IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL, MUMBAI

ORIGINAL APPLICATION NO.1133 OF 2017
(Subject : Pay and Recovery)

DISTRICT : MUMBAI

Dr. Vasudev Ramchandar Kamat,)
In-charge Medical Officer, ESIS, Service Dispensary,)
MGM Hospital Campus, Parel, Mumbai and residing at)
Dhanvantri, Building No.2, Flat No.14, 6th floor,)
J.J. Hospital Campus, Byculla, Mumbai.)**... Applicant**

Versus

1. Government of Maharashtra,)
Through Principal Secretary,)
Public Health Department,)
Mantralaya, Mumbai 400 032.)

2. Commissioner,)
Office of Employees State Insurance Scheme,)
Panchdeep Bhavan, 6th floor, N.M. Joshi Marg,)
Lower Parel, Mumbai 400 013)

3. Administrative Medical Officer,)
ESIS, 3rd floor, ESIS Hospital Building,)
Ganpatrao Jadhav Marg, Worli, Mumbai.)

4. Director of Accounts & Treasury,)
Pay Verification Unit, Having its office at)
Thackerse House, 3rd floor, Near International)
Post Office, Ballard Pier, S.V. Road, Fort,)
Mumbai 400 001.)**... Respondents**

Shri M.D. Lonkar, Advocate for the Applicant.

Ms. S.P. Manchekar, Chief Presenting Officer for the Respondents.

CORAM : **SHRI A.P. KURHEKAR, MEMBER(J)**

DATE : **03.07.2019**

J U D G M E N T

1. Heard Shri M.D. Lonkar, learned Advocate for the Applicant and Ms. S.P. Manchekar, learned Chief Presenting Officer for the Respondents.

2. The Applicant has challenged the impugned orders of July, 2017 issued by the Government as well as order dated 18.10.2017 issued by the Respondent No.3, thereby withdrawing the increment paid to the Applicant during the period of his suspension and recovery thereof from Pay and Allowances.

3. Briefly stated facts giving rise to this Original Application can be stated as under :-

The Applicant is serving as Medical Officer. By order dated 10.11.2005, he was placed under suspension in contemplation of Departmental Enquiry (D.E.). Accordingly, charge-sheet was issued on 26.09.2006 and D.E. was initiated. On conclusion of the D.E, Respondent No.1 imposed punishment of stoppage of three increments with cumulative effect. Being aggrieved by it, the Applicant has preferred an appeal and by order dated 08.10.2014, the order of punishment was modified and substituted by stoppage of one increment without cumulative effect. The Applicant preferred Review Petition wherein by order dated 28.04.2016, the order of punishment was substituted with punishment in the form of censure. In the meantime, the Applicant was reinstated in service. However, the question posed was about the suspension period from 10.11.2005 to 06.11.2007. The Respondent No.1 by order dated 18.03.2017 treated the period of suspension as suspension period, except for pension purpose and Pay & Allowances was restricted to 95%. The Applicant made representation in view of the order of treating the period from 10.11.2005 to 06.11.2007 as suspension period and prayed for increment during the said period. However, the Respondent No.1 by order passed

in July, 2017 informed the Applicant that he will not be entitled to increment during the period of suspension. On the basis of it, the Respondent No.3 in view of objection raised by Pay Verification Unit as well as the order of Government of July 2017 directed for recovery of increment already paid to him during the period of suspension as well as the excess payment of Pay and Allowances on account of increment released in favour of the Applicant by order dated 18.10.2017.

4. The Applicant in the present O.A. challenged the order of withdrawal of increment during the period of suspension from 10.11.2005 to 06.11.2007 and the consequent recovery contending that the recovery has been ordered without issuance of show cause notice and secondly, rule does not prohibit the payment of increment during the period of suspension.

