

IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL

MUMBAI

ORIGINAL APPLICATION NO.1057 OF 2016

DISTRICT : PUNE

Dr. Kailas Bhika Batte,)
Medical Officer, Group A, Class II, attached to)
Rural Hospital, Shirur, District Pune)
R/o A/P Ranjangaon (Ganpati), Tal. Shirur, Dist. Pune) ..Applicant

Versus

The State of Maharashtra,)
Through Principal Secretary,)
Public Health Department, Mantralaya, Mumbai-32) ..Respondent

Shri A.V. Bandiwadekar – Advocate for the Applicant.

Smt. Archana B.K. – Presenting Officer for the Respondent.

CORAM : JUSTICE SHRI A.H. JOSHI, CHAIRMAN

DATE : 11th January, 2017.

J U D G M E N T

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

2. Learned P.O. has tendered affidavit in reply. It is taken on record.

3. The applicant was working as Ad hoc Medical Officer with the respondent. Applicant was caught red-handed in a trap laid by the Anti Corruption Bureau for demanding illegal gratification and accepting it. Thereafter on the said ground the Applicant was terminated from service on 28.2.2006.

4. The applicant was prosecuted, however the trial has resulted into acquittal.

5. After acquittal applicant requested for reinstatement. His request was not accepted and no action was taken on it.

6. Therefore, the applicant has filed OA No.9 of 2009 claiming reinstatement etc.

7. The said OA No.9 of 2009 was allowed by this Tribunal by order dated 23.3.2009 and the order of termination was set aside without back wages and with liberty to the Government to proceed against applicant in accordance with law.

8. According to the applicant the order passed in OA NO.9 of 2009 was not complied with by the Government. Therefore, the Applicant had filed an application for taking action for Contempt. The applicant's averment in that regard are contained in para 6.11 of O.A.No.9/2009. Relevant text is quoted below :-

"6.11 The Petitioner states that in spite of the order passed in the above referred OA, that the Respondent did nothing in the matter as to reinstatement of the petitioner, which forced the petitioner to file contempt proceedings against the Respondent in that matter, when ultimately the respondent through the Deputy Director, Health Services, Pune Circle, Pune issued an order on 6.1.2010, thereby appointing the petitioner in the said post on temporary basis for 11 months. That accordingly the petitioner joined the said post and started working as such.

That thereafter similar orders came to be issued in favour of the petitioner on 29.11.2010 followed by similar orders being issued subsequently and accordingly the petitioner is working in the said post till date.”

(Quoted from page 8 & 9 of OA)

Averment contained in para 6.11 is dealt with in the affidavit-in-reply filed by the State in para 16. The fact of reappointment by order dated 6.1.2010 is accepted by the State. The facts of subsequent reappointments are matter of record, are not denied and are thus admitted by the Respondent. Moreover, the copy of appointment order on ad hoc basis which is dated 29.11.2010 and copy of order showing technical breaks are placed on record by the Applicant at pages 80-81 and 82 (Exhibit H), are also relied upon by the Respondent.

9. In the meanwhile i.e. during the period when the Applicant was out of service, the Government has taken a policy decision and issued ‘The Medical Officer in the Maharashtra Medical and Health Services, Group-A (One time Absorption of Medical Officers appointed on ad hoc basis in Maharashtra) (Special) Rules, 2009’. These rules are hereinafter referred to as “Absorption Rules”. A copy of said rules is on record at page 86 of the O.A..

10. Admittedly, as well as it is evident from record, the Medical Officers were appointed on ad hoc basis without reference for recruitment to Public Service Commission. These ad-hoc appointees were continued in service and applicant is one amongst those, and this fact is proved from issue of aforesaid Absorption Rules.

11. The object of absorption rules, even as emphasized by the State in affidavit in reply in para 18 is to absorb the Ad hoc Medical Officers who have completed 3 years of service on 31.12.2007 and who is in

service on the date of commencement of these rules. The relevant text as quoted in affidavit in reply in para 18 reads thus :-

“18.
Rule 2(1) of the Rules, 2009 defines the term “ad-hoc Medical Officer” as follows :-

2(1) In these rules, unless the context otherwise requires-

“ad-hoc Medical Officer” means a Medical Officer, who was appointed in the Department of Health on ad-hoc basis and completed 3 years on 31st December, 2007 and who is in the service on the date of commencement of these rules”.

