

**IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL
MUMBAI**

ORIGINAL APPLICATION NO.414 OF 2018

DISTRICT : MUMBAI

Dr. Pratik S/o. Motilalji Rathi.)
Presently working at ESIS Hospital, Worli,)
Mumbai.)...**Applicant**

Versus

1. The State of Maharashtra.)
Through its Secretary,)
Public Works Department,)
Mantralaya, Mumbai 400 032.)
2. The Commissioner.)
ESIS, Panchdeep Bhawan, Lower)
Parel, Mumbai – 400 013.)
3. Medical Superintendent.)
ESIS Hospital, Ulhasnagar.)
4. Medical Superintendent.)
ESIS Hospital, Worli Naka, Worli,)
Mumbai – 400 018.)...**Respondents**

Shri A.B. Mahajan, Advocate for Applicant.

Mrs. A.B. Kololgi, Presenting Officer for Respondents.

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

DATE : 16.01.2020

JUDGMENT

1. The Applicant has challenged the impugned order dated 30.10.2017 issued by Respondent No.2 for recovery of Non-Practicing Allowance (NPA) as well as orders dated 14.11.2017 and 28.03.2018 passed by Respondent No.4 thereby directing recovery in monthly installment of Rs.23,790/- from the salary of the Applicant.

2. Shortly stated facts giving rise to this application are as under:-

The Applicant is presently serving as Surgeon at ESIS Hospital, Worli, Mumbai. In the month of May, 2005, he was promoted to the post of Surgeon purely on ad-hoc basis and posted at ESIS Hospital, Ulhasnagar. He was sent to ESIS Hospital, Nagpur on deputation. At the time of joining at Nagpur, he had submitted an option vide application dated 30.11.2005 for private practice and asked the Department to stop NPA w.e.f.01.12.2005. The said application made by the Applicant was forwarded to Respondent No.4. However, NPA was continuously disbursed to the Applicant. The said aspect was noticed when one Mr. Jayant Moon, resident of Nagpur made complaint that though the Applicant was doing private practice, simultaneously he is availing NPA. Thereon, Show Cause Notice was issued to the Applicant on 02.06.2016. The Applicant submitted his reply admitting the submission of option vide application dated 30.11.2015 but contends that until the same was accepted by the Department, it cannot be acted upon, and therefore, the payment of NPA was correct. He further contends that he did not start private practice, as he was not communicated about the option dated 30.11.2015, and therefore, the question of recovery of NPA does not survive. The Respondents found explanation not satisfactory and ultimately, the Respondent No.2 – Commissioner, ESIS issued order dated 30.11.2017 for direction to recover NPA paid to the Applicant. Consequently, the Respondent No.4 by orders dated 14.11.2017 and 28.03.2018 issued orders for recovery of

NPA amount in monthly installment of Rs.23,790/-. These orders are challenged by the Applicant in the present O.A.

3. The Respondents resisted the application by filing Affidavit-in-reply *inter-alia* denying the entitlement of the Applicant to the relief claimed. The Respondents sought to justify the impugned action of recovery contending that the Applicant at his own availed the option vide application dated 30.11.2005 informing that he intends to opt for private practice w.e.f.01.12.2005 and further requested to stop payment of NPA. Accordingly, the Applicant has started private practice. However, inadvertently, NPA was disbursed continuously with his salary. The said aspect was noticed on the complaint made by Shri Jayant Moon. On receipt of complaint, a Show Cause Notice was issued to the Applicant and accordingly, having found that the Applicant has availed double benefit of grant of NPA as well as private practice, the said amount was ordered to be recovered in monthly installment of Rs.23,790/-. The Respondents, therefore, prayed to dismiss the O.A.

4. Shri A.B. Mahajan, learned Advocate for the Applicant sought to contend that there was no order on the option submitted vide application dated 30.11.2005 to the effect of its acceptance, and therefore, mere filing of option is not enough. He further submits that the Applicant was not doing private practice, and therefore, the payment of NPA was correct. He, therefore, submits that the impugned action of recovery is unsustainable in law.

5. Per contra, Smt. A.B. Kololgi, learned Presenting Officer submits that in view of option availed by the Applicant vide application dated 30.11.2005, he was not entitled to NPA but the same was paid inadvertently, and therefore, action of recovery is legal and valid.