5. Shri M.D. Lonkar, learned Advocate for the Applicant sought to contend that the order of recovery has been issued without issuing the show cause notice to the Applicant, and therefore, it being the violation of principles of natural justice, the same is unsustainable in law. Secondly, he placed reliance on the judgments passed by Maharashtra Administrative Tribunal, Nagpur Bench in ***O.A.No.260 of 2014 (Rajendra Shalikram Manke Vs. State of Maharashtra & 2 Ors.)*** decided on 25.03.2015 and in ***O.A.No.57 of 2004 (Chandrashekhar Manohar Sanhal Vs. State of Maharashtra & 2 Ors.)*** decided on 15.10.2004. On the basis of these two orders, he urged that, as the matter of judicial proprietary and considering doctrine of precedent, this Tribunal is required to decide the application in the same manner.

6. Par contra, Ms. S.P. Manchekar, learned Chief Presenting Officer for the Respondents urged that mere non-issuance of notice before passing the order of recovery, does not initiate the impugned orders as the issuance of notice would have been mere formality and reply even if would have been given by the Applicant,

it would not have changed the conclusion in view of non-entitlement of the Applicant to the increment during the period of suspension, as the period undergone in suspension is not treated as period on duty. She referred to Rule 72(7) of the Maharashtra Civil Services (Joining Time, Foreign Service, and Payments during Suspension, Dismissal and Removal) Rules, 1981 [hereinafter referred as ('Joining Time Rules 1981' for brevity) and also referred Rule 9(14) of Maharashtra Civil Services (General Conditions of Services) Rules, 1981 (hereinafter referred as 'General Conditions Rules 1981' for brevity) and Rule 39 of M.C.S. (Pay) Rules, 1981 (hereinafter referred to as "Pay Rules 1981' to brevity).

7. As regard the decision rendered by Maharashtra Administrative Tribunal, Nagpur Bench referred to above, she submits that these decisions are quite distinguishable and cannot be construed as precedent, as specific provisions were not brought to the notice of Tribunal.

8. Issue posed for consideration is whether the Applicant is entitled to earn increment during the period of his suspension i.e. from 10.11.2005 to 06.11.2007 and whether the impugned orders are sustainable in law. Undisputedly, the Applicant was subjected to D.E. wherein initially, the punishment of withholding of three increments with cumulative effect was imposed, but later in Review Petition, it was substituted with the punishment of censure.

9. The Applicant was under suspension from 10.11.2005 to 06.11.2007. Admittedly, after reinstatement of the Applicant in service, a show cause notice was issued to him as to why the period of suspension should not be treated as suspension period and Pay and Allowances should not be restricted to 75%. The Applicant submitted his explanation on 04.01.2017. Having considered the

explanation submitted by the Applicant, the Respondent No.1 by order dated 18.03.2017 passed order which is as follows :-

शासन निर्णय

डॉ. व्ही. आर कामत, वैद्यकीय अधिकारी, गट-अ, राज्य कामगार विमा योजना रुग्णालय, वरळी यांच्याविरुद्ध महाराष्ट्र नागरी सेवा (शिस्त व अपील) नियम १९७९ मधील नियम ८ अन्वये केलेल्या विभागीय चौकशीअंती डॉ. कामत याना दि. ०१.१२.२०१६ च्या शासन आदेशान्वये "ठपका ठेवणे" हि शिक्षा बजवण्यात आली असल्याने, त्यांचे निलंबन अंशत: समर्थनीय ठरते. त्यामुळे त्यांचा दि.१०.११.२००५ ते दि. ०६.११.२००७ हा निलंबन कालावधी महाराष्ट्र नागरी सेवा (पदग्रहण अवधी..... इ.) नियम १९८१ मधील नियम ७२(५) व ७२(८) मधील तरतुदीनुसार फक्त सेवानिवृत्ती-तवेतन वगळता इतर सर्व प्रयोजनार्थ निलंबन कालावधी म्हणून गाण्यात यावा. सदर कालावधीतील त्यांचे वेतन व भ-ते ९५: पर्यंत सिमित करण्यात यावेत. सदर कालावधीत त्यांना देण्यात आलेल्या निर्वाह भ-त्याची रक्कम समायोजित करुन व भ-ते अदा करण्यास शासन मान्याता देण्यात येत आहे.