Rule 3(1) of the Rules, 2009 provides that-

“(1) Notwithstanding anything contained in these rules, every such ad-hoc Medical Officer who is continued as such on the date of commencement of these rules shall be with effect from such date of commencement be absorbed on the post of Medical Officer with a pay scale specified for the post in Maharashtra Medical and Health Services.”

(Quoted from page 110 of OA)

12. It is thus evident that those rules i.e. Absorption Rules were made for absorbing in regular employment, the Medical Officers who were appointed and continued on ad-hoc basis, as specified in the said rules.

13. According to the Applicant, he had applied for requesting absorption and his request for absorption was favourably considered by the Public Health Department. It was also vetted favourably by the GAD, subject to opinion from the Law and Judiciary Department.

14. By communication dated 17.11.2015 (Annexure A page 22), applicant is informed by the Government that his request for absorption has been rejected. Applicant's claim for absorption being refused, the applicant is before this Tribunal.

15. In the present O.A., the applicant has claimed relief of absorption in Government service in the light of Government's policy decision and the said Absorption Rules by setting aside impugned communication dated 17.11.2015.

16. This O.A. is opposed by filing affidavit in reply. The objections to the prayer in O.A., as seen in affidavit in reply is that 'in view of the opinion received from the Law & Judiciary Department', the Applicant's request for absorption is refused.

17. Though the narration in the opinion given by the Law and Judiciary Department is about two pages, the opinion is in the last paragraph thereof. In the affidavit-in-reply filed by the State, in paragraph 21 thereof appearing at page 112 of the O.A. paper book few lines from the opinion are quoted.

18. Full text of the Law and Judiciary Department's opinion of said opinion of the Law and Judiciary Department is placed on record of the O.A. by the Applicant at pages 24 and 25. Portion – few lines from the opinion relied upon by the State by quoting in paragraph 21, are an incomplete quotation. Said quotation does not depict what exactly opinion expresses. Therefore, it shall be useful to quote few sentences from the said opinion, which is as below :-

“In the present matter, services of Dr. Batte were terminated by the Director, Health Services, Mumbai vide order dated on 28.2.2006 in view of his arrest for the offences p/u/s 7, 13(2)(d) r/w 13(2) of Prevention of Corruption Act, 1988. After setting aside his termination order by the MAT, Mumbai, Dr.

Batte was given fresh appointment on the post of Medical Officer, Class II on 6.1.2010. Thus, during the period from 28.2.2008 to 6.1.2010 Dr. Batte was not in Government service. From this fact it is manifestly clear that on the date of commencement of the Rule 2009 i.e. on 2.2.2009, Dr. Batte was not in continued service. Hence, he does not fulfill the mandatory conditions prescribed under Rules, 2009 for one time absorption on the post of Medical Officer, Class-II.

In view of the above facts, Dr. Batte does not appear to be eligible for absorption on the post Medical Officer, Class-II as per the provisions of Rules, 2009.”

(Quoted from page 25 of the OA)

Underlined text was specially emphasized by the State even during oral submissions.

19. The moot question which arises for consideration in this OA is formulated as follows :-

Whether :-

- (a) The applicant was actually and in fact in the employment within the contemplation of Absorption Rules of 2009 on ad hoc basis and had completed 3 years on 31.12.2007 ?
- (b) Is the applicant entitled to declaration that he has deemed to have completed 3 years, as an ad-hoc Medical Officer as on 31.12.2007, and is deemed to be in the employment on the date of commencement of the rules due to the order passed by this Tribunal ?
- (c) Is Applicant entitled for absorption furtherance to said Absorption Rules of 2009 ?

20. It is pertinent to note that date of commencement of the Absorption Rules is 2.2.2009. In fact the applicant was not actually and physically serving with the Respondent-State on 2.2.2009 and he was before this Tribunal claiming relief of reinstatement after acquittal. The order of setting aside the termination was passed by

this Tribunal on 9.12.2009 and the Applicant was actually reappointed as claimed by both the parties on 6.1.2010.

