I was not granted stay by the Hon'ble Tribunal to the order of transfer and only because I did not in that event join at the place of transfer, namely, Dhule, it cannot

be said that I am not entitled for the pay and allowances of the concerned period during which I did not work at Dhule.

I say that if such contention of the Respondent is accepted, then in that event never any justice would be rendered to the concerned Government servant like me and in that event the authorities like the Respondent would feel of having free hand to pass any kind of the transfer order of the Government servant to harass him even where such authority has no power and competence to pass such order of transfer.”

9. By filing Sur-Rejoinder (at pages 38 to 42) the Respondent sought to refute all contentions of the Applicant.

10. It was argued by learned Advocate Shri A.V. Bandiwadekar that O.A. No.524/2019 filed by the Applicant challenging his transfer was allowed by this Tribunal because the order of transfer was bad in law, it was required to be treated as *non-est* and consequently pay and allowances for the relevant period were required to be paid to the Applicant. In support of this submission attention of the Tribunal was drawn to what was held in paras 11, 12 & 13 in the judgment dated 20.01.2020 passed in O.A. No.524/2019.

“11. Though Additional Director General of Police, Wireless had forwarded the proposal to Government on 20.11.2015 there was no response to it. The Additional Director General of Police, Wireless, therefore, constituted committee i.e. PEB at his level headed by himself with four members as contemplated under Section 22J-3 of Maharashtra Police Act which provides for establishment of PEB for specialized agencies. The said Committee/PEB resolves to transfer the Applicant in view of default report received from Deputy Commissioner of Police, Wireless Mumbai. Thus, the fact remains that there is no Notification of the constitution of said PEB by State Government in Official Gazette. Besides there is nothing on record to show that one of the member of PEB is from backward class as mandated under provisions of Maharashtra Police Act. There has to be member from backward class in all PEB constituted at all levels and if none of the member of PEB belongs to backward class then additional member from the backward class is required to be appointed. However, in the

present case, the record does not indicate whether any of the members of the said PEB was from backward class. Secondly, there is no publication of constitution of said PEB by the State Government in its official gazette.

12. Publication of PEB in the Official Gazette by State Government with one member from backward class is mandatory requirement as explicit from the word used 'shall' in Section 22J-3 of 'Act of 1951'. As such it is not discretionary but mandatory requirement of law. Needless to mention that, when legislature provides for doing particular thing in a particular manner, then it has to be done in that manner only so as to comply the express provisions of law. However, in the present case, admittedly, there is no publication of PEB which purportedly resolved to transfer the applicant in Official Gazette which in my opinion is fatal to the respondents as the decision taken by such committee which is not formed in accordance to mandatory provisions of law cannot be said legal and valid. In other words, Notification of PEB with one of the member of backward class in its official gazette is sine-qua-non for the sustainability of the decision taken by such committee and in absence of it, the order passed by such committee are quite vulnerable in law.

13. In view of above discussion, there is no alternative except to conclude that transfer order of the Applicant is not sustainable in law for non-adherence of compulsory requirement of law.”

According to the learned Advocate Shri A.V. Bandiwadekar afore-quoted observation in O.A. No.542/2019 will clearly show that the order of transfer impugned therein was required to be treated as never having been in existence and consequently it would follow that the Applicant would be entitled to get pay and allowances for the period which was erroneously treated to be period of unauthorized absence by the impugned order. To support this submission reliance is placed on **Ramesh Motilal Khandelwal v/s. Zilla Parishad, Akola 1992 Mh.L.J.**

325. In this case the facts were as under:-

“A stenographer with a Zilla Parishad was by an order dated 6-12-1985 transferred to the post of Senior Assistant in the pay scale which he was drawing as a stenographer. At the time when he was transferred, a new rule was substituted

by Maharashtra Zilla Parishads District Services (Recruitment) (Third Amendment) Rules, 1985, under which such transfer was not permissible. The new rule had come into force on 22-8-1985. The transfer order was ultimately reviewed by the Zilla Parishad and he was reposted in his Original post of stenographer. It was directed that the period from 6-12-1985, the date of transfer to 4-8-1986 the date on which he was reposted in this original post should be treated partly as earned leave and partly without pay. The said decision was challenged by writ petition on the ground that the period concerned could not be treated as leave and in view of illegal transfer he was entitled to be paid even though he had not worked. There was no provision in the rules under the Maharashtra Zilla Parishad and Panchayat Samitis Act dealing with the situation.”

On these facts it was held –

“The order of transfer being contrary to statutory rules was illegal and void and therefore even assuming that the petitioner did not obey the same and was absent during the intervening period, he would be entitled to the wages for the period when the illegal order was set aside.”

While arriving at the afore-drawn conclusion it was observed –

“The Supreme Court has in the case of Nawabkhan Abbaskhan v/s. State of Gujarat, AIR 1974 SC 1471 held that it is not necessary to obey an order which is illegal and void and without obeying that order, that order can be challenged by the person concerned. In that case the question was whether the person who was externed should have obeyed the order before challenging it. The Supreme Court held that such an order was illegal and void being in violation of the fundamental rights of the petitioner and, therefore, it was not necessary to obey the same.”