(underlined mine)

10. As such by order dated 18.03.2017 entire period of suspension was treated as suspension period except for pension and Pay and Allowance was restricted to 95% invoking Rule 72 (7) of 'Joining Time Rules 1981' which is as under :-

> *"**72**(7) In a case falling under sub-rule (5), the period of suspension shall not be treated as a period spent on duty, unless the competent authority specifically directs that is shall be so treated for any specified purpose."*

11. As such, this is not the case where the Applicant was fully exonerated from the charges leveled against him. In fact, earlier the punishment of withholding of three increments was imposed but in Review, it was substituted with the punishment of censure. This being the position, the fact remains that the suspension undergone by the Applicant cannot be termed as "wholly unjustified". On the contrary, in view of the order of censure, only Pay and Allowances were restricted to 95% and importantly, the suspension period was treated as suspension except for the purpose of pension.

12. True, as per Rule 36 of Maharashtra Civil Services (Pay) Rules, 1981 (hereinafter referred to as 'Pay Rules 1981'), an increment shall ordinarily be drawn as a matter of course unless it is withheld as a penalty under the relevant provisions

of 'Discipline and Appeals Rules 1979'. Needless to mention that the said Rule applies to an employee who is on duty and it has no application where the suspension period has been treated as suspension period by passing specific order on conclusion of D.E.

13. Needless to mention that for entitlement to increment, a Government servant must be on duty. As per Rule 9(14) of the 'General Conditions Rules 1981', the duty includes the services as probationer, joining time, etc. but it does not include period of suspension. The very fact that the period of suspension is not included in the definition of duty goes to show that the suspension period cannot be considered for grant of increment. When the Government servant is put under suspension, he is paid Subsistence Allowance and not regular Pay and Allowances. By virtue of suspension, he is kept away from discharging the official duties, and therefore, the period undergone in suspension cannot be considered as period spent on duty, unless on conclusion in the Departmental Enquiry, the employee is fully exonerated and the order to that effect is passed by the Competent Authority under Rule 72 of 'Joining Time Rules 1981'. In this reference, it would be useful to refer Rule 39 'Pay Rules 1981'. The perusal of it shows that the duty period counts for increment includes leave, extra-ordinary leave, deputation period, period spent on training, etc. and importantly, it does not provide that the suspension shall be counted for increment.

14. Thus, there is conscious exclusion of treating suspension period as duty period in the Rules referred to above. This conclusion is obviously for the reasons that such period of suspension needs to be determined as to whether it is justified or not, only after conclusion in D.E. while passing the order to that effect after giving opportunity to the concerned delinquent. Thus, the conjoint reading of Rule 39 of 'Pay Rules 1981', Rule 72(7) of 'Joining Time Rules 1981' and Rule 9 of 'General

Conditions Rules 1981', leaves no doubt that for entitlement to increment, the Government servant must be on duty.

15. Shri M.D. Lonkar, learned Advocate for the Applicant could not point out any specific provision in support of his contention that the Applicant is entitled to increment during the period of suspension despite having found guilty for the charges levelled against him. Indeed, the period of suspension is not included in duty period in the Rules referred to above. It can be treated as duty period only in case the Competent Authority directs so. Whereas in present case, the Respondent No.1 in order dated 18.03.2017 has categorically held that except pension purpose, the suspension period be treated as suspension period.

16. Thus, position emerges from the conjoint reading of the above referred Rules and the order dated 18.03.2017 that the suspension period cannot be equated with duty period unless the Competent Authority directs so, which normally happens where the employee is fully exonerated from the charges, and therefore, the question of grant of releasing increment during the period of suspension does not survive. Suspension is always regulated or governed by the subsequent orders to be passed on conclusion in D.E. or Criminal cases.

