

**IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL
MUMBAI**

ORIGINAL APPLICATION NO.1049 OF 2019

DISTRICT : PUNE

Smt. Arifa Riyaj Shaikh.)
Age : 43 Yrs., Working as Staff Nurse in)
Sasoon General Hospital, Pune – 1 and)
Residing at Shanti Prime Building,)
Flat No.105, N.D.A. Road, Warje Malwadi,)
Pune – 411 058.) **...Applicant**

Versus

The Director.)
Medical Education & Research, M.S,)
Mumbai and having office at Government)
Dental College and Hospital Building,)
4th Floor, St. George's Hospital Compound,)
P.D'Mello Road, Mumbai - 400 001.) **...Respondent**

Mr. Arvind A. Bandiwadekar, Advocate for Applicant.

Mrs. K.S. Gaikwad, Presenting Officer for Respondent.

CORAM : SHRI A.P. KURHEKAR, MEMBER-J

DATE : 24.09.2021

JUDGMENT

1. The challenge is to the communication dated 27.08.2019 issued by Respondent thereby rejecting the claim of the Applicant to treat absence period from 01.06.2018 to 27.02.2019 as a duty period/compulsory

waiting period invoking jurisdiction of this Tribunal under Section 19 of the Administrative Tribunals Act, 1985.

2. Following are the undisputed facts to be borne in mind while deciding the present O.A.

(i) The Applicant was working as Staff Nurse at Sassoon General Hospital, Pune from 2006.

(ii) She was due for transfer in general transfers of 2018 and accordingly, in pursuance of transfer order dated 31.05.2018, she was transferred from Pune to Sangli and was relieved on 01.06.2018.

(iii) The Applicant, however, did not join at Sangli.

(iv) On 02.07.2018, the Respondent cancelled transfer order dated 31.05.2018 but again on the same day, he issued another order staying the order of cancellation meaning thereby transfer order dated 31.05.2018 were in operation.

(v) The Applicant had filed O.A.No.668/2018 challenging the transfer order dated 31.05.2018 which came to be disposed of by the Tribunal on 20.08.2018 by passing the following order.

“1. Heard Shri L.S. Deshmukh, the learned for the Applicant and Shri A.J. Chougule, the learned Presenting Officer for the Respondents.

2. Learned P.O. for the Respondents mentions as per the instructions received from Shri Kaushal Thakur, Office Superintendent in the office of Director, Medical Education & Research, Mumbai states that the department has considered the posting of the Applicant at Pune where he was working before the impugned transfer order.

3. The Respondent is directed to inform the Applicant as soon as the decision is taken.

4. On instructions of the Applicant, the learned Advocate for the Applicant states that in case the Applicant is posted at Pune, he is satisfied with the prayer and therefore he prays for disposal of the Original Application.

5. In view of the above, Original Application is disposed of with liberty to the Applicant to move before this Tribunal for payment of pending period.”

(vi) The Respondent then filed R.A.No.18/2018 in O.A.No.668/2018 stating that the statement made by concerned Officer before the Tribunal was incorrect without knowing full details, and therefore, sought to withdraw the said statement by recalling the order dated 20.08.2018 reproduced above.

(vii) R.A.No.18/2018 came to be allowed on 01.11.2018 by the Tribunal by passing the following order :-

“1. Heard Shri A. J. Chougule, the learned Advocate for the Applicants (Ori. Respondents) and Shri L.S. Deshmukh, the learned Advocate for the Respondent (Ori. Applicant).

2. Learned P.O. for the Applicants (Ori. Respondents) mentions that the statement made before the Tribunal by the concerned officer has been done without having full details at his statement and disposal. His statement is at Exb. RA-3. Learned P.O., therefore, seeks to recall this order.

3. Learned Advocate for the Respondent (Ori. Applicant) opposes the same.

4. However, in view of the facts and reasons stated in the RA., R.A. is allowed and the order issued on 20.08.2018 is recalled.

5. Learned P.O. is directed to file detailed reply on behalf of the Respondent in O.A. and file the same on 20.11.2018 and serve the copy of the same in advance to learned Advocate for the Respondent (Ori. Applicant).