21. Admittedly, State did not carry the order passed by this Tribunal before the Hon'ble High Court and the State has implemented the order passed in OA No.9 of 2009.

22. It is seen that the effect of the judgment of the Tribunal in OA No.9 of 2009 is binding on the State and now it is not open to any challenge or dispute by the Government.

23. The language of the operative order passed in OA No.9 of 2009 is unambiguous. Text of the order is quoted below for ready reference.

“8. The application is partly allowed. The order of termination of the applicant dated 28.2.2006 is set aside. The respondent to take steps consequential to this order within one month from today. However, in any case the applicant would not be entitled for back salary/wages. The respondents are at liberty to take any suitable action against applicant according to law.”

(Quoted from page 65-66 of the OA)

24. Though now the State has taken a plea that the applicant's acquittal in the criminal case was on account of technical grounds, the Government has not exerted to hold any disciplinary proceedings against the applicant in the matter of alleged misconduct.

25. Admittedly Medical Officers were appointed and continued on ad hoc basis. Therefore, due to the order of this Tribunal passed in the O.A., the Applicant would be relegated to the position where he was and to the status which he had on the date of termination though without earning back wages. Therefore, he was entitled to be restored with status of a Medical Officer appointed and continued as 'Ad hoc

Medical Officer' and this is the very modality which was actually used/operated and was acted upon by the respondent. Therefore, the applicant is bound to be treated and deemed to have actually served as ad hoc Medical Officer, and is and shall be entitled to all benefits of being continued as ad hoc Medical Officer by disregarding and ignoring termination, for the purposes of continuity, absorption etc..

26. The order of "re-appointment" as is shown does not override the judicial pronouncement by this Tribunal nor does the intervening period of absence from duty due to termination operate as voluntary cessation of employment.

27. The order of setting aside the termination and restoring the status as it existed before termination was an act of competent Tribunal having binding force as well as of finality thereto.

28. In these premises action of the State, which is based on legal opinion, is liable to be regarded as loaded with highest technicality. The approach of disregarding the effect of order of this Tribunal was not expected from the Law and Judiciary Department. The Law and Judiciary Department ought to have taken care to apply mind to the fact that this Tribunal has ordered setting aside order of termination. Record reveals that the word 'Reinstatement' is not used in the order, however, no other purport or content can be inferred from the order passed by this Tribunal that the Applicant was reinstated as an Ad-hoc Medical Officer, from which post he was terminated. For all purposes order passed in OA is for reinstatement as ad-hoc Medical Officer, and an inference of break or unemployment was impermissible.

29. In these premises the opinion and act of the Government (Law and Judiciary Department) in treating and/or interpreting that the applicant was not in employment on the relevant date, as indicated hereinbefore, is unsustainable, being dehors the text of binding operative order passed by this Tribunal.

30. Therefore, the questions which are framed in foregoing para no.19 are liable to be answered as follows :-

(a) The applicant has not actually and physically rendered services as Ad-hoc Medical Officer in the employment of the State for the crucial period, yet the applicant is entitled for being declared to have actually served, but without earning back wages for the said period.

(b) Applicant is entitled for declaration that he has completed three years on 31.12.2007 and is deemed to be in service on the date of commencement of the Absorption Rules i.e. on 2.2.2009 and also deemed to have continued in service by virtue of fact and implementation of the order passed by this Tribunal.

(c) The applicant is entitled to be absorbed in furtherance to Absorption Rules of 2009.

31. In the result, the impugned order deserves to be set aside, O.A. is allowed and the impugned order is quashed and set aside.

32. Applicant is held to be eligible and entitled to be absorbed furtherance to the Absorption Rules of 2009 referred to in foregoing para no.9, and as declared in the foregoing paragraph. Necessary corrective and consequential orders be issued by the State

expeditiously and in any event before 6 months from the date of this order.

33. Shri Bandiwadekar, Ld. Advocate for the applicant states that ordinarily with the type of approach which is exhibited, cost should follow, however, wrong legal advise is not to be treated as a malicious act and, therefore, he would not insist on payment of costs.

34. The cost shall be the cost in cause.

(A.H. Joshi, J.)
Chairman
11.01.2017

Dictation taken by: S.G. Jawalkar.

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