6. Thus, the crux of the matter is whether the action of recovery of NPA paid to the Applicant for the period from 01.12.2005 to 31.03.2015 is unsustainable in law.

7. Admittedly, in 2005, the Applicant was promoted to the post of Surgeon purely on ad-hoc basis and was posted at ESIS Hospital, Nagpur. At the time of joining, he had submitted an application to Medical Superintendent, ESIS Hospital, Ulhasnagar, District Thane (Respondent No.3) through Medical Superintendent, ESIS Hospital, Nagpur for stoppage of NPA w.e.f.01.12.2005. The contents of the letter are material, which are as under :-

“I Dr. Prateekn Rathi have been promoted as Surgeon MMIS Class-I vide order No.ESI/1276/desk 138/ESIS Dt. 16.5.2005. I am entitled for private practice. I intend to opt for private practice with effect from 01.12.2005.

Hence I kindly request you to stop drawing my non-practicing allowance as component of my salary with effect from 1.12.2005.

This is for your kind information and necessary action.”

8. It is thus quite clear from the tenor and language of the letter that the Applicant had already taken decision to opt for private practice, and therefore, he in no uncertain terms asked the Department to stop non-payment of NPA as a component of his salary. The submission advanced by the learned Advocate for the Applicant that there was no order or acceptance on his letter dated 30.11.2005 and in absence of any such order, the option cannot be said accepted by the Department is nothing but fallacious and misconceived. In the first place, in letter, he did not ask for prior permission and directly ask the Department to stop payment of NPA, as he has already taken decision to opt for private practice. The learned Advocate for the Applicant could not point out any rule or Circular to substantiate that such application requires specific order of Department about its acceptance. It was the option given about by the Applicant of his own volition and no such formal order on such option was required to be passed. However, inadvertently, the NPA was continuously disbursed with the salary which was noticed by the Department on receipt of complaint.

9. It is explicit that after submission of option, the Applicant was not entitled to receive NPA. However, as the same was disbursed inadvertently. He went on accepting the same though he had already given option of private practice. Indeed, as a Government servant, he ought to have brought this aspect to the notice of Department that he has already opted for private practice but NPA is being paid to him mistakenly. However, he remained silent and continuously obtained wrongful gain by not disclosing about the option already given by him. It is well settled that the option once given cannot be changed unless Rules provide. True, in 2014, after regular promotion, the Applicant was again asked to give option as seen by letter dated 07.06.2014 to which the Applicant gave option for availing NPA. Indeed, in terms of G.R. dated 10.08.2015, 35% NPA is made applicable to all Medical Officers with complete prohibition on private practice. Be that as it may, the letter dated 07.06.2014 and option submitted by the Applicant on 19.10.2014 has nothing to do with NPA for the period from 01.12.2005 to 31.03.2015.

10. Now reverting back to the option submitted by the Applicant on 30.11.2005, it is manifest that after making declaration to opt for private practice w.e.f.01.12.2005, the Applicant was not entitled to NPA. The language used in the letter and the intention of the Applicant is crystal clear that he had already decided to opt for private practice. After submission of such specific option, he cannot be allowed to turn around and to contend that he was not doing private practice, so as to retain NPA. If there were any bonafides on the part of Applicant, then after submission of option on 30.11.2005, if really he had not started private practice as informed to the Department in option dated 30.11.2005 then he would have filed application or representation stating that he is withdrawing the option given earlier (30.11.2005) and now want to avail NPA. He did not do so, as he was already getting NPA due to mistake on the part of Respondents, and therefore, remained silent spectator and

availed double benefit. This conduct of the Applicant also speaks in volume.

11. Before passing the impugned order show cause notice was issued to the Applicant and after considering his explanation the impugned order is passed. As such there is compliance of principles of natural justice. It is explicit that the applicant has availed double benefit by availing NPA and at the same time he was doing private practice in view of his clear, unequivocal and unambiguous option vide application dated 30.11.2005. There is clear suppression of material fact which was noticed by the Department when the compliant was received that the applicant is availing double benefit. I, therefore, see no illegality in the impugned action of recovery.

12. The necessary corollary of the aforesaid discussion leads me to sum up that the challenge to the impugned order of recovery holds no water and O.A. deserves to be dismissed.

O R D E R

Original Application is dismissed. No order as to costs.

Sd/-

(A.P. KURHEKAR)
Member-J

Mumbai

Date : 16.01.2020

Dictation taken by :

S.K. Wamanse.