The Applicant further relied on “**Diwakar Pundlikrao Satpute v/s. Zilla Parishad, Wardha and Ors., 2004(3) Mh.L.J. 151**. In this case, by relying on the case of **Ramesh Motilal Khandelwal (supra)** it was held as under:-

“17. Coming to the merits of the matter, insofar as the first grievance of the petitioner is concerned, it is undisputed, that, after considering the representations of the petitioner, the respondent - Block Education Officer has cancelled the transfer order, dated 17-1-1984 with retrospective effect, i.e.

17-9-1984, vide his order dated 21-1-1985. The petitioner, vide order dated 31-3-1985 was directed to join at Primary School Nara (Boys). The question, as to whether, the said period of 182 days could be treated as unauthorised absence, is no more res-integra.”

Facts of the case in hand were dealt with in the following manner.

“17.... 16. The Block Education Officer, having considered the petitioner's representation, and having realised that, the order dated 17-1-1984, was an illegal order, has himself cancelled, the said order vide order dated 21-1-1985 w.e.f. 17-9-1984. The Block Education Officer vide another order dated 31-3-1985, has directed the petitioner to join at Primary School, Nara (Boys). The order dated 24-3-1986, by which the aforesaid period of 182 days, has been treated, as unauthorised absence and the order dated 25-2-2000, by which the respondent Chief Executive Officer, has granted ex-post-facto sanction, are therefore, not sustainable in the eye of law and liable to be quashed and set aside.”

11. The Applicant has also relied on **“Nawabkhan Abbaskhan v/s. State of Gujarat (1974) 2 Supreme Court Cases 121**. In this case it is observed:-

“When a competent court holds such official act or order invalid, or sets it aside, it operates from nativity, i.e. the impugned act or order was never valid.”

12. On the other hand, the Respondent has relied on judgment dated 24.09.2021 passed by this Tribunal in O.A. No.1049/2019. In this application communication dated 27.08.2019 issued by the Respondent thereby rejecting the claim of the Applicant to treat period of her absence from 01.06.2018 to 27.02.2019 as duty period / compulsory waiting period was challenged. In this case by order dated 31.05.2018 the Applicant was transferred to Sangli and she was relieved on 01.06.2008. She chose to remain absent instead of joining at Sangli inspite of the fact that in O.A. No.668/2018 filed by her challenging her transfer no stay order was operating. O.A. No.668/2018 was disposed of on the basis of statement made by the concerned official that the Department was

considering reposting of the Applicant on her previous post. In view of this statement O.A. No.668/2018 was disposed of.

While dismissing O.A. No.1049/2019 this Tribunal relied on "**Sukhdeo Pandey Vs. Union of India (2007) 7 SCC 455**" wherein it is held.

"It is well-settled principle in service jurisprudence that a person must be paid if he has worked and should not be paid if he has not."

While dismissing O.A. No.1049/2019 this Tribunal reiterated that in O.A. No.668/2018 the transfer impugned therein was not declared to be bad in law and hence it could not be treated to be a nullity. This Tribunal reiterated that the Respondent – Department had shown consideration for grievances of the Applicant regarding her transfer and had decided to repost her on her previous post. According to the learned P.O., these details clearly show that there was no question of branding transfer order dated 31.05.2018 as bad in law.

13. The Respondent has also relied on the judgment dated 05.04.2022 passed by this Tribunal in O.A. No.749/2019. In this O.A. the Applicant had challenged the order dated 14.06.2018 passed by Respondent No.1 therein treating period of absence of the Applicant as Extra Ordinary Leave. In this case the Applicant was transferred. He was relieved on 31.12.2009.

While deciding the O.A. No.749/2019 this Tribunal observed.

"Admittedly, the Applicant was relieved on 31.12.2009 and he was bound to join at Kolad at 01.01.1990. However, he neither joined at Pen where he was posted nor submitted any application seeking time to join or for permission to continue holding public awareness programs. Indeed, the Government had received complaints that Applicant was misusing the permission to hold public awareness program, and therefore, the Government by letter dated 30.06.2010 cancelled the permission. This being so, the Applicant would not have indulged in such public awareness program, if any, without concurrence of Government or his immediate superior authority of Pen. The Applicant ought to have joined at Pen and would have sought permission afresh and it is only in the event of grant of permission, he would have

continued his public awareness program. However, Applicant unilaterally remained absent, and therefore, his contention that he was conducting public awareness program which was in fact in addition to his regular duties cannot be accepted to treat his absence from 01.01.2010 to 18.05.2011 in respect of which recommendations were made to the Government for consideration. As such, no weight can be given to the recommendations dated 27.08.2014 and 17.11.2014 as well as 28.05.2015. Apart, this is in respect of period 01.01.2010 to 18.05.2011 and not at all concerned with subsequent absent from 26.07.2011 to 01.04.2012. There is absolutely no explanation about absence from 26.07.2011 to 01.04.2012.”

In the aforesaid factual background the O.A. was dismissed by this Tribunal.