6. S.O. to 20.11.2018.”

(viii) Accordingly, O.A.No.668/2018 was restored to be filed for hearing on merit which came to be disposed of on 25.02.2019 since Respondent tendered letter dated 21.02.2019 stating that impugned transfer order will be cancelled and Applicant will be reposted in Pune.

(ix) O.A. was accordingly disposed of with liberty to the Applicant to make representation about her entitlement to pay and allowances for the absence period.

(x) The Respondent then issued transfer order of the Applicant thereby posting her at Pune and accordingly, she joined at Pune on 28.02.2019.

(xi) The Applicant had made representation dated 11.03.2019 requesting the Respondent that her absence period from 01.06.2018 to 27.02.2019 be treated as compulsory waiting period and claimed pay and allowances for the said period *inter-alia* contending that despite the statement made by the concerned official, the Department delayed the issuance of reposting order at Pune without there being any fault on her part.

(xii) However, the Respondent by impugned communication dated 07.08.2019 rejected the representation stating that the absence period from 01.06.2018 and 27.02.2019 cannot be treated as duty period/waiting period since she herself chooses not to join at Sangli despite transfer order dated 31.05.2018 and the said period can be treated as Extra-Ordinary Leave period.

3. It is on the above background, the Applicant has challenged legality of order dated 27.08.2019 in the present O.A.

4. Shri A.V. Bandiwadekar, learned Advocate for the Applicant sought to assail the impugned order dated 27.08.2019 *inter-alia* contending that Respondent itself had created mess by cancelling transfer order dated 31.05.2018 by order dated 02.07.2018 and again on same day, recalled the order of cancellation which has created utter confusion amongst the employees. He further contends that legality of transfer order dated 31.05.2018 was challenged by filing O.A.668/2018 which came to be disposed of in view of statement made by concerned official of the

Department that the Department is considering the posting of the Applicant at Pune but again delayed the issuance of posting order of the Applicant at Pune which ultimately came to be issued late. It had delayed the joining of the Applicant at Pune, and therefore, the Applicant cannot be said at fault and the said period from 01.06.2018 to 27.02.2019 was required to be treated as compulsory waiting period. He further sought to contend that the transfer order dated 31.05.2018 itself is bad in law, and therefore, it being nullity, the Applicant was not required to join at Sangli. According to him, had O.A.No.66/2018 decided on merit, it would have been allowed and this aspect needs to be considered by the Tribunal in this proceeding as a collateral proceeding. In this behalf, he sought to rely on certain observations in the Judgment ***AIR 1974 SC 1471 (Nawabkhan Abbaskhan Vs. State of Gujarat)***.

5. Per contra, Mrs. K.S. Gaikwad, learned Presenting Officer submits that the Applicant was overdue at the time of general transfers of 2018 and accordingly, she amongst others came to be transferred to Sangli by order dated 31.05.2018 and was relieved on 01.06.2018. But she choose to remain absent without joining at Sangli though there was no stay to the impugned transfer order in O.A.No.668/2018, and therefore, she cannot claim pay and allowances for the absence period not it can be treated as compulsory waiting period. She further submits that O.A.No.668/2018 came to be disposed of on the basis of wrong statement made before the Tribunal and the Applicant is now trying to take the benefit of it. According to her, though the Applicant had overstayed at Pune, the Respondent again by taking sympathetic view posted her again at Pune and the Applicant cannot be allowed to take the benefit of this situation. She, therefore, submits that the impugned communication needs to interference.

6. In view of submissions advanced at the Bar, the issue posed for consideration is whether the absence from 01.06.2018 to 27.02.2019 in the facts and circumstances of the present matter could be considered as

duty period/compulsory waiting period entitling the Applicant to full pay and allowances for the said period and the answer is in emphatic negative.

7. Admittedly, the Applicant was posted at Pune in 2006 and she was overdue. Accordingly, by order dated 31.05.2018 in general transfers of 10 Nurses, she was transferred to Sangli and admittedly, relieved on 01.06.2018. However, she chooses not to join at Sangli and remained absent at her own peril. Furthermore, though she had challenged the legality of transfer order dated 31.05.2018, admittedly, there was no stay to the transfer order, and therefore, she was bound to join at Sangli. There is growing tendency amongst Government servants to remain glued or stuck to a particular place of posting. They manage to stay at one place for years together or for a maximum period and when got transferred, choose not to obey the transfer orders and again try to get choice posting and joined only on getting posting of one's choice. Such tendency needs to be curbed by passing an appropriate order when a Government servant defy the transfer order without there being any stay to the transfer order, so as to maintain the discipline. Be that as it may, in the present case, admittedly, there was no stay to the transfer order dated 31.05.2018, and therefore, the Applicant ought to have joined at Sangli but she again choose to remain absent at her own peril. She had challenged the legality of transfer order dated 31.05.2018 by filing O.A.No.668/2018 but it came to be disposed of without being decision on merit.

