

**IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL
MUMBAI**

ORIGINAL APPLICATION NO.416 OF 2019

DISTRICT : MUMBAI

Shri Digambar M. Birajdar.)
Age : 56 Yrs., Working as Driver in the)
Office of belownamed Respondent and)
Having office at 341, Bandra-Kurla)
Complex, Bandra (E), Mumbai – 400 051.)...**Applicant**

Versus

The Commissioner.)
Food and Drugs Administration,)
Having Office at 341, Bandra-Kurla)
Complex, Bandra (E), Mumbai – 400 051.)...**Respondent**

Mr. Arvind V. Bandiwadekar, Advocate for Applicant.

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

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

DATE : 26.10.2021

JUDGMENT

1. The challenge is to the order dated 13.03.2018 whereby the claim of the Applicant to treat his temporary service for the benefit of pension by condoning break in service is rejected invoking jurisdiction of this Tribunal under Section 19 of the Administrative Tribunals Act, 1985.

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

Initially, the Applicant was appointed purely on temporary basis on the post of Driver by calling the names from Employment Exchange after taking driving test and interview in pay scale of Rs.950-1500 for three months by order dated 16.02.1991. After giving technical break of one or two days, he was continued in service till 1998. In the said period, the total break from 18.02.1991 to 07.09.1998 was 60 days. By order dated 22.09.1998, he was selected by State Selection Board and appointed on regular basis in same pay scale. He continued in service till he attained the age of superannuation on 31.05.2020. Before retirement, by letter dated 18.01.2018, he requested the Respondent to consider his previous service from 1991 to 1998 for pension purpose after condoning technical break in service. However, the Respondent by communication dated 13.03.2018 requested his claim solely relying on the basis of Circular dated 25.08.2005. Being aggrieved by it, the Applicant has filed the present O.A.

3. Though initially in O.A, the Applicant has sought one more relief of benefit of Time Bound Promotion by including his previous service from 1991 to 1998, later learned Advocate for the Applicant deleted the said relief (Prayer Clause [c]) and restricted O.A. only to the extent of consideration of temporary service period for pension purpose.

4. The Respondent resisted the O.A. by filing Affidavit-in-reply *inter-alia* contending that the initial service of the Applicant was purely on temporary basis with break in service, and therefore, it cannot be considered for pension purpose. In this behalf, reference was made to Circular dated 25.11.2005 issued by GAD. It is further contended that in the period of temporary service, the Applicant had filed complaint (ULP No.701/1991) before Industrial Court, Thane and in view of interim relief, the services of the Applicant were continued and thereafter, the said complaint was disposed of, as matter was settled out of Court.

5. Shri A.V. Bandiwadekar, learned Advocate for the Applicant referred Rule 30 and Rule 48 of Maharashtra Civil Services (Pension) Rules, 1982 (hereinafter referred to as 'Rules of 1982' for brevity) to substantiate that even if the initial appointment of the Applicant was temporary, at the time of retirement, he was holding substantively permanent post, and therefore, his qualifying service is required to be counted from the date of his initial appointment on temporary capacity and break in service, it being technical break not exceeding one year ought to have been condoned as contemplated in Rule 48 of 'Rules of 1982'.

6. Per contra, Mrs. K.S. Gaikwad, learned Presenting Officer sought to justify the impugned order *inter-alia* contending that the initial appointment of the Applicant was purely temporary with technical break in service, and therefore, his temporary service cannot be counted for pension purposes. She referred to Circular dated 25.08.2005, which is at Page No.55 of P.B.

7. In view of submissions advanced at the Bar, the issue posed for consideration is whether the initial period of service rendered by the Applicant under the nomenclature of temporary appointment could be counted for pension purposes by continuing technical break in service.