17. Now turning to the absence of notice before passing the impugned order of recovery, it is material to note that before passing the order dated 18.03.2017, a show cause notice was issued to the Applicant as to why the period of suspension should not be treated as suspension period, to which the Applicant has submitted his reply on 04.01.2017. As such, before issuance of order under Rule 72 of 'Joining Time Rules 1981', a show cause notice was admittedly issued to the Applicant. As regard the impugned order of recovery, it is obvious that earlier the increments

were released and consequent to it, the Pay and Allowances were paid. However, the objection was raised by Pay Verification Unit for release of increment during the period of suspension and this fact was within the knowledge of the Applicant. In this context, it is material to note that the Applicant himself made representation on 03.06.2017 stating in his opinion that the increment released earlier is in consonance with the Rules. In representation, he stated that he came to know about the objection raised by Pay Verification Unit for grant of increment during the period of suspension and requested the Government to clear the objections raised by Pay Verification Unit, so that the recovery will not be made. Thereafter again, the Applicant made representation on 08.08.2017 addressed to Respondent No.2 - Commissioner, Employees State Insurance Scheme stating that it would be inappropriate to withdraw the increments already paid to him. These representations dated 03.06.2017 and 08.08.2017 are on Page Nos.114 and 119 of the Paper Book.

18. In view of the above representations, it is obvious that the Applicant was aware of the proposed action of recovery and he had already submitted his contention in his representations. This being the position, it cannot be said that the Applicant was subjected to any prejudice for absence of formal show cause notice before issuance of order of recovery dated 18.10.2017. In such situation, issuance of show cause notice prior to order of recovery dated 18.10.2017 would have been a mere formality.

19. In this context, learned C.P.O. referred to the judgment of Hon'ble Supreme Court in ***(2000) 7 Supreme Court Cases 529 (Aligarh Muslim University & Ors. Vs Mansoor Ali Khan, Civil Appeals No.4780 of 2000 with No.4781 of 2000) decided on 28.08.2000***. The Hon'ble Supreme Court while discussing the doctrine of "useless formality" and the issuance of notice in compliance of principles of natural justice

held that there can be certain situations in which an order passed in violation of natural justice need not be set aside under Rule 226 of the Constitution of India, particularly where no prejudice is caused to the concerned person. It has been further clarified by the Hon'ble Supreme Court that mere violation of principles of natural justice itself would be treated as prejudice and '*defacto*' prejudice needed to be proved. There must have been some real prejudice to the complainant and not a merely technical infringement of natural justice. In fact situation, the absence of notice under Rule 5(8)(i) of Aligarh Muslim University Revised Rules, 1969 the Hon'ble Supreme Court held that even if no notice is given, the position would not have been different because that particular explanation should not be treated as satisfactory, and therefore, the absence of issuance of notice cannot be treated to have caused any prejudice.

20. Now turning to the facts of present case, as stated above, the Applicant had already made representations on 03.06.2017 and 08.08.2017 thereby raised objection and requested to confirm the effects of increments already given to him during the period of suspension. As such, even if the notice would have been issued to him prior to impugned order of recovery, he would have replied in the same manner as per his representations made earlier and it would not have been made any difference in view of legal position of infringement of rules adverted to above in Pension Rules, which do not provides that duty period include the period of suspension.

21. The learned Advocate for the Applicant could not point out any express provision for issuance of show cause notice, as a mandatory, before the order of recovery dated 18.10.2017. The issuance of notice is in observance of principles of natural justice. In the present case, the Applicant was aware about the objection raised by Pay Verification Unit and made representations requesting the authorities

to confirm the increments already granted to him during the period of suspension. Whereas in law, the suspension is not included in duty period and secondly, in view of specific order passed on 18.03.2017, the period of suspension is treated as suspension period for all purpose except pension. Where recovery is being made on account of wrong payment of increment to which the App licant was not entitled in Service Rules, the principles of nature justice will not apply as an inherent requirement much less fatal to the right of recovery. As such considering the facts and circumstances of the present matter, in my considered opinion, the non-issuance of notice prior to passing of order of recovery dated 08.10.2017 will not render the recovery order illegal.