14. The Respondent has further relied on judgment dated 30.03.2022 passed by this Tribunal in O.A. No.102/2021. In this case the Applicant challenged the order dated 18.12.2019 whereby his absence from 27.12.2018 to 29.12.2019 was treated as a commuted leave (for 50 days), earned leave (97 days) and extra ordinary leave without pay (160 days). In this case by order dated 19.12.2018 the Applicant was transferred from his Head Quarter to Police Station, Mhaswad. He was relieved on 20.12.2018. However, he did not join on the transferred post. He chose to remain absent. Later on, Respondent No.2, by order dated 22.10.2019 cancelled transfer order of the Applicant considering his family difficulties and posted him back in Police Head Quarters in Satara. The Applicant, however, joined only on 30.11.2019. The period between the date of cancellation of transfer order of the Applicant i.e. 19.12.2018 and the date of his actual joining is 30.11.2019 which comes to 307 days which was treated as aforesaid, was challenged by the Applicant by filing O.A. While dismissing O.A. No.102/2020 this Tribunal observed.-

“He did not challenge transfer by availing legal remedy. If transfer order was illegal, he ought to have challenged the transfer order availing legal remedy and it is in that event of stay only, he could have justified for not joining at Mhaswad Police Station.”

This Tribunal held that the Applicant had remained absent without availing any legal remedy and such absence could only be treated to be willful. By observing thus the O.A. No.102/2020 was dismissed.

15. The Respondent has also relied on the judgment dated 18.11.2021 passed by this Tribunal in O.A. No.225/2019. In this O.A. the Applicant challenged the order dated 30.09.2016 issued by the Government treating period of his absence of 174 days as extra ordinary leave without pay and allowances. While dismissing the O.A. this Tribunal adverted to the following facts:-

“Material to note that the Applicant was transferred by order dated 16.12.2014 from Pune to Raigad and was relieved on 16.12.2014 as seen from his own application dated 11.06.2015 which was at Page No.17 of Paper Book. Here, material to note that the Applicant did not join at Raigad and unilaterally proceeded on leave without making any application. It is for the first time on 11.06.2015 that is after enjoying absence of 174 days, he applied for grant of commuted leave on medical ground for 54 days as well as earned leave of 119 days. That time also he did not annex any medical certificate along with his application. The medical certificate was later on annexed along with his 2nd application dated 11.06.2015. It was medical certificate issued by private hospital namely Chatrapati Shahu Accident and General Hospital, Latur dated 13.04.2015. In this certificate all that certified that Applicant was under treatment for cervical lumber spondylosis and sciatica as OPD patient. Except that bare certificate no other medical certificate or prescription of medicine is forthcoming.”

16. In the instant case it is the contention of the Applicant that the impugned order cannot be sustained because while allowing O.A. No.524/2019 this Tribunal had quashed and set aside the transfer order dated 30.05.2019 qua the Applicant mainly on the ground that it was not in consonance with mandatory provision of Section 22J-3 of Maharashtra Police Act, 1951 and hence pay and allowances for the relevant period ought to have been paid to the Applicant instead of

treating the said period as period of unauthorized absence. There is merit in this submission. This submission receives support from the rulings on which reliance is placed by the Applicant. Facts of the cases relied upon by the Applicant and facts of the case in hand tally as far as the proposition of law i.e. an order which is bad in law should be treated to be *non-est* or a nullity is concerned. On the other hand facts of the cases decided by this Tribunal on which the Respondent sought to rely are clearly distinguishable. I have referred to the facts of these cases. It may be reiterated that in O.A. No.1049/2019 the earlier order was passed in O.A. No.668/2019. It was based on the concession/statement made on behalf of the Respondent and there was no determination declaring the order impugned to be bad in law. In O.A. No.749/2019 the Applicant simply chose to remain absent without availing the legal remedy of challenging order of his transfer. Same was the case in O.A. No.102/2021 and O.A. No.225/2019.

17. It is pointed out by learned Advocate Shri A.V. Bandiwadekar for the Applicant that in the impugned order (Exhibit A) there is reference to Rule 29 of Maharashtra Civil Services (General Conditions of Services) Rules, 1981 which was not at all relevant. Perusal of Rule 29 title of which is "Relieving Government servant to intimate probable date of joining to the Government servant to be relieved." fully supports this contention.

18. It was argued by learned P.O., Smt. Archana B.K. that once this Tribunal had declined to pass interim order staying the effect and implementation of the impugned order, the Applicant was duty bound to join on the transferred post and his failure to do so would amount to contempt since want of interim order meant that the impugned order had to be obeyed. It may be observed that in the instant case the impugned order is held to be *non-est*. Therefore, it can be treated to have never come in existence and hence the question of subsistence or

otherwise of interim order in the O.A. will not adversely affect the merits of the Application.

19. For the reasons discussed hereinabove the impugned order cannot be sustained. Hence, the order.

ORDER

A) Original Application is allowed in terms of prayer clause (a) and the impugned order dated 22.04.2021 is quashed and set aside. This order shall be complied within 6 weeks.

B) No order as to costs.

Sd/-

**(M.A. lovekar)
Member (J)**

Place: Mumbai

Date: 02.05.2022.

Dictation taken by: N.M. Naik.

Uploaded on: _____