8. At the very outset, it needs to be highlighted that the initial appointment of the Applicant cannot be termed as backdoor entry or appointment without following process. Indisputably, that time, the Respondents had called the names of eligible candidates from Employment Exchange Office and after taking driving test as well as interview, the Applicant came to be appointed by order dated 16.02.1991 (Page No.21 of P.B.). The Respondent in reply did not dispute this position. Suffice to say, it cannot be termed as back door entry since appointment was made in view of recommendations made by Employment Exchange after driving test and interview. As such, the Applicant has undergone the process before his appointment. He was

appointed in pay scale of 950-1500. True, the initial appointment was of three months as a temporary appointment till the regular appointment from Selection Board, but fact remains that he was continued in service by giving technical break of one or two days. One more important aspect to be borne in mind is that the appointment was made on vacant sanctioned post, as clearly seen from letter dated 01.02.2019 (Page No.18 of P.B.).

9. True, it appears that before regular appointment, the Applicant had filed complaint (ULP No.701/1991) in Industrial Court, Thane wherein initially interim relief was granted against removal from service. Thus, it appears that the Applicant had apprehended termination from service, and therefore, he approached Industrial Court. However, Industrial Court later by order dated 30.07.1997 disposed of complaint stating that matter is settled out of Court. Thereafter, by order dated 02.09.1998, the Applicant was appointed on regular basis on same pay scale after his selection from Selection Aboard. It is on this background, he made representation for continuation of break in service and to count his initial period of service for pension purpose, which came to be rejected solely on the basis of Circular dated 25.08.2005. The effect and relevance of Circular dated 25.08.2005 will be dealt with a little later.

10. At this juncture, it would be apposite to reproduce Rule 30, which is as under :-

“30. Commencement of qualifying service.- Subject to the provisions of these Rules qualifying service of a Government servant shall commence from the date he takes charge of the post to which he is first appointed either substantively or in an officiating or temporary capacity: Provided that at the time of retirement he shall hold substantively a permanent post in Government service or hold a suspended lien or certificate of permanency.”

Whereas Rule 48 of ‘Rules of 1982’ is as under :-

“48. Condonation of interruption in service.- (1) The appointing authority may, by order, condone interruptions in the service of a Government service :

Provided that –

- (a) the interruptions have been caused by reasons beyond the control of the Government servant;
- (b) the total service pensionary benefit in respect of which will lost, is not less than five years duration, excluding one or two interruptions, if any; and
- (c) the interruption including two or more interruptions, if any, does not exceed one year.

[Provided further that, such service of the Government servant shall be counted as qualified service for the purposes of Rule 33.]

(2) The period of interruption condoned under sub-rule (1) shall not count as qualifying service.

(3) In the absence of a specific indication to the contrary in the service record, an interruption between two spells of civil service rendered by a Government servant under Government, shall be treated as automatically condoned and the pre-interruption service treated as qualifying service.

(4) Nothing in sub-rule (3) shall apply to interruption caused by resignation, dismissal or removal from service or for participation in a strike.

(5) The period of interruption referred to in sub-rule (3) shall not count as qualifying service.”

11. It is thus explicit from reading of Rule 30 of ‘Rules of 1982’ that even temporary service is required to be counted for pension purposes, if at the time of retirement a Government servant is holding substantive post.

12. It would be advantageous to refer the decision of Hon’ble Bombay High Court in **Writ Petition No.3690/2005 (Anant Tamboli Vs. Collector, Ratnagiri) decided on 09.12.2006** where Hon’ble High Court interpreted Rule 30 in the matter of appointment of seasonal Godown Keepers on temporary basis where there services were later regularized. In that case, the issue before the Hon’ble High Court was whether initial temporary service before regularization can be counted for pension purpose on the touch-stone of Rule 30 of ‘Rules of 1982’. The Hon’ble

High Court in Para Nos.4 and 5 dealt with the issue of applicability of Rule 30 and its interpretation, which are as under :-

“4. The learned Counsel for Petitioner has placed before us the Maharashtra Civil Service (Pension) Rules, 1982 and, in particular, Rule 30 thereof to support his case. We reproduce Rule 30 hereinbelow.

30. Commencement of qualifying service.- Subject to the provisions of these Rules qualifying service of a Government servant shall commence from the date he takes charge of the post to which he is first appointed either substantively or in an officiating or temporary capacity: Provided that at the time of retirement he shall hold substantively a permanent post in Government service or hold a suspended lien or certificate of permanency.....”