8. True, O.A.No.668/2018 was disposed of on the basis of statement made by concerned official that the department is considering the reposting of the Applicant at Pune where she was working at the time of issuance of transfer order. This statement made by the learned P.O. on the basis of instructions cannot be construed as a vested right to get again posted at Pune, particularly when she had already spent more than 13 years in Pune. It appears that the said statement was made on

the basis of incorrect information, and therefore, the said statement was recalled and R.A. was allowed. Thereafter again when O.A.No.668/2018 was taken-up for hearing on merit, the Respondent again considered the Applicant's case and reposted her at Pune taking sympathetic view of the matter. The Applicant, accordingly, again joined at Pune on 28.02.2019. As such, the fact remains that there was no decision of O.A.No.668/2018 on merit so as to accept the Applicant's contention that the impugned transfer order dated 31.05.2018 was bad in law. Indeed, it was general transfer order, and therefore, the question of its' treating as bad in law is nothing but surmises and conjunctures.

9. The submission advanced by the learned Advocate for the Applicant that had O.A.No.668/2018 decided on merit, it would have resulted in his favour treating transfer order dated 31.05.2018 bad in law and nullity is nothing but assumption in absence of any such declaration by the Tribunal. The submission advanced is obviously misconceived and fallacious.

10. Even assuming for a moment that transfer order dated 31.05.2018 was bad in law, in that event also, the Applicant having not joined at Sangli, she could not be said entitled to pay and allowances for the said period on the principle of 'no work no pay'. It is more so when there was no stay to the transfer order and Applicant was obliged to obey the transfer order and to join at Sangli. It is only on decision in O.A. on merit, if transfer order is quashed, a Government servant can be reposted on the post from which he is transferred, but if he remained absent and abstains from work, he certainly not entitled to pay and allowances on the principle of 'no work no pay' and in such situation to treat the period of absence as a duty period and to grant pay and allowances would be against the public policy and loss of public exchequer.

11. In this behalf, reference can be made to the decision of Hon'ble Supreme Court in **Sukhdeo Pandey Vs. Union of India (2007) 7 SCC 455**. In Para No.17, the Hon'ble Supreme Court held as under :-

“Before parting with the matter, however, we may make one thing clear. From the record, it appears that after the appellant was reverted from the cadre of Postman to his substantive post of EDBPM, he has not joined duty and has not worked. No interim relief was granted by any court including this Court in his favour. In the circumstances, it was obligatory on him to report for duty as EDBPM. He, however, failed to do so. We, therefore, hold that if the appellant has not worked, he will not be paid salary for the period for which he has not worked. 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. In other words, the doctrine of 'no work, no pay' is based on justice, equity and good conscience and in absence of valid reasons to the contrary, it should be applied. In the present case, though the appellant ought to have joined as EDBPM, he did not do so. He, therefore, in our considered opinion, cannot claim salary for that period. But he will now be allowed to work as Postman. He will also be paid salary as Postman but we also hold that since the action of the respondent authorities in reverting him to his substantive post of EDBPM was strictly in consonance with law, the appellant would be entitled to pensionary and other benefits not as Postman but as EDBPM which post he was holding substantively.”

12. In **Sukhdeo Pandey's** case (cited supra), the Applicant was reverted from the cadre of Postman to the post of EDBPM which reversion was challenged by him. However, there was no interim relief in his favour. Therefore, it was incumbent on his part to join as EDBPM but he remained absent. In that case, material to note that, though Hon'ble Supreme Court ultimately allowed the Petitioner Sukhdeo to work as Postman, it is clearly held that he had not worked on the post of EDBPM on his reversion, and therefore, he was not entitled for the salary on the principle of 'no work, no pay'. The Hon'ble Supreme Court has emphasized that the doctrine of 'no work, no pay' is based on justice, equity and good conscience and in absence of valid reasons to the contrary, it should be applied. In the present case also, there are no such reasons much less valid to grant pay and allowances to the Applicant for the period in which she abstains from work at her own peril.