22. In so far as judgments in ***O.A.No.260 of 2014 and in O.A.No.57 of 2004*** relied by learned Advocate for the Applicant is concerned, I have gone through the judgments and found it quite distinguishable and are of little assistance to the Applicant in the present situation. In ***O.A.No.57 of 2004***, the Tribunal was dealing with the issue of grant of increment during the period of suspension while D.E. was pending. It is in that context, when the employee was reinstated by revoking the order of suspension, directions were issued to release increment falling during the period of suspension. The Tribunal, however, made specific observations on the Applicant's right to receive salary for the suspension stating that it will be decided by the Competent Authority on the basis of enquiry report. As such, in that case, the D.E. was pending but the employee was reinstated in service and in such situation directions were issued to release increments. However, the question about the Applicant's right to receive salary for the period of suspension was kept open stating that it shall be decided by the Competent Authority on the basis of D.E. report. Whereas, in present case, the D.E. is already concluded and the finding holding the Applicant guilty attains finality. Furthermore, after giving opportunity to

the Applicant, a specific order has been passed on 18.03.2017 that the period from 10.11.2005 to 06.11.2007 shall be treated as suspension period for all purposes except for pension. Therefore, this judgment referred is of little assistance to him.

23. As regard the judgment in ***O.A.No.260 of 2014***, the action of recovery of increment paid during the suspension was under challenge. The recovery was ordered after retirement of the Government servant. The Tribunal observed that learned C.P.O. could not point out the Rule that during the period of suspension, the annual increments automatically remains withheld. The Tribunal referred to Rule 39 of 'Pay Rules 1981' which is in fact applicable to the employees who are in service. It seems that in that case the learned C.P.O. did not point out the provisions of Rule 9(14) of 'General Conditions Rules 1981', whereas in present case, the learned C.P.O. has specifically pointed out that the duty is defined in Rule 9(14) of 'General Conditions Rules 1981' as well as Rule 39 of 'Pay Rules 1981' does not include suspension period as duty. She has also pointed out that Rule 39 of 'Pay Rules 1981' which prescribes the conditions and services which counts as duty does not count the period of suspension for increment. Besides, in ***O.A.No.260 of 2014***, the Tribunal allowed the O.A. in view of the judgment of Hon'ble Supreme Court in ***AIR 2015 SC 696 (State of Punjab and others Vs. Rafiq Masih (White Washer)***, wherein it has been held that the recovery from retired employee or employee who are due to retire within one year of the order of recovery or recovery from the employees belonging to Class-III and Class-IV is not permissible. Whereas in present case, the Applicant is a Medical Officer who does not fall in the parameters laid down by the Hon'ble Supreme Court in the above judgment. This being the position, the judgment in ***O.A.No.260 of 2014,*** in my considered opinion, cannot be construed as precedent. Had the provision referred to above brought to the notice of Tribunal perhaps result would have been different. Apart, in that matter, the recovery was

directed after retirement which is hit by the Judgment in ***'Rafiq Masih's*** case. Whereas, in the present matter the Applicant is in service.

24. In view of the above, there is no escape from the conclusion that in Rules nowhere include suspension period as duty period, and therefore, the claim for increment during the period of suspension is not tenable. Secondly, the Government by order dated 18.03.2017 has passed specific order to treat that the suspension of the Applicant from 10.11.2005 to 06.11.2007 as suspension period for all purposes except pension. Therefore, the impugned action for recovery of the increment wrongly released in favour of the Applicant cannot be faulted with. The challenge to the impugned orders are devoid of merit and O.A. deserves to be dismissed. Hence, the following order :-

O R D E R

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

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

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