A bare perusal of this rule would indicate that if a government employee is holding a substantive post at the time of his retirement, his qualifying service shall be computed from the date of his first appointment either substantively or in an officiating capacity or temporary capacity. It is clear from the record that petitioners had been given temporary appointment as seasonal godown keepers and this fact has been recognized by the Tribunal as also by the respondents in their reply before us. In this view of the matter, we find that the entire period of service from the date of their joining would have to be counted for the purpose of computing their entitlement and quantum of pension.

5. We accordingly allow this Petition and direct the respondents to make payment to petitioners in accordance with their qualifying service within a period of 6 months from today. Rule is made absolute accordingly. However, in the facts and circumstances of the case, there shall be no order as to costs.”

13. Material to note that Judgment delivered in Writ Petition No.3690/2005 had attained finality in view of dismissal of SLP by Hon’ble Supreme Court.

14. Suffice to say, in view of interpretation of Rule 30 by Hon’ble High Court in Writ Petition No.3690/2005, it will have to be held that previous service rendered by the Applicant under the nomenclature of temporary service has to be counted for pension purposes since admittedly, at the time of retirement, he was holding permanent and substantive post.

15. Now turning to Rule 48 of ‘Rules of 1982’, it empowers appointing authority to condone interruption in service where conditions mentioned

in Rule 48(1) are satisfied. In the present case, all these conditions are satisfied since interruption period does not exceed one year's outer limit. It was just technical break of one or two days between two appointments, which was indeed artificial technical break only to deprive the Applicant the benefit of continuous service. There was requirement of services and appointment was also on vacant post. Therefore, such artificial break given deliberately for which Applicant cannot be blamed ought to have been condoned in terms of Rule 48 of 'Rules of 1982'.

16. Now turning to the Circular dated 25.08.2005, it reveals that the said Circular was issued by GAD to highlight the Judgment of Hon'ble Supreme Court in **Umarani's** case and the parameters/principles laid down in **Umarani's** were brought to the notice of Departments. In **Umarani's** case, the issue was revolving around backdoor entry in Government service without following process. It is in that context, it has been held that where appointment is illegal and in contravention of mandatory provisions of statute or ignoring minimum educational qualification, it cannot be regularized and such employee do not have vested right of continuation in service. There could be no dispute about these settled principles of law highlighted by Hon'ble Supreme Court. However, in the present case, as stated above, this is not a case of backdoor entry or illegal appointment. The Applicant's name was sponsored by Employment Exchange Office and after taking driving test as well as interview, having found eligible as well as suitable, he was appointed on vacant post on regular pay scale. This being the position, the Circular dated 25.08.2005 has no relevance in the present situation.

17. As such, the harmonious construction of Rule 30 read with Rule 48 of 'Rules of 1982' leads to the conclusion that even if initial appointment of the Applicant was on temporary basis, at the time of retirement, he was holding permanent post, and therefore, his initial service requires to be counted for pension purpose. In other words, his qualifying service for pension purpose starts from initial date of

appointment. The Respondent completely glossed over this aspect and mechanically rejected the claim on the basis of Circular dated 25.08.2005, which is not at all relevant in the present scenario.

18. The cumulative effect of aforesaid discussion leads me to conclude that the impugned order is totally unsustainable in law and deserves to be quashed. The Applicant's initial period of service ought to be counted for pension purpose by condoning break in service. It would be highly iniquitous, harsh and unjust to not give the benefit of previous service to the Applicant for pension purposes. Hence, the following order.

ORDER

- (A) The Original Application is allowed.
- (B) The impugned order dated 13.03.2018 is quashed and set aside.
- (C) The Respondent is directed to count the previous service of the Applicant for the purpose of pension by condoning the break in service and accordingly, pensionary benefits be released in accordance to Rules within three months from today.
- (D) No order as to costs.

Sd/-

(A.P. KURHEKAR)
Member-J

Mumbai

Date : 26.10.2021

Dictation taken by :

S.K. Wamanse.

D:\SANJAY WAMANSE\JUDGMENTS\2021\October, 2021\O.A.416.19.w.10.2021.Regularization.doc

Uploaded on