13. The decision in **Nawabkhan's** case (cited supra) referred by the learned Advocate for the Applicant is of no assistance to him in the present case. It was a case arising from externment order passed under Section 56 of Bombay Police Act and criminal prosecution under Section 142 of Bombay Police Act for the breach of externment order. During the pendency of criminal trial, the externment order was quashed under Article 226 of the Constitution on the ground of failure to give an opportunity of hearing to the accused under Section 59 of Bombay Police Act. It is in that context, the Hon'ble Supreme Court held that there is breach of fundamental right of the accused under Article 19 of the Constitution and the accused, therefore, could not have been held guilty for flouting an order which never legally existed. It is on this background, in Para No.20 which is relied by the learned Advocate for the Applicant, the Hon'ble Supreme Court observed that the order which is void may be directly or collaterally challenged in legal proceedings and where a competent court held such order invalid or set aside, it operates from nativity. In Para No.20 on which much reliance is placed is as follows :-

“We express no final opinion on the many wide-ranging problems in public law of illegal orders and violations thereof by citizens, grave though some of them may be. But we do hold that an order which is void may be directly and collaterally challenged in legal proceedings. An order is null and void if the statute clothing the administrative tribunal with power conditions it with the obligation to hear, expressly or by implication. Beyond, doubt, an order which infringes a fundamental freedom passed in violation of the audi alteram partem rule is a nullity. When a competent court holds such official act or order invalid, or sets it aside, it operates from nativity, i.e. the impugned actor order was never valid. The French jurists call it L'indevistence or outlawed order (p.127 Brown and Garner, French Administrative Law) and could not found the ground for a prosecution. On this limited ratio the appellants are entitled to an acquittal. We allow his appeal.”

As such, these observation of Hon'ble Supreme Court cannot be read out of context. In that matter, externment order itself was void and in that context, it was observed that order which is void may be directly and collaterally challenged in legal proceedings. Whereas, in the present case, there is no such decision in O.A.No.668/2018 declaring transfer

order dated 31.05.2018 bad in law, nor it can be treated void and nullity. Indeed, it was general transfer and in absence of stay, the Applicant was bound to obey the same and to join at Sangli. Therefore, this decision of Hon'ble Supreme Court is of no assistance to the learned Advocate for the Applicant.

14. Likewise, the decision referred by him delivered by this Tribunal in **O.A.No.703/2016 (Ms. Kiran P. Aghav Vs. Superintendent of Police, Pune) decided on 31.03.2017, O.A.No.194/2012 (Shri Kutubuddin G. Khan Vs. Superintendent of Police, Pune) decided on 06.09.2012** and decision in **O.A.No.614/2017 (Pramod H. Sawakhande Vs. State of Maharashtra) decided on 27.03.2018** are totally irrelevant, since those pertains to mid-term and mid-tenure transfers and set aside by the Tribunal having found not in consonance with the provisions of 'Maharashtra Government Servants Regulation of Transfers and Prevention of Delay in Discharge of Official Duties Act, 2005. Whereas, in the present case, O.A.No.668/2018 was disposed of without decision on merit.

15. In view of aforesaid discussion, I have no hesitation to sum-up that the claim of the Applicant for pay and allowances for the absence period from 01.06.2018 to 27.02.2019 is rightly rejected by the Respondent, since she herself choose to remain absent on duty in defiance of transfer order. Only because during the pendency of O.A.No.668/2018, the Respondent had shown sympathy to consider her reposting at Pune that itself cannot be construed that transfer order dated 31.05.2018 was illegal. Once the Applicant was transferred by order dated 31.05.2018 and there was no stay to the transfer order, she was bound to join but she abstains from work at her own peril and joined at Pune only after getting reposting at Pune. In such situation, the claim for pay and allowances has to be rejected. The filing of such O.A. is nothing but abuse of the process of law and nothing else. Hence, the following order.

ORDER

The Original Application stands dismissed with no order as to costs.

Sd/-
(A.P. KURHEKAR)
Member-J

Mumbai

Date : 24.09.2021

Dictation taken by :

S.K. Wamanse.

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